

**Software & Information
Industry Association**

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**Comments of the
Software & Information Industry Association (SIIA)
On
Permanent Extension of the COPPA Rule
“Sliding Scale 2005, Project No. P054513”
Submitted February 14, 2005**

The Software & Information Industry Association (SIIA) appreciates the opportunity to provide the following comments on the Federal Trade Commission's (FTC's) proposal to make the current “Sliding Scale Rule” permanent.

In summary, SIIA **strongly supports** the FTC’s proposal to make the sliding scale mechanism permanent. This action is consistent with the earlier recommendation of SIIA when the FTC sought comments on extending the Rule in November of 2001. In our view, making the Rule permanent is consistent with the requirements and purposes of the Children's On-Line Privacy Protection Act (COPPA), reflects the lack of pervasive implementing technologies that are cost-effective and usable, and the FTC's effective enforcement of the Act.

Background

The Software & Information Industry Association (SIIA) is the principal trade Association of the software code and digital content industry with over 600 members operating globally. Our members develop and market software and electronic content for business, education, consumers and the Internet. SIIA's membership is comprised of large and small software companies, e-businesses, and information companies, as well as many other large and small traditional and electronic commerce companies. A significant number of our members develop software and information products for the education market, and in many other cases for use by children.

SIIA and its member companies have played a leadership role in promoting effective privacy protections for many years, and were one of the earliest industry leaders to recognize the importance of adopting effective privacy policies and privacy enhancing technological tools. SIIA has, through technical assistance and privacy seminars, worked with hundreds of companies to develop, write and implement effective, consumer-friendly privacy policies. In the U.S., we actively monitor developments at the Federal Trade Commission with regard to its Section 5 actions and in the legal frameworks of COPPA, Gramm-Leach-Bliley Act (G-L-B Act), and the Health Information Portability and Accountability Act (HIPAA). At the international level, SIIA is working to encourage company participation in the "safe harbor agreement" negotiated between the Department of Commerce and the European Union.

SIIA and its member companies are also at the forefront of developing global e-commerce markets in which business, consumers and users can have confidence. Thus, one of the priorities of our Association is to promote the recognition of electronic records, contracts and signatures as key steps toward providing a framework for promoting electronic transactions in both a domestic and global context. In particular, SIIA is monitoring implementation of various electronic transactions laws in the US and abroad, and are deeply familiar with the use of technologies to authenticate transactions in a variety of contexts, ranging from individual consumer transactions to business-to-business transactions that require higher degrees of security.

Support of the Permanent Extension of the Sliding Scale Rule

As the FTC correctly points out in its Notice of Proposed Rulemaking, as part of the effort to protect children's online privacy, Congress enacted the Children's Online Privacy Protection Act of 1998, 15 U.S.C. 6501 *et seq.* ("COPPA"), to prohibit unfair or deceptive acts or practices in connection with the collection, use, or disclosure of personally identifiable information from children on the Internet.

The final Rule implementing COPPA imposes certain requirements on operators of websites or online services directed to children under 13 years of age, or other websites or online services that have actual knowledge that they have collected information from a child under 13 years of age. Among other things, the Rule requires that website operators obtain verifiable parental consent prior to collecting, using, or disclosing personal information from children under 13 years of age.

To achieve the requisite verifiable parent consent, the Rule provides 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." To accomplish this goal, the Rule sets forth a **sliding scale approach** to obtaining verifiable parental consent depending on whether the information gathered will be disclosed to third parties or used only internally by the website operator.

Based on all the facts -- specifically, the lack of pervasive low-cost, end user-friendly implementations, the lack of evidence that the requirements of COPPA for gaining verifiable parental consent for information used only for internal purposes are not being met, and the lack of demonstrated need for stricter methods of obtaining consent for internal use -- the permanent extension proposed by the FTC is reasonable and consistent with the requirements of the Act.

SIIA recognizes that the FTC has been successful in seeking enforcement actions under COPPA without adopting a "one size fits all" framework to obtain verifiable parental consent and instead relying on a sliding scale approach. The Rule as adopted has been effective in striking a balance between the obvious need to protect children online and the need to maintain the interactivity that kids enjoy so much. Interactivity and consumer end use acceptability is the hallmark of the Internet and the Rule recognizes that.

Moreover, a requirement that all parental consent be subject to strict verification procedures would be unworkable and counterproductive. As the FTC acknowledges, there are legitimate questions raised by the availability of appropriate technologies to achieve the goal. In reviewing developments over the last several years, there are no clear signals that the anticipated verification technology -- technology that must be low-cost, widely deployed and acceptable to consumer end users -- is likely to be economically and widely available in the consumer market in the foreseeable future. If the FTC were to merely extend the Rule for several years, we are just as likely to face the same challenges at that time as we do today.

If the FTC were to abandon the Sliding Scale Rule, the change of course in mid-stream would have considerable negative consequences, particularly for many small and medium size web-based business that serve children. It would have another direct impact: heightened uncertainty for businesses that want to do more to provide value content and services to children with regard to what business standards they must operate against. Our assessment of this market suggests that, in fact, this regulatory environment uncertainty (taken together with other economic and investment factors) has been an inhibition in this market. Making the sliding scale permanent would contribute greatly to a predictable future for content and services oriented towards children.

Most significantly, the present approach has worked well. The key step for the FTC is to take into consideration both standards in the rule: "available technology" and "reasonable calculation." Most of the discussion has been on the former. The answer, in our view, is to focus on the latter. Consistent with industry practice, and with the FTC's own advisory committee's work in related areas, the sliding scale mechanism provides for different methods between data gathered only for internal use and that which will be disclosed to third parties and, as such, is "appropriate to the circumstances".¹ In

¹ See, e.g., **Final Report of the FTC Advisory Committee on Online Access and Security**, May 15, 2000. One of the recommendations of the Advisory Committee, related to Security, is directly on point: "[A] security program should be appropriate to the circumstances. This standard, which must be defined case by case, is sufficiently flexible to take into account changing

adopting the sliding scale in the Rule, the Commission wisely acknowledged in its own comments that the risks involved where an operator uses a child's personal information solely for its internal use, with no disclosure, were minimal. It is time to make the Rule permanent.

Conclusion

SIIA appreciates the opportunity to provide comments on this Notice of Proposed Rulemaking. Our members support the FTC's efforts to enforce COPPA fully. As a result, we strongly support the FTC proposal to make the sliding scale permanent in the Rule.

Our strong support for making the current sliding scale mechanism permanent is based on our analysis of the legal requirements and public policy goals of COPPA, which clearly point to the fact that a permanent sliding scale approach meets the requirements of the Act, achieves the goals of obtaining verifiable parental consent when the information gathered is used only for internal purposes, and will facilitate more services and content directed at children.

If we can provide further information or answer any questions, please do not hesitate to contact Mark Bohannon, SIIA's General Counsel & SVP Public Policy at 202-789-4471 or mbohannon@siaa.net.