

Lawyer Insights

Takeaways From FTC Children's Privacy Rule Proposal

By Phyllis Marcus

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On Dec. 20, 2023, after over four years of consideration and right before the holiday season, the [Federal Trade Commission](#) issued proposed revisions to its Children's Online Privacy Protection Rule.¹

The [FTC's proposal](#) is the next step in an inquiry launched in the summer of 2019 and follows the agency's review of over 175,000 public comments.²

According to the notice of proposed rulemaking,³ the FTC proposes modifying most provisions of the COPPA Rule.

In a separately filed statement,⁴ FTC Commissioner Alvaro Bedoya stated that the proposed changes will ensure "the Children's Online Privacy Protection Rule will enter its second quarter century stronger and better prepared to protect children online."

Before delving into what the FTC is proposing to change, it is worthwhile exploring what will remain the same:

- The commission declined to expand COPPA's directed-to-children standard to include online sites and services likely to attract an audience that includes a disproportionately large percentage of children under age 13;
- Likewise, recognizing that it is constrained by the U.S. Congress in the underlying statute, the commission will not revise COPPA's actual knowledge standard by moving to a constructive knowledge standard;
- The definition of personal information will not be expanded to include data that is inferred about, but not directly collected from, children, or other data that serves as a proxy for personal information;
- The commission will retain the 2013 modification to include stand-alone persistent identifiers as personal information, and declines to require that persistent identifiers instead be associated with other individually identifiable information to be considered personal; and
- The commission is not proposing significant modifications to narrow or expand the definition of support for internal operations.

With that, let's turn to what the commission's 2023 proposal entails.

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Below we identify the changes, by category, and include the questions the FTC has posed to the public for consideration. The agency is taking public comment on its proposed changes until March 11.⁵

The FTC also will hold an open meeting on Jan. 18 during which the staff will provide an overview of its proposed changes.⁶

Mobile Phone Number

The commission would modify the definition of online contact information to include a mobile number, thus allowing operators to collect and use a parent's or child's mobile phone number in certain circumstances, including in connection with obtaining parental consent through a text message.

FTC Question Posed

The commission is seeking feedback on whether allowing operators to contact parents through text message to obtain consent presents security risks.

Biometric Information

The commission proposed modifying the definition of personal information to include a biometric identifier that can be used for the automated or semi-automated recognition of an individual.

This would include fingerprints or handprints, retina and iris patterns, genetic data — including a DNA sequence — and data derived from voice data, gait data or facial data.

FTC Question Posed

The commission asked whether any other biometric identifiers should be included and whether any exceptions might apply to their collection.

Avatars

The commission asked whether avatars generated from a child's image should be considered personal information.

Directed to Children

The commission reiterated that its multifactor test, applying a "totality of the circumstances" standard, works well to determine whether an online site or service is directed to children.

However, it expanded the types of evidence the FTC will consent to regarding audience composition and intended audience to include marketing or promotional materials or plans, representations to consumers or to third parties, reviews by users or third parties, and the age of users on similar websites or services.

Operators Collecting Personal Information

The commission proposed to slightly modify the situation in which third-party operators are themselves

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held to be a "website or online service directed to children."

Under the existing rule, such operators must have actual knowledge they are collecting personal information directly from users of another site or service directed to children.

Without getting too technical, the FTC proposed to tighten this definition by removing the word "directly," thus avoiding a potential loophole in which third parties — e.g., ad networks — that receive large amounts of data from children's sites could claim they are outside of COPPA's reach.

Mixed Audience

The commission proposed formalizing and clarifying its mixed-audience category of sites and services directed to children by adding to the rule a separate, standalone definition for "mixed audience website or online service."

The new definition provides that a mixed-audience site or service is one that meets the multifactor test for "directed to children," but does not target children as the primary audience.

In addition, mixed-audience operators will be given the flexibility either to collect age information or use "another means that is reasonably calculated, in light of available technology, to determine whether the visitor is a child."

However, the commission has specified that the means used for determining whether a visitor is a child be done in a neutral manner that does not default to a set age or encourage visitors to falsify age information, thereby preventing operators from suggesting to users that certain features will not be available to users who identify as younger than age 13.

Finally, the commission proposed adding a statement to the definition that mixed-audience operators will not be deemed to be directed to children with regard to any user not identified as under age 13.

Audience Composition Analysis

The commission is seeking input on whether it should provide an exemption for operators from being deemed to be child-directed if they undertake an analysis of their audience composition and determine that no more than a specific percentage of users are likely to be under age 13.

Support for Internal Operations

The commission proposed expanding its nonexhaustive list of restrictions to prohibit operators from using or disclosing persistent identifiers for processes — including machine learning — that optimize user attention or maximize user engagement, including by sending push notifications to prompt a child to engage with the site or service, without verifiable parental consent.

FTC Question Posed

The commission posed whether the rule should distinguish between techniques used to keep a child engaged on a site or service and those that permit user-driven — or other — personalization.

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Contextual Advertising

The commission is seeking input on whether it should modify its treatment of contextual advertising as support for internal operations, "given the sophistication of contextual advertising today, including that personal information ... may be used to enable companies to target even contextual advertising to some extent."

Direct Notices

The commission clarified that operators may use means to initiate parental consent other than those that do not require collecting online contact information.

As an example — and for the first time — the commission recognized mechanisms such as in-app, pop-up messages that direct the child to hand a device to the parent and then instruct a parent to call a toll-free number.

Operators that use children's personal information to send push notifications or otherwise encourage or prompt use of the site or service will have to expressly describe this use in their direct notice.

The commission is proposing that operators be required to disclose in the direct notice the categories of third parties with which they share data.

FTC Question Posed

Is this information better placed in an operator's privacy policy rather than in the direct notice?

Privacy Policies

Under the current rule, an operator that collects a persistent identifier for permitted uses is not required to provide notice of the collection.

Under the FTC's proposal, operators would be required to specify in their privacy policies the particular internal operations for which they collect persistent identifiers and describe the means they use to ensure they do not use or disclose such identifiers to contact a specific individual, deliver behaviorally targeted advertising, amass a profile on specific users, or for processes that encourage or prompt use of a site or service, or for any other purpose — except as permitted by the support for the internal operations' exception.

Separate Consent for Information Sharing

Under the proposal, operators will now have to obtain separate opt-in parental consent to disclose information to third parties — including third-party advertisers — unless the disclosure is integral to the nature of the website or online service.

The FTC appears to be interpreting this new requirement as disallowing third-party behavioral advertising as a default setting and permitting it only if and when a parent expressly opts in to such sharing.⁷

Operators required to obtain this separate parental consent for disclosures may not condition access to

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the website or online service on such consent.

FTC Question Posed

Where should this consent be obtained?

Eliminating Monetary Charge Requirement

The commission is proposing to eliminate the monetary transaction requirement when an operator obtains consent through a parent's use of a credit card, debit card or an online payment system.

The rule would still require notice of a discrete transaction, even where there is no monetary charge.

Use of Audio Files

The commission proposed codifying its 2017 enforcement policy statement regarding the collection of audio files.

Under this change, an operator will not be required to obtain parental consent to collecting children's audio files where such files are used to perform a task or to engage with a device — and not simply, as before, to replace written text.

Operators will not be allowed to retain the audio files or use them for other purposes such as product improvement or internal operations, even if the operator has taken steps to de-identify the data.

Schools' Use of EdTech

The commission proposed codifying its guidance permitting schools, state educational agencies and local educational agencies, in certain instances, to consent on parents' behalf to a child's use of online services.

Schools can only consent to the collection of student data for educational purposes but not for other commercial purposes.

FTC Question Posed

What types of services should be considered school-authorized educational purposes?

To fall within this exception, operators may not use or disclose student data for marketing or advertising purposes.

Note that the commission indicated that product improvement and development could be viewed as part of providing an educational purpose provided the use is directly related to the service the school authorized.

The proposed school authorization exception would require that the education technology provider and the school have a written agreement in place setting forth the exception's requirements.

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The required written agreement must specify that the school will have direct control over the operator's use, disclosure and maintenance of the personal information.

According to the revisions, "the agreement must also include the operator's data retention policy with respect to personal information collected from children under the school authorization exception."

Finally, the written agreement must identify the name and title of the person providing consent and specify that the school has authorized the person to provide such consent.

Operators collecting personal information from children under the school authorization exception must include an additional notice in their privacy policy that:

- "The operator has obtained authorization from a school to collect a child's personal information";
- "The operator will use and disclose the information for a school-authorized education purpose and no other purpose"; and
- "The school may review information collected from a child and request deletion of such information."

Operators relying on this exception must provide schools — but not parents — with the right to review personal information collected from a child, refuse to permit operators' further use or future online collection of personal information, and to direct operators to delete such information.

Confidentiality and Security of Children's Personal Information

Operators will be required to, at minimum, establish, implement and maintain a written comprehensive security program that contains safeguards appropriate to the sensitivity of children's information and to the operator's size, complexity and nature and scope of its activities.

Under the written security program, the operator must:

- "Designate an employee to coordinate the information security program";
- Identify and, at least annually, perform additional assessments to identify risks to the confidentiality, security and integrity of personal information collected from children;
- Design, implement and maintain safeguards to control any identified risks, as well as test and monitor the effectiveness of such safeguards; and
- At least annually, evaluate and modify the program.

Operators that release personal information to third parties must obtain written assurances that the

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recipients will employ reasonable measures to maintain the confidentiality, security and integrity of the information.

Data Retention and Deletion

The commission proposed modifying its retention and deletion requirements in several ways:

- To clarify that operators may retain children's personal information for only as long as is reasonably necessary for the specific purpose for which it was collected, and not for any secondary purpose;
- To require operators to delete the information when such information is no longer reasonably necessary for the purpose for which it was collected — and to prohibit retaining the information indefinitely; and
- Under the commission's proposal, operators will also be required to establish and maintain a written data retention policy specifying its business need for retaining children's personal information and its time frame for deleting it.

COPPA Safe Harbor Programs

The FTC is taking a closer look at the safe harbor structure, and is proposing additional reporting and oversight requirements, including:

- Identifying each participating operator and all approved sites or services in the program, as well as all subject operators that have left the program;
- Providing copies of each consumer complaint related to each subject operator's violation of program guidelines and a description of the process for determining whether an operator is subject to discipline; and
- Submitting triennial reports to the FTC providing details on their technological capabilities and mechanisms for assessing subject operators' fitness for maintaining membership.

FTC Question Posed

Are there any conflicts that would prevent a safe harbor program from effectively assessing an operator's fitness for membership?

Takeaways

So, what does this all mean?

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First, it is clear from the FTC's extensive list of 20 questions that its COPPA rulemaking is far from over. The agency is not only asking the public to weigh in on the specific regulatory changes proposed, but also on a wide range of issues it has not yet considered — ranging from the role of avatars to percentage thresholds, age verification mechanisms and contextual advertising.

Our best guess is that, after taking public comment, the agency will issue a supplemental notice of proposed rulemaking, perhaps this summer, with additional and more concrete regulatory language and will take comment on that proposal.

If this is correct, then we should not expect a final COPPA Rule to be issued until late 2024, with an effective date sometime in 2025.

Second, while the commission proposes modifying most provisions of the rule, the revisions are not as seismic as might have been expected under the current FTC leadership.

Of course, as the FTC recognizes, some of the most radical changes — e.g., changing the actual knowledge standard or raising COPPA's age coverage — are constrained by statute. But other feared changes seem not to have materialized.

To be sure, some of the proposed changes will require heavy operational lifts. The FTC expects additional data security accountability for operators in the children's space — if the proposal is finalized, operators will be required to establish, implement, and maintain a detailed written security program for children's data and obtain written assurances before releasing children's data to third parties.

Operators will be prohibited from retaining children's personal information for secondary use, and must delete such information when it no longer is necessary for the purpose for which it was collected.

And, for the first time, COPPA could require granular, layered consents for data sharing — a proposal the agency describes as prohibiting the use of settings that allow third-party behavioral advertising as a default.

However, many of the changes the FTC has proposed were to be expected and reflect current trends in FTC enforcement and under state law.

It remains to be seen where the commission ultimately will land, but for now, the agency has given parents, industry, advocates, and other regulators and enforcers much food for thought.

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Notes

1. <https://www.ftc.gov/news-events/news/press-releases/2023/12/ftc-proposes-strengthening-childrens-privacy-rule-further-limit-companies-ability-monetize-childrens>.
2. <https://www.federalregister.gov/documents/2024/01/11/2023-28569/childrens-online-privacy-protection-rule>.
3. <https://www.ftc.gov/legal-library/browse/federal-register-notices/16-cfr-part-312-childrens-online-privacy-protection-rule-nprm>.
4. <https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/statement-commissioner-alvaro-m-bedoya-issuance-notice-proposed-rulemaking-update-childrens-online>.
5. <https://www.regulations.gov/>.
6. https://www.ftc.gov/news-events/news/press-releases/2024/01/ftc-announces-tentative-agenda-january-18-open-commission-meeting?utm_source=govdelivery.
7. <https://www.ftc.gov/business-guidance/blog/2023/12/ftc-proposes-enhanced-protections-kids-online-where-do-you-stand>.

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