

000002

Permission Management Business Solutions for Kid Brands

VIA HAND-DELIVERY

February 14, 2005

Federal Trade Commission
Office of the Secretary
Room 159-H (Annex Y)
600 Pennsylvania Ave., N.W.
Washington, DC 20580



Re: Comments on the Proposed Amendment to the Children's Online Privacy Protection Rule ("Sliding Scale 2005, Project No. P054503").

Dear Sir or Madam:

Privo, Inc. ("Privo") respectfully submits these comments in response to the Federal Trade Commission's ("FTC's" or "Agency's") notice of proposed rulemaking and request for comment¹ on the proposed amendment to the Children's Online Privacy Protection Rule ("the Rule"), originally promulgated pursuant to the Children's Online Privacy Protection Act ("COPPA"). As explained herein, Privo strongly opposes making permanent the sliding scale approach for obtaining parental consent. Specifically, Privo believes currently available technologies would do a far better job at protecting children than the sliding scale approach proposed by the Agency. Moreover, Privo believes the FTC has a statutory obligation to evaluate available technologies, and for the FTC to in effect "lock-in" a less than reliable approach for protecting children would be misguided and would directly contravene Congressional intent.

Privo is an infomediary service formed to help companies effectively manage COPPA-compliant registration, and create a solution that enables companies to responsibly initiate and manage safe and profitable online relationships with children. Our technology provides user companies with a way to efficiently gain verifiable parental consent and empowers parents and children with tools to manage their online identities and the dissemination of their personal information. Since its incorporation in February 2001, Privo has processed hundreds of thousands of online registrations requiring verifiable parental consent, and successfully applied for and was awarded Safe Harbor Status by the FTC for its Privacy Assurance Program.

As you are aware, the proposed amendment to the Rule would make permanent the sliding scale approach for obtaining verifiable parental consent. Accordingly, website operators and

¹ 70 Fed. Reg. 2580 (Jan. 14, 2005).

online services that collect personal information from children solely for internal use would be permanently permitted to obtain verifiable parental consent through use of an email message to the parent, coupled with additional assurances that the parent is providing the consent (“email plus”).

It is essential to recognize, however, that COPPA was enacted to ensure that children could not provide personally identifiable information without verifiable parental consent. Although “email plus” may arguably be “efficient,” “less expensive,” and more “convenient” than alternative security methods, Privo believes it is an unreliable form of verifiable parental consent and does not serve COPPA’s primary goal of protecting children online. Based on our extensive experience with COPPA and its practical implementation, Privo respectfully opposes the proposed permanent extension of the sliding scale for the following reasons:

- COPPA, and the FTC’s implementing regulations, require that any method of obtaining verifiable parental consent be reasonably calculated, in light of “available technology,” to ensure that the person providing consent is the child’s parent. Such technologies currently exist and should not be ignored by the Agency.
- “Email plus” frequently does not result in a reliable verification of parental consent, and can be easily circumvented by children.
- Internal use is not necessarily a lower risk use of children’s personally identifiable information.
- Infomediary services such as Privo are widely available at a reasonable cost.
- Making the sliding scale approach permanent would provide a disincentive for industry to develop secure technology for the purpose of obtaining parental consent.
- Making the sliding scale approach permanent would enable the collection of children’s personal information for internal marketing purposes at virtually no cost, and would remove any remaining hesitancy to employ this unreliable method heretofore restrained by the expectation it would expire in 2005.
- The current comment period provides an insufficient time-frame for proper evaluation of the proposed amendment.

Based upon the above, Privo urges the FTC to allow the sliding scale to expire, or alternatively, conduct a formal comprehensive study/analysis of this question in the overall review of COPPA, required to be initiated no later than April, 21 2005 – prior to “locking-in” what Privo believes is an unreliable approach for protecting children online.

I. COPPA Requires the FTC to Consider “Available Technologies” When Assessing the Sufficiency of Verifiable Parental Consent

In the late 1990’s, it became clear that children were actively and passively disclosing personal information online, in the absence of parental consent. The growth of online services and content aimed at children under the age of 13 resulted in a wide range of significant problems, including but not limited to:

- Invasion of children’s privacy through solicitation of personal information granted unknowingly by child participants;
- The growing popularity of youth communication forums (such as chat rooms, email, pen pals, online tutors/homework help, Instant Messenger, and bulletin boards) that potentially exposed them to the lures of online pedophiles and generally made children targets for malicious adult behavior;
- An imbalance of power between vulnerable, young computer users and sophisticated new forms of advertising; and
- Omission of a parent’s guardianship and consent in a child’s online experience.

COPPA was designed to introduce parents into the decision-making equation, and give them the final say on which sites their child would be allowed to interact with, and what information may be disclosed. Accordingly, COPPA directed the FTC to promulgate regulations requiring the operator of any website or online service directed to children, and that collects personal information from children,² to “obtain verifiable parental consent for the collection, use, or disclosure” of their personal information.³

COPPA explicitly defines “verifiable parental consent” as:

any reasonable effort (taking into consideration available technology), including a request for authorization for future collection, use, and disclosure described in the notice, to ensure that a parent of a child receives notice of the operator’s personal information collection, use, and disclosure practices, and authorizes the collection, use, and disclosure, as applicable, of personal information and the subsequent use of that information before that information is collected from that child.⁴

In its implementing regulations, the FTC additionally noted that “[a]ny method to obtain verifiable parental consent must be reasonably calculated, in light of available technology, to ensure that the person providing consent is the child’s parent.”⁵

² The requirement also applies to an operator of a website or online service that has actual knowledge it is collecting personal information from a child.

³ 15 U.S.C. § 6502(b)(1)(A)(ii).

⁴ 15 U.S.C. § 6501(9)(emphasis added).

⁵ 16 C.F.R. § 312.5(b)(1).

Accordingly, the FTC must not ignore the Congressional mandate to consider “available technology” when assessing the sufficiency of verifiable parental consent. As discussed in more detail below, Privo believes that “email plus” verification (in light of currently available technology) is no longer a “reasonable effort” at ensuring that the person providing consent is the child’s parent. Even assuming the FTC at present disagrees with Privo and believes “email plus” is currently the best approach to verify parental consent, this would still not justify the FTC’s proposal to permanently “lock in” the sliding scale approach. There is simply no justification for the Agency to “lock-in” a sub-par approach - particularly when technologies may continue to emerge that are potentially even superior to those currently available today. Permanently extending the “email plus” approach without consideration of present or future available technologies would contravene the FTC’s statutory mandate and would fail to adequately protect children’s online privacy.

II. The Sliding Scale Approach Does Not Adequately Protect Children

Privo believes the sliding scale approach should be eliminated since: (1) the “email plus” approach frequently fails to provide reliable verification of parental consent; and (2) internal use is not necessarily a lower risk use and requires more reliable forms of verification.

A. “Email plus” Frequently Does Not Result In a Reliable Verification of Parental Consent

In order for all constituents (providers, companies, and parents) to be confident that the FTC is serious about COPPA enforcement, then the fundamental component of this law, “verifiable parental consent,” must be upheld. Although “email plus” offers the apparent advantages of convenience for the parent and lower cost to the company, in reality it offers no advantages as it has the significant potential to compromise children’s privacy and security. As explained below, “email plus” frequently does not result in reliable verification, and for the FTC to adopt such an inadequate approach would convey precisely the wrong message – that the FTC is more concerned about convenience than protecting children.

1. Children May Fabricate Spurious Email

When a child requests registration at an Internet site, he or she will be faced with providing parental consent when personally identifiable information is required. It must be acknowledged however, that many children under the age of 13 are technologically sophisticated, and quite capable of circumventing parental consent. Experience has shown that children often misrepresent their age or craft fake email messages allegedly sent from their parents. Even the COPPA Final Rule states:

“Based on the comments, the Commission is persuaded that e-mail alone does not satisfy the COPPA because it is easily subject to circumvention by children.”

When asked for parental consent, the anonymity and efficiency of the Internet easily allows a child to provide his or her own email address instead of their parent’s or guardian’s. A child can subsequently “acknowledge consent” through their own email and self-grant permission. It is naïve to believe that children, motivated to participate in an online activity, and loathe to

involve a busy parent whose unfamiliarity with the proposed activity may lead to lack of permission, will not take advantage of the loophole offered by “email plus.”

2. Changes in the Email Landscape

“Email plus” is also ineffective in light of two major developments in email usage since COPPA was first enacted. First, there has been a proliferation of children’s personal email accounts. Instead of one main family email account, it is currently commonplace for all members of the family to have their own accounts to which all communication from friends, school, church, or websites (not to mention spam) are separately addressed. As a result, children can act “as if” they are the parent behind the guise of their own email account, making the reliability of “email plus” that much more suspect.

Secondly, email account holders are now inundated with “spam email” or unsolicited junk messages from commercial entities. As a result, parents may completely miss an email message from the website operator. Although website operators are required to take additional steps to provide assurances that the parent is providing the consent (such as sending a confirmatory email to the parent after receiving consent, or obtaining a postal address or telephone number from the parent and confirming the parent’s consent by letter or telephone call), the additional step of sending a confirmatory email is simply inadequate, but nonetheless the method most often utilized by companies. Given the vast amount of spam people receive today, a follow up confirmatory email to the parent (which, must be remembered, is provided by the child and thus the parent may not even know to look for the confirmatory email) will likely get lost among the many spam emails.

B. Internal Use Is Not Necessarily a Lower Risk Use of Children’s Personally Identifiable Information

“Email plus” is defended as appropriate when the purpose of collecting personally identifiable information is for internal use only, rather than for uses that will involve disclosing the information to the public or third parties.

Internal use, however, is not free of concern and differs little, if any, from other “more risky” forms of information collection. Internal use gives companies and marketing departments around the world the ability to build complex profiles of its young customers and market to them in a very personal and focused manner for years to come. This type of information collection from young children, who are incapable of appreciating the significance of disclosing their personal information, is the very concern for which COPPA was designed to protect kids and empower parents.

Furthermore, the definition and boundaries of internal use are unclear. For example, is it merely the webmaster verifying an email address, or can it include the sophisticated profile development of child customers? Can a website for one product share its information with a website for a different product if the two websites are owned by the same company? Can a multi-faceted media company collect information for internal use from a young children’s site, and share it with another site intended for teens owned by the same company?

The FTC appears to believe that the only real threat to children's privacy arises when companies "share" data with outside third parties. Sharing data with other companies, for most consumer marketing companies, is a secondary purpose. Internal use is the primary purpose of gaining personally identifiable information because it allows companies to build a profile of their young customers for future use. This is acceptable as long as this is clearly communicated and parents have provided consent. It belies the evidence for the FTC to simply assume that internal use has no or low potential for abuse.

III. Currently Available Infomediary Services, Such as Privo, Are Widely Available at a Reasonable Cost

In 2002, Privo recognized that a *reasonable* extension of the sliding scale approach to obtaining verifiable parental consent may have been necessary to give industry time to transition into, and implement, more reliable consent methods. Although we believed that three years was more time than necessary, Privo accepted the FTC's ruling as done in good faith. Based upon currently available technologies, however, Privo believes it is no longer tenable for the FTC to maintain that the sliding scale must continue due to the lack of infomediary services.

Technological solutions and/or infomediary services are now widely available to assist industry in obtaining verifiable parental consent. Privo, for example, qualifies as an infomediary service anticipated by COPPA as a technology solution capable of obtaining reliable and secure verifiable parental consent. Privo is currently available at a reasonable cost, is scalable, tested by hundreds of thousands of registrations, and like other infomediary companies is capable of ramping up quickly to satisfy additional demand for its services. Moreover, Privo successfully created a privacy seal program called the Privacy Assurance Program, which received safe harbor approval from the FTC in August of 2004.

Many continue to argue that no reliable method of parental verification exists at a "reasonable cost." The only real marginal cost of COPPA, however, is the cost of verification. Any interactive features of a web site, such as the registration pages that trigger COPPA, privacy policies, notice of information practices, or ability to opt out, must be created in order to obtain the information. Only verification represents a net, additional cost to industry, yet Privo currently does not charge more than \$1 per verification, and often much less. Costs associated with verifying credit card numbers, partial social security numbers and Driver's License information are well established and only run between \$.20 to \$.50. Given the low cost of verification, "excessive cost" is a position that no longer remains a valid objection to requiring more reliable forms of verification.

Moreover, the cost argument misses the fundamental point and intent of the law: protecting children online. No sliding scale, or other attempt to ease the burden of COPPA, should be acceptable if it results in unreliable verification of parental consent and puts children at risk. The FTC should not put a cost on children's safety, particularly when the cost is eminently reasonable considering the issues at stake.

IV. Making the Sliding Scale Approach Permanent Would Create a Disincentive for Industry to Develop Secure Technology for the Purpose of Obtaining Parental Consent

Allowing “email plus” to expire in April 2005 would create a healthy pressure on websites to fully embrace the intent of COPPA, and to search for full-compliance solutions. A permanent extension, however, will introduce doubt as to whether enforcement of these provisions is truly intended, and decrease incentives to protect children’s online privacy.

Moreover, Privo believes that the tolerance of an unreliable form of parental verification (“email plus”) discourages investors from supporting technologies that create verification solutions at a reasonable cost. If the FTC permanently allows the “email plus” method (which does not impose an additional cost on industry) to verify parental consent, investors would have no reason to believe there will be a market for a product that improves parental verification at a slight cost. Investors may ultimately conclude that there are no teeth in the enforcement of COPPA sufficient to warrant the development of more reliable parental consent measures.

V. Making the Sliding Scale Permanent May Increase the Collection of Personal Information for “Internal Use”

Making the sliding scale approach permanent would enable the collection of children’s personal information for internal marketing purposes at virtually no cost and remove any remaining hesitancy to employ this unreliable method heretofore restrained by the expectation it would expire in 2005.

Until now, many web operators and marketing departments were advised against relying on the “email plus” method given its temporary nature and potential to soon become an “unreasonable” effort at obtaining verifiable parental consent. Once the sliding scale is made permanent, companies will have no reason to refrain from collecting cost-free personally identifiable data from children. This information will be increasingly used to develop customer profiles and marketing strategies aimed at young children who are completely unaware of the commercial intent behind activities such as giveaways, contests, and surveys. More stringent parental consent is a necessity.

VI. The Broader Implications of Sliding Scale Leniency On “Tweens”

One of the elements of this debate that requires greater illumination is the problem of the eleven and twelve year old children (“Tweens”) whose interests cross over into websites whose primary audience are older teenagers. In these instances, the leniency and fuzzy logic of the sliding scale play particular havoc with the original intent of COPPA. There is insufficient recognition by the FTC that children under 13 visit, view, and register with sites whose content is intended for those over the age of 13. Yet, personally identifiable information is requested by these sites and provided by young visitors with virtually no restrictions or safeguards. In most cases a statement such as “you must be 13 or over to register for this website” is accepted as sufficient to prevent younger, COPPA protected children from providing information. Children under 13, however, routinely register and

provide personally identifiable information to websites without parental knowledge or consent by simply ignoring the warning or falsely claiming to be 13.

This situation highlights the problems associated with low level enforcement of children's online privacy protection measures. Since COPPA was first enacted and enforced, the message sent to industry is one of accommodation. The sliding scale and "email plus" approach is part of a greater regime of leniency, and allows "borderline" websites to gain access to children with little or no oversight or assurance that parents are part of the equation.

VII. The Proposed Permanent Extension is "A Rush To Judgment"

The intent and purpose of COPPA was to protect children from sophisticated and unscrupulous online marketing practices, and give parents the power to permit or deny the use of their children's personal information.

In order to protect children's online privacy and properly evaluate the effects of a permanent extension of the sliding scale, the FTC should at a minimum wait until the Congressionally mandated review of COPPA due to begin in April, 2005 prior to making a final decision. The FTC is required, no later than April 21, 2005, to:

initiate a rulemaking review proceeding to evaluate the implementation of [the Rule], including the effect of the implementation of [the Rule] on practices relating to the collection and disclosure of information relating to children, children's ability to obtain access to information of their choice online, and on the availability of websites directed to children; and report to Congress on the results of this review.⁶

During this important review, the sliding scale's permanent extension or expiration can be appropriately assessed in a broader, more comprehensive context.

VIII. Conclusion

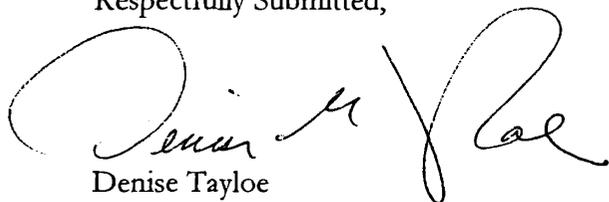
The sliding scale was extended in 2002 and scheduled to expire on April 21, 2005, at which time website operators would have had to obtain verifiable parental consent using the more reliable methods for all uses of personal information. Emerging infomediary services and other companies relied on this date to support research and development on more reliable parental consent solutions. Moreover, the original expiration date of the sliding scale created a healthy pressure on websites to embrace COPPA and search for full-compliance solutions.

"Email plus" (particularly with delayed email as the confirmatory method) simply does not provide a reliable method of parental verification. This fact, coupled with a better understanding of the implications of internal use, leads us to conclude that "email plus" has outlived its usefulness. Infomediary services, as anticipated by COPPA, are widely available and the cost of verification is reasonable.

⁶ 16 C.F.R. § 312.11.

Privo therefore urges the FTC to allow the sliding scale to expire, or alternatively, include a further comprehensive study of this question in the overall review of COPPA due to begin in April, 2005 – prior to “locking-in” what Privo believes is an unreliable approach for protecting children online.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Denise Tayloe". The signature is fluid and cursive, with a large initial "D" and a long, sweeping tail.

Denise Tayloe
President and CEO
Privo, Inc.