

**SLIDING SCALE 2005 – PROJECT NO. P054503**

**CHILDREN ONLINE PRIVACY PROTECTION ACT**

Comments presented by:

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As an attorney practicing with a lawfirm, I have handled many information privacy and information security matters for the past 15 years. Some of these engagements have included representing companies and non-profit organizations in COPPA-related matters.

The comments below are presented on my own behalf, and not on behalf of any of my clients.

**QUESTION 1 – Secure electronic mechanisms?**

Although secure electronic mechanisms are available, many parents many not have the adequate capabilities to use these techniques: for example underprivileged families, families with limited education, families without computers, etc.

For a mechanism to work, it needs to be useable uniformly by all those involved. Relying on sophisticated technologies will create a financial burden for most websites, which are typically run on a shoestring budget, through grants or donations. It will be also an obstacle for parents who do not have access to sophisticated computer technologies.

**QUESTION 2 – Availability of infomediary services?**

I am not aware of these services.

Consider, as an alternative, the school systems as a potential trusted intermediary in many instances.

Schools and teachers are (hopefully) trustworthy individuals, who have both access to parents and children and can assist in identification in many programs.

In my experience, most programs that attempt to collect children information are handled through schools.

### **QUESTION 3 – When will secure infomediary services be available?**

I think that it is not practical to rely on third party commercial services.

The technological divide is still very important in this country. If the Internet is to help children, it should help ALL children. Those who need it the most are children whose parents cannot read English, or do not own a computer. Relying on sophisticated services to obtain parents consent will take these underprivileged children out of the loop.

### **QUESTION 4 – Elimination of the Sliding Scale?**

I would not eliminate the Sliding Scale, and to the contrary, I suggest three levels for the sliding scale:

LEVEL ONE – non profit, non commercial activities (see example 1 below)

LEVEL TWO – internal use for commercial purpose (see example 2 below)

LEVEL THREE – re-disclosure to third parties (see example 3 below)

### **Example 1 – internal use for pro-bono purposes**

COPPA does not apply to NPOs. However, many commercial companies that want to “do good” are frequently discouraged by the obstacles created by COPPA. These commercial companies just want to increase their goodwill through their “pro bono” activities, but have otherwise no direct or indirect use for the children’s PII other than to operate a program that benefits children.

The Rule needs to provide simple, efficient mechanisms for them, so that they can keep creating programs.

For example, one of my clients developed a program for children with an educational game with questions, to help children learn geography, and understand how learning geography in school would be useful for their life as an adult. The program was to be run in cooperation with schools, worldwide.

The company was not going to use the names and email addresses other than to help connect children throughout the world, in cities where the company had offices, and where other schools would participate in the program. No commercials, no marketing, no re-disclosure of information. Just some goodwill generated through the program and the “fun” geography lessons.

After I explained to them that they would need to obtain individual consent from each parent, they gave up. The program was cancelled.

In an instance such as the one above, it would have been tremendously helpful if the school or the teacher could have been appointed the “trusted third party” able to collect all parents consent, and involve the children in the program.

The sliding scale needs to be improved to include concepts such as the one described above: to make it easy for companies to collect some information about these children, so that they can use it to accomplish their pro bono programs for children.

In my experience, those collections of children information constitute the greatest percentage of instances where information is collected.

### **Example 2 – internal use for commercial purposes**

Companies that collect children PII for internal “commercial” use, e.g., to sell products, services, etc. to children should face substantial hurdles. The Rule should require one parent’s involvement. The methods listed in 16 CFR 312.5(b)(2) are adequate.

In addition, there should be specific limitation to the collection of information, such as:

- Limit the information that is collected to that amount which is necessary
- Mandatory OPT-IN (un-clicked ones) for the recipient of any commercial message, newsletter, etc. so that the individual whose information is collected is clearly required to agree to the uses of the information.
- Require renewal of the parental consent on an annual basis
- Require detailed specific notice of the use
- Require all communications with the child to contain an “unsubscribe” section similar to what is used for commercial messages under CAN SPAM, without any distinction between commercial, transactional or other type of communications.

### **Example 3 – disclosure to third parties**

It is difficult imagining any situation where a company should be allowed to disclose children information to third parties other than to its service providers.

### **QUESTION 5 – Mechanism not working?**

COPPA requirements often create an obstacle to commercial companies with genuine pro bono intent. In my experience, those collections of children information constitute the greatest percentage of instances where information is collected.

As indicated above, many commercial companies have pro bono programs directed to children, but otherwise do not intend to use children’s PII other than to operate a program that benefits children. They often give up their pro bono efforts out of discouragement with the obstacles created by COPPA.

For example, one of my clients had developed a program that included an educational game with questions, to help children learn geography, and understand how learning geography in school would be useful for their life as an adult. The program was to be run in cooperation with schools. There was nothing for the company. It was not going to use the email addresses other than to help connect children throughout the world, in

cities where the company had offices, and where other schools would participate in the program. No commercials, no marketing, no re-disclosure of information. Just some goodwill generated through the program and the “fun” geography lessons. After I explained to them that they would need to obtain individual consent from each parent, they gave up. The program was cancelled.

The Rule needs to provide simple, efficient mechanisms for them, so that they can keep creating programs. It would have been tremendously helpful in the example above if the school or the teacher could have been appointed the “trusted third party” able to collect all parents consent.

The sliding scale need to be improved to include concepts such as the one described above: to make it easy for companies to collect some information about these children, so that they can use it to accomplish their non-profit programs for children.

#### **QUESTION 6 – Extension of the Sliding Scale**

Some sliding scale mechanism needs to remain in place, and improved or adapted to help distinguish pro bono efforts from commercial uses and misuses.

#### **QUESTION 7 - Elimination of the Sliding Scale?**

The Sliding Scale should not be eliminated, but rather refined, and adapted to new technologies.

For example, take into account the existence of pop-up ads, which are generated by information collected on cookies, and elsewhere, and that are an additional invasion of children’s privacy.

#### **QUESTION 8 – Permanent Sliding Scale**

The Sliding Scale should not be permanent, but rather reevaluated to adapt to new technologies, new uses, new needs, and continue to be consistent with existing laws.

Respectfully submitted,

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