

ESRB Safe Harbor Proposal - Comment, P004504

Donald S. Clark
Secretary
Federal Trade Commission
Room H-159, 600 Pennsylvania Avenue, NW
Washington, DC 20580



Dear Mr. Clark:

The Center for Media Education, the Consumer Federation of America, the American Academy of Child and Adolescent Psychiatry, Junkbusters Corporation, the National Alliance for Non-violent Programming, National Association of Elementary School Principals, Privacy Times, and Public Advocacy for Kids ("CME/CFA *et al.*") respectfully submit these comments in response to the Federal Trade Commission's ("FTC" or "Commission") Notice of Proposed "Safe Harbor" Guidelines and Request for Public Comment on the Application of ESRB Privacy Online, a division of the Entertainment Software Rating Board, 65 FED. REG. 39901 (June 28, 2000)("Safe Harbor Notice"). CME/CFA *et al.* is a broad coalition of child advocacy, education, health and parents groups dedicated to improving the quality of electronic media, especially on behalf of children and their families.¹ CME/CFA *et al.* have a strong interest in ensuring that the Commission only approve self-regulatory guidelines that fully comply with the FTC's rules and with the underlying purpose of the Children's Online Privacy Protection Act ("COPPA"), *i.e.*, to prohibit the collection of personal information from children without the verifiable informed consent of their parents.

¹ See Appendix for more information on the public interest groups that comprise CME/CFA *et al.*

INTRODUCTION

The Entertainment Software Rating Board's ("ESRB") proposed self-regulatory guidelines is one of the first applications submitted for approval under the Safe Harbor provisions of the Children's Online Privacy Protection Rule, 64 FED. REG. 59888 (Nov. 3, 1999) ("COPPR"). As CME/CFA *et al.* have indicated in comments to previous applications, the Commission's response to the first generation of Safe Harbor applications, such as ESRB's proposal, will set the standard for applications submitted in the future. Approval of inadequate guidelines would set a dangerous precedent that would undermine the goal of protecting children's privacy in the online environment. Accordingly, it is imperative that the Commission carefully review ESRB's proposed guidelines to ensure that they meet the spirit and the letter of the Commission's rules and the Act itself.

The ESRB Application is comprised of three parts. Section One provides general information on ESRB and the full text of the ESRB Privacy Online Principles and Guidelines ("Guidelines" or "ESRB Guidelines"). The ESRB Guidelines are applicable to adult, teen, and general age websites, as well as sites targeted to children under 13.² Section Two of the Application contains a chart comparing the COPPR with the corresponding provisions of the ESRB Guidelines. Finally, Section Three of the Application provides further explanation of how the Guidelines meet the requirements of the COPPR.

² Notably, although the Guidelines make various reference to the special privacy needs of children throughout, only one section- section 7- specifically addresses the privacy policies and guidelines for children under 13.

As you know, the FTC will approve a safe harbor application only if the self-regulatory guidelines provide "substantially similar requirements that provide the same or greater protections for children as those contained in sections 312.2-312.9 of the rules." 16 C.F.R. § 312.10(b). The ESRB Application comports with many of the provisions of the COPPR. Indeed, the ESRB Application goes a long way towards addressing the shortcomings CME/CFA *et al.* have identified in previous proposals. For example, the Sentinel Program proposed in the ESRB Application contains various legitimate independent assessment mechanisms, such as the Sentinel Monitoring, Verification and Spot Check procedures. See ESRB Application at 31-34. The Sentinel Program also provide consumers with an Consumer Online-Hotline privacy violation complaint service at no-charge. Id. In addition, CME/CFA *et al.* commend ESRB for requiring website operators to implement internal processes for ensuring that they comply with their privacy policies, to train personnel in information privacy practices and to participate in electronic marketplace consumer education programs. Id. at 11.

However, there are a few significant deficiencies in the Application that must be corrected before approval is warranted. CME/CFA *et al.* therefore recommend that if the Commission approve the ESRB Application, it should do so only on the condition that ESRB amends its Guidelines to address the concerns identified in this comment, as well as any other shortcomings the Commission may recognize.

As discussed in more detail below, the ESRB Guidelines are problematic in three respects. First, the Guidelines fail to provide "the same or greater protection" as several of the notice requirements of § 312.4 of the COPPR. In order to gain approval, ESRB must amend its Guidelines to fully comport with all the notice requirements of § 312.4. The second problem is

that the Guidelines do not ensure that the person reviewing a child's personal information is the actual parent of the child as required by § 312.6. Finally, although CME/CFA *et al.* generally support ESRB's independent assessment mechanisms and compliance incentive schemes, ESRB should clarify that its enforcement measures are indeed part of the Guidelines and that ESRB has adequate resources to implement such measures.

I. NOTICE REQUIREMENTS OF SECTION 312.4 AND THE ESRB GUIDELINES

The Safe Harbor Notice specifically asks whether "the provisions of the proposed guidelines governing operators' information practices provide the 'same or greater protections for children' as those contained in Sections 312.2-312.8 of the Rule." Safe Harbor Notice, 16 FED. REG. at 39902. CME/CFA *et al.* submit that the ESRB Guidelines do not provide "the same or greater protection for children" as those contained in the notice requirements of § 312.4.

A. Section 312.4(b)(1)(i) - Clearly Labeling the Link to the Privacy Policy as a Notice of its Children's Information Practices.

Section 312.4(b)(1)(i) requires that an operator's link to its privacy policy notice "must be clearly labeled as a notice of the website or online service's information practices with regard to children." 16 CFR 312.4(b)(1)(i). The ESRB Guidelines do not meet this requirement. The Guidelines only state that the "notice must be prominent and readily accessible to all Web users." ESRB Application at 12. Without a clear indication that the link is to a notice of the website's information practices with regard to children, the goal of informed parental consent would be frustrated. For example, a general age site may have a link labeled "Our Privacy Policy" on its homepage as well as in the site's separate children's area. But a parent visiting the general age site and the separate children's area would be unaware that the "Our Privacy Policy" link

displayed in the main area and the "Our Privacy Policy" link in the children's section are different. Thus, a parent may not gain "a clear idea of what the operator intends to do" with his/her child's personal information. COPPR, 64 FED. REG. at 59894.

B. Section 312.4(b)(2) - Content Requirements of the Privacy Notice.

Section 312.4(b)(2) details six elements that an operator must include in its privacy notice in order for the notice "to be complete" under the COPPR. 16 CFR § 312.4(b)(2). As discussed below, the ESRB Guidelines fail to meet two of these essential elements.

1. Section 312.4(b)(2)(i) - Contact information.

Section 312.4(b)(2)(i) requires that operators provide in the notice the "name, address, telephone number, and e-mail address of all operators collecting or maintaining personal information from children through the website or online service." 16 CFR § 312.4(b)(2)(i). The ESRB Guidelines only require that the company identify in the notice "who is collecting the data" and "how consumers can ask questions." ESRB Application at 7. This is not enough. As the Commission discussed in the Notice of the Proposed Rule, parents need information "to both identify *and contact* the operator should the parent want further information about the website." Children's Online Privacy Protection Rule, Proposed Rule, 64 FED. REG. 22750, 22754 (April 27, 1999) (emphasis added). The ESRB Guidelines do not clearly require the operator to provide the necessary contact information in its privacy notice.

2. Section 312.4(b)(2)(iv) - Third party disclosure information.

Section 312.4(b)(2)(iv) requires the privacy notice to disclose whether the operator shares personal information with third parties, and if so, the notice must also reveal "[1] the types of business in which the such third parties are engaged, and the general purposes for which such

information is used; [2] whether those parties have agreed to maintain the confidentiality, security, and integrity of the personal information they obtain from the operator; and [3] that the parent has the option to consent to the collection and use of their child's personal information without consenting to the disclosure of that information to third parties." 16 CFR §312.4(b)(2)(iv).

The ESRB Guidelines do not meet the third party notice requirements of § 312.4(b)(2)(iv). With respect to third party disclosure information, the ESRB Guidelines only require that the privacy notice state "how the information may be used, including those outside the company with whom it may be shared." ESRB Application at 7. This is clearly insufficient, especially in light of the fact that "disclosure to third parties are among the most sensitive and potentially risky uses of children's personal information." COPPR, 64 FED. REG. at 59899.

In order to give informed, meaningful consent, parents need to know the types of business in which third parties are engaged and what such parties generally intend to do with their children's personal information. Id. at 59896. And "[p]arents need to know the steps an operator has taken to ensure that third parties will protect their children's data in order to provide meaningful consent." Id. The Guidelines do not provide the notice necessary to meet these concerns.³

³ Nor does the *Data Integrity/Security* Section of the ESRB Guidelines adequately address the notice requirements concerning the sharing of personal information with third parties. ESRB Application at 9-10. This Section only directs the operator to take "reasonable steps to assure that third parties to whom they transfer [personal] information are aware of [the operator's] security practices, and that the third parties also take reasonable precautions to protect transferred information." Id. The only reference to any notice an operator must give concerning third parties is that the "participating companies must **notify** consumers that they cannot guarantee that third parties will adhere to the same security standards." Id.

The ESRB Guidelines also fail to require operators "to notify a parent that he or she has the option of consenting to an operator's collection and use of the child's personal information without consenting to the disclosure of that information to third parties." Id. As the Commission concluded in the COPPR "giving parents a choice about whether information can be disclosed to third parties implements the clear goals of the COPPA to give parents more control over their children's personal information, limit[sic] the unnecessary collection and dissemination of that information and preserve[sic] children's access to the online medium." Id. at 59899. The ESRB Guidelines briefly mention in a footnote that a participating company "must provide a reasonable mechanism for parents of the child to consent to the collection and use of their child's personal data ... without consenting to the disclosure of that data to third parties." ESRB Application at 8 n.2. But providing a "reasonable mechanism" is not enough. The rules explicitly require that this language must be included in the operator's privacy notice. See 16 CFR § 312.4(b)(2)(iv).

C. Section 312.4(c) - Parental Notice Requirements.

Section 312.4(c) of the COPPR discusses the notice an operator must give to a child's parent before an operator can collect personal information from the child. The "notice to the parent must contain additional information that is not required in the [privacy] notice on the site." COPPR, 64 FED. REG. at 59897. The ESRB Guidelines fail to meet the requirements of § 312.4(c) in two respects.

First, under ordinary circumstances, in its parental notice the website operator "must tell the parent that he or she wishes to collect personal information from the child (section 312.4(c)(1)(i)(A)) and may not do so unless and until the parent consents, and the operator must describe the means by which the parent can provide that consent (section 312.4(c)(1)(ii))."

COPPR, 64 FED. REG. at 59897. The ESRB Guidelines do not have a corresponding parental notice section included in its segment explaining operator's obligation to obtain verifiable parental consent. See ESRB Application at 12-13.

Second, section 312(c)(1) also details the content an operator must provide in a notice seeking consent under the exceptions to prior parental consent set forth in §§ 312.5(c)(3) & (4). Again, ESRB fails to include these requirements in the Guidelines. In fact, the Guidelines are completely silent on the "exceptions to prior parental consent" set forth in § 312.5(c). It is unclear whether the absence of any discussion on the exceptions to prior parental consent indicates that the ESRB Guidelines do not countenance any exceptions to the prior consent rule, or that the ESRB Guidelines will permit exceptions to the rule but neglected to include the necessary requirements. In any event, the Commission should require ESRB to clarify its position and then compel ESRB to amend its Guidelines accordingly.

In sum, several notice provisions of the ESRB Guidelines fail to provide the "same or greater protections for children as those contained" in section 312.4(b) & (c). Therefore, the Commission cannot grant approval of the ESRB Application until ESRB amends its Guidelines to comply with all of the notice requirements of the COPPR.

II. PARENTAL REVIEW OF PERSONAL INFORMATION UNDER SECTION 312.6 AND THE ESRB GUIDELINES

In addition to the notice requirements discussed above, the ESRB Guidelines do not fully provide "the same or greater protection for children" as § 312.6 of the COPPR concerning the parental review of personal information.

Section 312.6 discusses the right of a parent "to review personal information provided by a child" to the operator. 16 CFR § 312.6. Under §312.6(a)(3), the operator of a website is required to provide a parent whose child has submitted personal information with a means, upon request, of reviewing any personal information collected from that child. Operators that receive such requests must "[e]nsure that the requestor is a parent of the child, taking into account available technology." 16 CFR § 312.6(a)(3)(i).

Although the ESRB Guidelines provide parents with the right to review, the Guidelines do not comply with § 312.6(a)(3)(i) because they fail to ensure that the requesting party is the parent of the child. See ESRB Application at 8, 9, 10, and 13. The Commission explicitly "required operators to ensure that the person seeking to review such information was the child's parent" because "of the danger inherent in requiring an operator to release a child's personal information." COPPR, 64 FED. REG. at 59904. Accordingly, ESRB must amend its Guidelines to require parental verification before a requesting party can review a child's personal information. ESRB should also provide in its amendment the means by which an operator could lawfully obtain the parental verification required by § 312.6(a)(3)(i). See Id. at 59905.

III. INDEPENDENT ASSESSMENT MECHANISMS, INCENTIVES FOR COMPLIANCE AND THE ESRB GUIDELINES

The Safe Harbor Notice also asks whether the mechanisms used to assess operator's compliance with the ESRB Guidelines, as well as its incentives for compliance, are effective. See Safe Harbor Notice, 65 FED. REG at 39902. CME/CFA *et al.* generally support ESRB's independent assessment Sentinel Program and its various incentive mechanisms. However, CME/CFA *et al.* do have a few concerns with the enforcement facet of ESRB's Guidelines.

Primarily, CME/CFA *et al.* submit that ESRB must include its Sentinel Program within the actual text of the Guidelines. Section 312.10(b) requires that the guidelines submitted for approval to the Commission must include "an effective, mandatory mechanism for the independent assessment of ... operator's compliance ... [and] ...effective incentives for ... operators' compliance with the guidelines." 16 CFR § 312.10(b)(2) & (3). The Sentinel Program, imparting the independent assessment mechanisms and incentives to be used by ESRB, is not included as part of the actual ESRB Guidelines.⁴ Although probably unintentional, this oversight could be read to mean that the Sentinel Program is not actually part of the Guidelines.

ESRB should amend its Guidelines to clearly include the Sentinel Program. As a practical matter, the absence of the independent assessment mechanisms and incentives from the Guidelines limits the efficacy of many of the Sentinel Program's policies. For example, the Consumer Online-Hotline is an excellent independent enforcement mechanism, but it is not part of the Guidelines a participating entity must follow. Thus, there is no provision in the Guidelines that require an operator to indicate in its privacy notice that consumers have the option of contacting ESRB directly through the Online-Hotline. Including the Sentinel Program in the Guidelines themselves would explicitly notify participating corporations that they are being routinely monitored and assessed, and will therefore encourage compliance.

⁴ Rather the Sentinel Program is discussed in pages 6 and 31- 34 of the Application. The actual text of the Guidelines is found on pages 7-13. And notwithstanding that section six of the Guidelines is entitled *Enforcement and Accountability*, it only addresses the operator's role in assessing and maintaining compliance with the Guidelines. See ESRB Application at 11-12. There is no mention of any of the provisions of the Sentinel Program.

Second, CME/CFA *et al.* have concerns as to whether ESRB has the resources to effectively implement its Sentinel Program. Among other things, the Sentinel Program asserts that for every participating corporation ESRB will: 1) perform annual on-site audits, 2) conduct random and scheduled quarterly reviews of participating company's information practices, 3) perform additional random spot checks or seeding of websites; 4) investigate privacy complaints and 5) provide arbitration and mediation services. ESRB Application at 31-34. Although this program appears adequate on paper, CME/CFA *et al.* are concerned that in practice the program may not be as effective as required by the COPPR due to the large amount of resources needed to efficaciously implement the program. CME/CFA *et al.* therefore recommend that the Commission ask ESRB to provide some verification indicating that ESRB has the wherewithal to fully and forcefully implement its Sentinel Program.

CONCLUSION

CME/CFA *et al.* respectfully urge the Commission to condition approval of ESRB's Application on the foregoing stipulations. In order to warrant approval, ESRB must amend its Guidelines to provide the "same or greater protections for children" as those provided by the notice and parental review verification requirements of the COPPR. In addition, the Commission should direct ESRB to include its Sentinel Program in the Guidelines themselves and verify that ESRB has adequate resources to effectively implement the independent assessment and compliance mechanisms set forth in its Sentinel Program.

Respectfully submitted,

 F.A.D.

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APPENDIX

Center for Media Education (CME), is a national nonprofit, nonpartisan organization dedicated to creating a quality electronic media culture for children, their families, and the community. CME's four-year national campaign led to the 1996 Federal Communications Rule requiring a weekly minimum of three hours of educational television programming. CME's report "Web of Deception" (1996) first drew attention to potentially harmful marketing and data-collection practices targeted at children on the Internet and laid the groundwork for the Children's Online Privacy Protection Act (COPPA).

Consumer Federation of America (CFA) is a non-profit association of some 260 pro-consumer groups, with a combined membership of 50 million, that was founded in 1968 to advance the consumer interest through advocacy and education. CFA has worked closely with CME to defend the rights of children's privacy online and jointly published a consumer education brochure for parents and children entitled, *The Internet, Privacy and Your Child: What You Need to Know as a Parent/Keeping Secrets About You on the Internet, A Kid's Guide to Internet Privacy*.

The American Academy of Child and Adolescent Psychiatry (AACAP) is a nonprofit professional organization representing over 6,500 child and adolescent psychiatrists. Its members are physicians with at least five years of additional training beyond medical school in general and child and adolescent psychiatry. Its members actively research, diagnose and treat psychiatric disorders affecting children, adolescents, and their families. The AACAP is committed to protecting the well-being and rights of children and their families.

Junkbusters Corp. helps consumers defend themselves against intrusive marketing and protect their privacy online. At <http://www.junkbusters.com>, the company provides extensive free resources for stopping telemarketing calls, unwanted physical mail, junk email, and commercial invasions of privacy on the Internet.

The National Alliance for Non-violent Programming (NANP) is a not-for-profit network of organizations with a long history of effective community involvement and education. Member organizations include the American Medical Women's Association, Jack and Jill of America, Inc., Jewish Women International, the Links, Inc., the National Association of Women Business Owners, National Council of LaRaza, Soroptimist International of the Americas, and YWCA of the U.S.A. With the capacity to reach two million people, NANP builds and supports community initiatives to promote and teach media literacy and non-violence. NANP headquarters in Greensboro, NC serves as the information, technical assistance, materials distribution and network center for member organizations, local initiatives and the general public.

The National Association for Elementary School Principals (NAESP) was founded in 1921 by a group of principals who sought to promote their profession and to provide a national forum for their ideas. Over the past 75 years, NAESP has grown to become the most powerful voice of Pre-K-8 principals across the United States and around the world with a peer network of more than 27,000 principals worldwide. The NAESP is dedicated to assuring the nation's continued strength and prosperity by assuring the best possible schooling for its most important resource, the children. Its mission is to serve as advocates for children and to help principals do the best job possible.

Privacy Times, a Washington-based newsletter that covers the information world, is designed for professionals and attorneys who need to follow the legislation, court rulings, and industry developments that frame the ongoing debate about information privacy. Privacy Times covers such issues as the FTC's developing policy for the Internet, credit reports, Caller ID, medical records, "identity theft," the Freedom of Information Act, direct marketing and the European Union's Directive On Data Protection.

Public Advocacy for Kids is a non-profit child advocacy organization devoted to education, health, telecommunication, and parental involvement issues at the federal level. Services provided on a consulting basis include advocacy training, child policy development, organizing for local and federal action, and communications development.