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ALERT

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Selected Highlights from the FTC's COPPA FAQs

The FTC posted on its website an updated version of its [COPPA FAQs](#). (The FTC amended its [COPPA Rule](#) in December 2012, which we summarized in this [Alert](#).) The deadline for complying with the amended COPPA Rule is July 1, 2013. The FAQs contain 92 questions and answers (some new and some old) on a variety of topics. This Alert highlights some of the important issues addressed in the FAQs.

Information Collected Prior to July 1, 2013

The FTC amended the definition of personal information in the new Rule to include three new categories of personal information – photos, videos, and audio files; screen and user names; and persistent identifiers – and clarified the definition of geolocation information. The FTC is treating “legacy data” (data that was collected prior to the July 1, 2013, effective date) in these four categories differently, depending on whether the category was added or clarified in the amended Rule. Because the change to the definition of geolocation information was a clarification, operators that have collected geolocation information prior to July 1, 2013, are required to obtain parental consent immediately or delete the stored information. For the other three categories of personal information – photos, videos, and audio files; screen and user names; and persistent identifiers – operators are not required to obtain retroactive parental consent. However, the FTC recommends, as a best practice, that operators cease use of such information or, if possible, obtain parental consent. In addition, the FTC states that if new information is associated with legacy data after the July 1 effective date, then COPPA will be triggered.

Photos, Videos, and Audio Files

The FAQs narrow the application of COPPA to the collection of photos, videos, and audio files. In the comments to the amended Rule, the FTC stated that COPPA applies to the collection of photos, videos, and audio files “without qualification.” FAQ 45, however, states that photos will not

be considered personal information under the Rule if an operator blurs a child's facial features before posting the picture. In addition, FAQ 44 states that COPPA will not apply if the operator pre-screens children's photos and deletes the entire photo depicting children's images or deletes any portion of the photo depicting the child. The FTC cautions, however, that the operator must also remove any other personal information the photos contain, such as geolocation metadata, and ensure that it is not using or disclosing persistent identifiers collected from children in a manner that violates the amended Rule.

Mobile Applications

The FTC made two important clarifications for operators of mobile applications. In the comments to the amended Rule, the FTC stated that it did not mandate that a mobile application's privacy policy be posted at the point of purchase or in the App Store. However, in the FAQs the FTC made a distinction for child-directed apps that are designed to collect personal information as soon as they are downloaded. For these apps, the FTC states that it is necessary to provide the direct notice and obtain verifiable consent at the point of purchase or insert a landing page where a parent can receive notice and give consent before download is complete.

In addition, the FTC clarified the process by which mobile app operators can comply with the COPPA notice and consent requirements through an app purchase under the amended Rule. According to the FAQs, a purchase of an app with a credit card or with an account with a credit card associated with it will not fulfill the notice and consent requirements under the amended Rule because with the credit card purchase alone the parent will not have received the required direct notice. The amended Rule requires that the mobile app

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operator send parents a direct notice of its collection policies prior to the collection of any personal information from the child. This direct notice traditionally is emailed to the parents. FAQ 34 states that mobile application operators may provide the direct notice to the parent through other means, such as through the device onto which the application is downloaded, if the mechanism (1) provides such notice and obtains the parent's consent before any collection of personal information and (2) is reasonably designed to ensure that it is the parent who receives the notice and provides the consent. However, if this direct notice requirement is not fulfilled, the mobile app operator will be in violation of COPPA.

Persistent Identifiers

Under the amended Rule, website operators who collect persistent identifiers that do not fall within the internal operations exception must comply with the notice and consent requirements for COPPA. This includes identifying in the website's privacy policy all the third-party operators who are collecting information on the website. In FAQ 26, the FTC advises that a clear and prominent link in the privacy policy to a complete list of the third parties collecting information will fulfill this requirement. Moreover, in the FAQs the FTC warns operators of child-directed sites that they are responsible for the collection of personal information from the users of their site - no matter who is doing the collection. Therefore, while the FTC recommends that operators signal their status as a child-directed site to third-party advertising services, it clearly states that this will not absolve website operators of potential liability under the amended Rule. Instead, the FTC advises that prior to allowing any third-party advertising networks on a child-directed website or app, the website operator must determine:

- (a) if there is a way to control the type of advertising that appears on the sites and services (e.g., can you stipulate and contract only for contextual advertising and can you prohibit behavioral advertising or retargeting?); and
- (b) what categories of information will be collected from users on the site and services in connection with the ads they are served? Will persistent identifiers be collected for purposes other than support for internal operations? Will geolocation information be collected in connection with the ads served?

In the FAQs, the FTC repeatedly emphasizes the importance of conducting this due diligence because the amended Rule holds website operators strictly liable for the collection of information that occurs on or through its sites and services, even if the operator itself did not engage in such collection.

Unlike the operators of child-directed websites and services that are held strictly liable for the collection of information from children, independent entities or third parties, such as advertising networks or downloadable plug-ins, that collect information from users through child-directed sites and services will have to comply with COPPA only if they have actual knowledge that they are collecting information from a child-directed site. In FAQ 39, the FTC clarifies what would give rise to actual knowledge. The FTC states that if the website operator directly communicates to the third-party advertising network either in a direct communication or through an agreed-upon convention to identify child-directed sites, such as an explicit signal embedded in the web page, then the third-party advertising network would be deemed to have actual knowledge. In addition, the third-party advertising network may be deemed to have actual knowledge if one of its representatives recognizes the child-directed nature of the site. The FTC indicates that the mere collection of a URL would probably not be enough to trigger the actual knowledge standard and that it is likely that some additional independent evidence would be necessary.

In addition to providing the updated FAQs, the FTC [sent letters](#) to over 90 companies outlining the revised COPPA Rule in anticipation of the July 1 effective date. The letters emphasize that companies that make good-faith efforts to comply with the new Rule may avoid early enforcement actions. By issuing these letters, the FTC is further emphasizing its expectations that companies comply with the amended Rule as of the July 1 effective date.

For more information about the new COPPA Rule or other consumer privacy matters, please contact [Nerissa Coyle McGinn](#).

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