

FTC Proposes Updates to COPPA Rule

The proposed amendments are expansive and would significantly affect how companies comply with the Children’s Online Privacy Protection Act.

Key Points:

- The proposed amendments, which clarify or expand many of the COPPA Rule’s existing provisions, would be the first updates to the Rule in over a decade and would formalize recent FTC guidance and enforcement in the COPPA space.
- Key modifications include revisions to the definitions of “personal information” and “a website or online service directed to children”; mandates for separate, stand-alone parental consent for the disclosure of children’s data to third parties; new mechanisms for obtaining verifiable parental consent; additional data security requirements; and additional guidance regarding data retention.

On December 20, 2023, the Federal Trade Commission (FTC or Commission) issued a [Notice of Proposed Rulemaking](#) (Notice) recommending amendments to the Children’s Online Privacy Protection Rule (COPPA Rule or Rule).

The FTC last updated the COPPA Rule more than 10 years ago, in 2013, to account for changes in the ways children use and access the Internet (the 2013 Amendments). The Notice incorporates feedback received in response to the Commission’s [2019 request for comment](#) on the effectiveness of the 2013 Amendments in creating “stronger protections for children,” as well as the FTC’s own enforcement experience over the last several years.

Once the FTC formally publishes the Notice in the *Federal Register*, it will open an additional 60-day public comment period, after which it will finalize and publish the amended regulations.

This Client Alert summarizes significant proposed amendments and highlights notable portions of the COPPA Rule that the FTC is declining to amend.

Background

The Children’s Online Privacy Protection Act (COPPA) was signed into law in 1998. It applies to “operators of websites and online services” that are “directed to children under 13” or who have “actual knowledge” that they are collecting personal information from users under 13. In 1999, the FTC published the COPPA Rule, which implements COPPA and imposes several obligations on operators

of websites and online services, including requiring that operators provide clear direct notice to parents and obtain verifiable parental consent before collecting, using, or disclosing personal information from children under 13.

Summary of Key Changes

The proposed amendments to the COPPA Rule aim to further restrict the collection and use of children's data and to clarify the 2013 Amendments. While many of the changes are unsurprising and consistent with the Commission's recent guidance and enforcement activity, several updates constitute more novel expansions to the COPPA Rule. As with prior COPPA rulemakings and solicitations of public comment, extensive public comment is expected on the new proposal.

Below is a summary of several significant proposed amendments as well as notable portions of the COPPA Rule that the FTC is declining to amend.

Expanding the definition of “personal information” to include biometric identifiers

The FTC is proposing to expand the definition of “personal information” to encompass biometric identifiers that “can be used for the automated or semi-automated recognition of individuals.”¹ This includes fingerprints, handprints, retina and iris patterns, genetic data such as DNA sequences, and data derived from voice, gait, or facial recognition. While the FTC requested feedback in 2019 about whether it should expand the definition of “personal information” to include data inferred about a child, the FTC ultimately declined to propose such an expansion. According to the FTC, the COPPA statute expressly pertains to data collected *from* a child, and such information would therefore be outside the scope of the Commission's authority.

Changes to the definition of “website or online service directed to children”

The FTC currently uses a multi-factor test to determine whether a site or service is directed to children under 13 and therefore must apply COPPA protections for its users. The Rule sets out several factors that the FTC will consider, such as the subject matter, visual content, use of animated characters, music or audio content, presence of child celebrities or celebrities who appeal to children, competent and reliable empirical evidence regarding audience composition, and evidence regarding the service's intended audience. While the FTC has declined to eliminate any existing factors or modify how it applies the multi-factor test, the Notice proposes to modify *what evidence the FTC will consider* regarding the last two factors — audience composition and intended audience.

Specifically, the FTC proposes combining the two factors (by removing the comma that separates them in the current COPPA Rule) and adding examples of specific evidence that can “help elucidate the intended or actual audience of a site or service,” including “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 online services.”² Notably, the Commission does not identify an operator's responsibilities regarding third-party reviews and the age of users on similar websites or services (e.g., whether an operator must proactively monitor or analyze reviews related to its site or service or otherwise actively investigate the age of users of competitors).

Further, while the definition of child-directed sites and services in the 2013 Amendments distinguishes between purely child-directed sites and services and those that don't target children as their primary audience, commenters expressed confusion over this so-called “mixed audience” classification. In response, the FTC has proposed a defined term for “mixed audience website or online service,” which clarifies that a mixed audience site or service meets the criteria of the Rule's multi-factor test but does not

target children as the primary audience.³ Those sites and services falling into the mixed audience category need only apply COPPA protections to users under 13. This modification also clarifies that “mixed audience” services are considered a subset of the “child-directed” services category.

The Notice also explains that the FTC has declined to implement commenters’ proposed modification of the definition of “directed to children” to include online services “likely to attract” a significant number of children. According to the FTC, because the Rule “already considers the demographics of a website’s or online service’s user base in its determination,” such a modification is not necessary.⁴ The FTC has also declined to adopt a specific percentage cutoff for determining whether a website has an audience composition that would move the service from “general audience” to “directed to children.” However, the Notice does request additional comment on whether the Rule should provide an exemption under which an operator’s site or service “would not be deemed child-directed if the operator undertakes an analysis of the site’s or service’s audience composition and determines that no more than a specific percentage of its users are likely to be children under 13.”⁵

Additional requirements for the “support for internal operations” exemption

The COPPA Rule currently exempts from its notice and consent requirements operators of online services that collect persistent identifiers only for the purpose of “providing support for the internal operations of the website or online service.”⁶ The proposed amendments would require operators currently exempt from obtaining parental consent under this exception to provide notice specifying the internal operations for which the data is collected and describing how the operator ensures that persistent identifiers are not used or disclosed for contacting individuals, including through behavioral advertising, profiling, or “for any other purpose.” Under the proposed amendments, operators would also be prohibited from using or disclosing persistent identifiers to “enhance user engagement,” including sending notifications to encourage children to interact with the site or service without first obtaining verifiable parental consent.

Separate parental consent for any disclosures to third parties

The Commission is proposing to require operators who disclose information to third parties to obtain separate verifiable parental consent for such disclosures unless they are integral to the website or service’s nature (e.g., the website is an online chat service that necessarily involves interacting with other users). The Commission further clarifies that this requirement would apply to disclosures of persistent identifiers for targeted advertising, marketing, or other purposes. While the FTC does not elaborate on what it specifically means by “separate” verifiable parental consent, it has requested additional comment on this proposed modification and may provide more clarity if this proposed requirement is included in the final rule. Consistent with the text of the current COPPA Rule, the FTC again emphasizes that operators cannot make access to the website or service contingent upon consent to third-party disclosure.

New parental consent mechanisms

The Commission is proposing two additional methods to verify parental consent: (1) “knowledge-based authentication” and (2) facial recognition technology.⁷

The knowledge-based authentication method would allow operators to obtain parental consent by asking dynamic multiple choice questions that are “of sufficient difficulty that a child age 12 or younger in the parent’s household could not reasonably ascertain the answers.”⁸ The facial recognition method would permit operators to accept government-issued identification, which can be compared using facial recognition technology against an image of the parent’s face taken with a phone camera. Notably, the proposed rule requires that trained “personnel” must “confirm” that the photos match, suggesting that an operator cannot rely exclusively on the automated technology.⁹

Separately, the FTC is also proposing to allow the use of text messages to obtain verifiable parental consent. While the FTC is not proposing to expressly add text message consent to the verifiable parental consent section of the COPPA Rule, it has proposed modifying the definition of “online contact information” to include phone numbers, which it says would have the effect of allowing operators to obtain consent via text message (in lieu of email consent).

Addition of a formal school authorization exception

The Commission is proposing to formalize its March 2022 ed tech [guidance](#), which states that educational institutions may authorize the collection of personal information from children under 13 in limited circumstances for “school-authorized educational purposes.” The Commission is clear in the proposed amendment that schools could not authorize an operator to use a child’s personal information for commercial purposes such as marketing and advertising (only parents can consent to this use), though the proposal would permit operators to use data collected in the education context for product improvement and development, provided such use “directly relate[s] to the service the school authorized.”¹⁰ This new provision would also require a written agreement between operators and schools establishing that the operator will limit its use and disclosure of data collected under this exception to the school-authorized educational purpose.

Additional security requirements

For the first time, the FTC is proposing more prescriptive data security requirements for operators subject to the COPPA Rule. Under the proposed rule modeled after the Gramm-Leach-Bliley Act’s Safeguards Rule, operators would be required to “establish, implement, and maintain a written comprehensive security program that contains safeguards that are appropriate to the sensitivity of children’s information and to the operator’s size, complexity, and nature and scope of activities.”¹¹ The security program would need to include certain specified elements, such as conducting risk assessments and maintaining controls to manage identified risks.

Data retention limits

Consistent with recent guidance and COPPA enforcement actions, the FTC has proposed adding language to the requirement that operators may only retain personal information “as long as is reasonably necessary for the specific purpose(s) for which it was collected, ***and not for any secondary purpose***” (new text in bold and italics). According to the FTC, this modification makes clear that an operator cannot retain children’s data for uses unrelated to the specific purpose for which it was collected and cannot retain data indefinitely. Operators would also need to publicly disclose their data retention policies for children’s personal information in their children’s privacy policy.

Conclusion

The proposed changes to the COPPA Rule are significant and would materially impact how companies that collect personal information from children under 13 comply with COPPA. Given that the 2019 request for feedback produced more than 175,000 comments, we anticipate another large volume of comments during the coming public comment period. In addition, the FTC is likely to make some additional changes in the final rule.

That said, the FTC will likely adopt many of the proposed changes, as they follow its positions taken in the investigations and enforcement context. Therefore, companies should begin considering how the proposed changes, if adopted, would impact their compliance with COPPA to put themselves in the best position when the final rule is published.

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Endnotes

¹ Children's Online Privacy Protection Rule at 29, ___ Fed. Reg. ___ (proposed Dec. 20, 2023) (to be codified at 16 CFR pt. 312), available at https://www.ftc.gov/system/files/ftc_gov/pdf/p195404_coppa_reg_review.pdf ("Notice").

² *Id.* at 49.

³ Additionally, the Notice explains that "Current staff guidance notes that operators should carefully analyze the intended audience, actual audience, and, in many instances, the likely audience for the website or online service in determining whether children are the primary audience or not." *Id.* at 53 n. 175 (citing COPPA FAQs, FAQ D.5).

⁴ *Id.* at 11.

⁵ *Id.* at 12.

⁶ 16 CFR 312.5(c)(7).

⁷ Notice at 67.

⁸ *Id.* at 154.

⁹ *Id.*

¹⁰ *Id.* at 83.

¹¹ *Id.* at 101.