December 10, 2019

By Electronic Filing

Ms. April Tabor
Federal Trade Commission
Office of the Secretary, Room H-113 (Annex E)
600 Pennsylvania Avenue, NW
Washington, DC 20580

RE: COPPA Rule Review, 16 CFR part 312, Project No. P195404

Dear Secretary Tabor:

The Entertainment Software Association ("ESA") files these comments to explain whether and how evolving technology and business practices should affect the Commission's enforcement of the Children's Online Privacy Protection Act ("COPPA") and its administration of the accompanying COPPA Rule.

The ESA is a U.S. trade association representing nearly all of the major video game publishers and manufacturers of video game consoles and handhelds. Our members deliver high-quality, interactive experiences that push the boundaries of storytelling, competition, and social interaction online, while maintaining the privacy and safety of all video game players, including children, as a top priority. We therefore appreciate the Commission's careful attention to whether the COPPA Rule is keeping pace with rapid technological change.

As explained in more detail below, we request that the Commission continue to carefully balance the need for robust parental involvement in their children's online activities

with the benefits that children receive from free and readily available access to websites and online services that pose little or no risk to their privacy or safety online. Specifically,

- Section I explains why the "directed to children" factors should continue to be assessed holistically, with no single factor sufficient to determine whether the site or service is directed to children.
- Section II asks that the Commission refrain from assessing as part of its child-directed analysis whether a "large" number or percentage of children use the site or service, which could have the effect of forcing general audience operators to age gate or imposing a constructive knowledge standard contrary to the statutory text and fundamental First Amendment principles.
- Section III describes why the COPPA Rule's definition of "personal information" is working well and should be modified only to promote the support of internal operations, if at all.
- Section IV encourages the Commission to consider new forms of verifiable parental consent that are aligned with the developing digital marketplace.
- Section V explains why content providers who upload content onto general audience platforms should not be considered "operators" if the providers do not control the platform's data practices.
- And Section VI discusses why, pursuant to the Commission's statutory mandate, the definition of a "child" should remain "an individual under the age of 13."

I. WHETHER A SITE OR SERVICE IS "DIRECTED TO CHILDREN" SHOULD CONTINUE TO BE ASSESSED HOLISTICALLY, WITH NO SINGLE DETERMINATIVE FACTOR.

In its Request for Public Comment, the Commission asked whether Section 312.2 of the COPPA Rule correctly articulates the factors for determining whether a website or online service is "directed to children."[1] ESA strongly urges the Commission to retain its longstanding position—influenced by the legislative history, formed when the COPPA Rule was first adopted in 1999, and reiterated multiple times since[2]—that all of the factors must be considered holistically when assessing a site or service, and that no one factor, taken alone, is sufficient to determine whether the site or service is directed to children. This holistic approach provides the Commission appropriate flexibility to accommodate the fact that some factors may be more (or less) indicative of whether a site or service is child-directed in a particular industry and uphold important First Amendment principles.

For example, applying a holistic, flexible approach to determining whether a site or online service is directed to children is particularly important in the video game industry. Video games widely vary in their genres, playstyles, themes, activities, and levels of difficulty (among many other characteristics) and, as a result, they may appeal to a diversity of audiences across the age spectrum. Although video games sometimes are perceived as being especially popular with children, over ***164 million adults*** in the United States play video games.[3] And as the

[1] 84 Fed. Reg. 35842, 35844, Question 15.

[2] *See, e.g.*, Statement of Sen. Bryan, 144 Cong. Rec. S12741-04 ("The subject matter, visual content, age of models, language, or other characteristics of the site or service, as well as off-line advertising promoting the website, are ***all*** relevant to this determination.")(emphasis added); 64 Fed. Reg. 59888, 59893 (1999); 71 Fed. Reg. 13247, 13252 (2006); 78 Fed. Reg. 3972, 3983-84 (2013).

[3] ESA, "2019 Essential Facts About the Computer and Video Game Industry" (last visited Sep. 22, 2019), https://www.theesa.com/esa-research/2019-essential-facts-about-the-computer-and-video-game-industry/.

leading form of entertainment today, video games are an integral part of American culture. Some video games are fairly categorized as directed to children under the Commission's existing multi-factor test. However, some video games may satisfy one or even a few of the COPPA Rule's child-directed factors, but clearly be directed to a general audience or to adults specifically once the game is considered under all of the factors holistically. Consequently, it is important that the Commission proceed with caution as it considers whether to alter these factors and how they are weighted and applied to websites and online services.

As explained below, four of the COPPA Rule's child-directed factors—subject matter, use of animated characters, visual content, and child-oriented activities and incentives—can be especially problematic for the video game industry if given undue weight in the analysis.

Subject matter. Many video games contain themes, storylines, and similar content that are appropriate for audiences of all ages. Consistent with the plain language of the COPPA Rule, games that have subject matter or content that are appropriate for, and are directed to, a general audience should not be considered child-directed without a holistic assessment of all of the child-directed factors.

This conclusion should hold even if some indeterminate number of users are or are likely to be children. As Senator Bryan, one of the co-sponsors of the COPPA legislation, explained, "an online general interest bookstore or compact disc store will not be considered to be directed to children, even though children visit the site."[4]

[4] Statement of Sen. Bryan, 144 Cong. Rec. S12741-04. Rather, an operator of such site would be subject to COPPA only if it either "knows that a particular visitor from whom it is collecting information is a child" or "if that site has a special area for children." *Id.*

Accordingly, age ratings based on a game's content are not an appropriate indicator of whether or not a video game is child directed. These ratings indicate only whether the content of the game is *appropriate* for children, and do not bear on whether a game is *directed* to children. For example, video game ratings assigned by the Entertainment Software Rating Board assess whether violence, blood, gore, profane language, suggestive themes, crude humor, simulated or actual gambling, drugs, alcohol, tobacco, nudity, or sexual content are present in the game (and, if so, the type and degree). Clearly, content should not be ***required*** to include or address such adult themes in order for the Commission to consider such content to be directed to a general audience. To conclude otherwise would vastly expand the reach of the COPPA statute beyond what the legislature could have intended or the Constitution could bear.[5]

Many puzzle, racing, sports, and other casual games, as well as classic games like chess, contain content that is appropriate for players of all ages and are free of profane language, violence, or similar content. These games often receive low age ratings in app stores even where they are not targeted to children. In addition, age ratings often are assigned by independent third parties rather than the content creator, and may therefore be an incomplete reflection of the intended or actual audiences.

For these reasons, the fact that a video game or app has subject matter or content that is acceptable (or not inappropriate) for a broad age range should be afforded little weight in the child-directed analysis.

[5] *See, e.g.*, *Ashcroft v. American Civil Liberties Union*, 524 U.S. 656 (2004) (holding that the Children's Online Protection Act of 1998 was likely to violate the First Amendment by unduly burdening adults' access to protected speech).

Use of animated characters. Although the presence of animated characters may in some circumstances be a helpful indication that a site or service is directed to children, this factor should be given no weight in the video game and similar media contexts specifically. Because video games are, by their very nature, computer-generated media, they inherently utilize animated characters. These animated characters, however, can be quite adult-oriented, particularly in certain action, horror, or warfare games. Similarly, popular adult-oriented series such as *Family Guy*, *The Simpsons*, and *South Park* illustrate that animation and animated characters are not the exclusive domain of child-directed media. The presence of "animated characters," therefore, should not by itself determine whether a site or service is child-directed.

Moreover, a number of video game franchises feature "nostalgic" animated characters that are directed to an audience of all ages given their prominence in popular media for many years (and sometimes decades). These characters belong to brands and stories that multiple generations have grown up with, leading to their general appeal, and appear in video games that are directed to a general audience. Their appearance in any particular video game, therefore, should not necessarily be considered determinative of that title's child-directed nature.

Visual content. As with the use of animated characters, video games are inherently a visual medium of entertainment. Casual games, in particular, often include bright colors, playful visual styles, and whimsical visual elements. In the context of video games, specifically, this factor significantly overlaps with other factors, such as the "subject matter" and "use of

animated characters." Consequently, this factor generally should be afforded little weight in assessing whether a video game site or service is child-directed.[6]

Child-oriented activities and incentives. Casual games that are directed to a general audience or adults are by far the most popular of video game genres, with an estimated 71% of 164 million adult gamers in the U.S. playing casual games.[7] However, many of these casual games are based on simple activities and uncomplicated gameplay, sometimes utilizing interfaces as simple as swipes or taps on a smartphone screen. They also often utilize incentives such as badges, coins, or jewels to facilitate gameplay or support an otherwise free-to-play app with in-app purchases (sometimes requiring a credit card to complete the transaction). Although these types of activities and incentives may be simplistic or may also appear in games directed at children, they are not, in and of themselves, "child-oriented."

The Commission's holistic application of these and the other child-directed factors is particularly important given the potential tension with First Amendment principles that could result from an overly broad interpretation. In its 2013 COPPA Rule, the Commission emphasized that its revisions to the child-directed definition were not intended "to expand the reach of the Rule to additional sites and services," in part due to commenters' concerns that broadening the definition could be unconstitutional.[8]

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[6] The Commission has recently expressed support for this view, informing content creators that "just because your video has bright colors or animated characters doesn't mean you're automatically covered by COPPA. While many animated shows are directed to kids, the FTC recognizes there can be animated programming that appeals to everyone." *See* Kristin Cohen, "YouTube channel owners: Is your content directed to children?" (Nov. 22, 2019), https://www.ftc.gov/news-events/blogs/business-blog/2019/11/youtube-channel-owners-your-content-directed-children.

[7] ESA, "2019 Essential Facts About the Computer and Video Game Industry" (last visited Sep. 22, 2019), https://www.theesa.com/esa-research/2019-essential-facts-about-the-computer-and-video-game-industry/.

[8] 78 Fed. Reg. 3984.

Consequently, whether a video game fulfills one (or even some) of the Rule's "directed to children" factors cannot be determinative of its child-directed status. Video games' broad appeal and unique characteristics make the factors difficult to apply in isolation. As such, the factors should continue to be applied holistically and in context of a video game as a whole.

II. The definition of "Web site or online service directed to children" should not be amended to consider having "large" numbers or percentages of child users.

The Commission asked whether the definition of "Web site or online service directed to children" should be amended to address sites and services "that do not include traditionally child-oriented activities, but that have large numbers of child users."[9] ESA strongly urges the Commission to retain its current definition because adopting the proposed alternative would create regulatory uncertainty and would prove unworkable.

As a threshold matter, it is worth emphasizing that the Commission considered—and resoundingly rejected—in the 2013 COPPA Rule a similar proposal to consider whether the site or service is "likely to attract an audience that includes a disproportionately large percentage of children under age 13 as compared to the percentage of children in the general population."[10] There do not appear to be any sound reasons to reverse this decision only six years later, and the reasons for rejecting it remain equally applicable today. Considering whether a "large" number or percentage of users are children remains as unworkable today as it was in 2013. Moreover, it is unclear and vague what would constitute a "large number" or percentage of

[9] 84 Fed. Reg. 35842, 35844, Question 15.

[10] 78 Fed. Reg. 3984.

child users. And it would be impossible to determine what percentage of users are actually children without collecting age information in the first instance.

Additionally, based solely on the appeal of video games to a broad general audience, this factor could have the effect of significantly expanding the scope of video games subject to COPPA. In response to this regulatory uncertainty, general audience video games likely would either (a) begin age gating every player, even where the child-directed factors otherwise wouldn't be met; or (b) be subjected to what would in effect constitute a constructive knowledge standard, which the COPPA statute does not support and which the Commission has long rejected. As explained in detail below, both of these options are unworkable and ill-advised, particularly given that there is no evidence that the current child-directed standard is resulting in any consumer harm or that such an expansion of the child-directed definition would meaningfully benefit children and their parents.

A. Age-gating for general audience sites and services is costly for both businesses and consumers.

Should the Commission begin to disproportionately weigh whether a site or service has a "large number of child users," operators of general audience video games that are appropriate for players of all ages might in effect be forced to implement age gates in order to avoid the risk of inadvertently collecting personal information from children. This would be technically complex and burdensome. In some instances, this would stifle creation and innovation, particularly if proper compliance necessitates the development of two versions of the same game (one for users over 13 years old and another for children under 13). It also would be costly for consumers, who counterintuitively would need to provide more information than they otherwise might prefer in order to play the game.

B. The "actual knowledge" standard for operators of general audience websites should be retained.

Alternatively, general audience video games that do not apply age gates would risk being subject to what would be, in effect, a constructive knowledge standard. Even if they were not child-directed at first, and even without actual knowledge of their collection of personal information from children, they could become subject to COPPA's requirements merely because they appeal to a large child audience. This result is deeply troubling, particularly because it is in tension with the COPPA statute's actual knowledge standard, it would be difficult to comply with in practice, and it would raise significant First Amendment concerns.

The Commission has described "knowledge" as a continuum "marked by 'constructive knowledge' at one end and 'actual knowledge' at the other," with various gradations — such as "notice of likelihood"— in the "poorly charted area that stretches between the poles."[11] Contrary to testimony at the October 7, 2019 COPPA workshop, the Commission does not have latitude to redefine "actual knowledge" more broadly. Rather, as the Commission previously acknowledged, actual knowledge is "a far stricter standard than constructive knowledge or knowledge implied from the ambient facts."[12] It is not equivalent to "'knowledge fairly implied

[11] Children's Online Privacy Protection Rule, Proposed Rule, 76 Fed. Reg. 59804, 59806 n.26 (Sep. 27, 2011) (citing *United States* v. *DiSanto,* 86 F.3d 1238, 1257 (1st Cir. 1996) (citing *United States* v. *Spinney,* 65 F.3d 231, 236 (1st Cir. 1995))). In elaborating on this point, the First Circuit explained that even a "practically certain" standard is "akin to, but something less than, actual knowledge." *See, e.g.*, *United States v. Ruiz*, 105 F.3d 1492, 1508 (1st Cir. 1997); *but see In re Bernard L. Madoff Inv. Sec. LLC*, 515 B.R. 117, 139 (Bankr. S.D.N.Y. 2014) (stating that "'actual knowledge' implies a high level of certainty and absence of any substantial doubt regarding the existence of a fact" and citing Black's Law Dictionary (10th ed. 2014) (defining "actual knowledge" as "direct and clear knowledge, as distinguished from constructive knowledge.")).

[12] 76 Fed. Reg. 59806 n.26.

by the circumstances" or a "reasonable efforts" standard.[13] Instead, "the actual knowledge standard is triggered only at the point at which an operator becomes aware of a child's age."[14]

Accordingly, the Commission has repeatedly rejected standards lesser than the high actual knowledge bar. For example, in the last rulemaking, the Commission retained and reaffirmed the "actual knowledge" standard for operators of sites and services that are not directed to children. As the Commission noted in 2011, "COPPA . . . was never intended to apply to the entire Internet, but rather to a subset of Web sites and online services."[15] The "actual knowledge" standard is not only consistent with Congress's statutory mandate (which expressly applies only to child-directed operators or "any operator that has *actual knowledge* that it is collecting personal information from a child"[16])—it also provides a necessary bright line delineating COPPA liability for general audience sites and services. This line provides clear, practical guidance to industry while protecting children's online privacy when personal information from children is collected. Standards of liability requiring anything lesser than "actual knowledge" would create significant regulatory uncertainty with minimal countervailing benefit, since these standards would oblige operators of general audience sites and services "either to make guesses about the presence of underage children or to deny access to a wide swath of participants, not only young children."[17] And, as prior commenters pointed out (and

[13] *Id.*

[14] *Id.* 59806.

[15] *Id.*

[16] *See* 15 U.S.C. § 6503(a)(1).

[17] 76 Fed. Reg. 59804, 59806.

as the Commission acknowledged), "such actions would result in greater data collection from all users, including children, in order to determine who should receive COPPA protections (or, alternatively, be denied access to a site). . . . [T]his result [would be] contradictory to COPPA's goal of minimizing data collection."[18]

Weakening the actual knowledge standard also would be in tension with fundamental First Amendment principles. Under a lesser standard, operators either would need to "self-censor" to avoid offering content that the Commission might deem to be appealing to children or else restrict ***all*** users' access (including adult users) to the content unless and until the operator could reasonably conclude the user is at least 13 years old. Either result would place an undue burden on speech, with no clear benefit over the status quo.

ESA wholeheartedly agrees with the Commission's conclusion in 2011 that "[a]ctual knowledge is far more workable, and provides greater certainty, than other legal standards that might be applied to the universe of general audience Web sites and online services. . . . [I]mposing a lesser 'reasonable efforts' or 'constructive knowledge' standard might require operators to ferret through a host of circumstantial information to determine who may or may not be a child."[19] Such an approach would be unworkable, contrary to the statutory text, and in tension with the First Amendment.

[18] *Id.*

[19] *Id.*

III. The definition of "personal information" is working well and should be modified only to promote the support of internal operations, if at all.

The Commission asked for feedback regarding the 2013 COPPA Rule amendments modifying, among other terms, "personal information."[20] ESA believes that the definition of "personal information," particularly with regard to how screen and user names are treated, is working well to promote both interactivity and privacy in video game environments. Should the Commission consider modifying these terms further—particularly whether to include additional categories of "personal information" that would be covered by the Rule—ESA urges the Commission to emphasize the distinction between individually identifiable information that risks infringing upon children's privacy and non-individually identifiable information that is used to support internal operations. This distinction is essential in interpreting existing categories of "personal information" as well as in the formulation of any new categories (such as the potential addition of biometric data). Further, the definition of "personal information" should not be expanded to include inferences "about" children.

A. Utilization of screen and user names for anonymized game-related functions should continue to be permitted.

The current formulation of screen and user names under the "personal information" definition strikes a critical balance between requiring parental consent before a child user can be contacted directly online and ensuring that internal, privacy-protective uses of screen and user names are permissible for the benefit of the child.

In 2013, the Commission revised the COPPA Rule to amend the definition of "personal information" and include "[a] screen or user name where it functions in the same manner as

[20] 84 Fed. Reg. 35842, 35844, Question 11.

online contact information." Notably, the Commission clarified that its intention was to cover screen or user names "*only* in those instances in which a screen or user name rises to the level of *online contact information*"[21]—that is, "direct, private, user-to-user contact."[22] In doing so, the Commission expressly noted that it "believes the description permits operators to use anonymous screen and user names in place of individually identifiable information, including use for content personalization, filtered chat, for public display on a Web site or online service, or for operator-to-user communication via the screen or user name. Moreover, the definition does not reach single log-in identifiers that permit children to transition between devices or access related properties across multiple platforms."[23]

This flexibility is essential for video game operators, who use screen and user names for a variety of permissible purposes, including to allow limited social interactions in a privacy-protective manner in the broader context of multi-player gameplay. These uses promote both interactive online experiences for children and preserve their privacy and safety. For example, "gamer tags" are often used in canned, filtered, or moderated forums or chat, where no personal information beyond screen or user names are disclosed to other players. Similarly, gamer tags can be used in multiplayer game modes, where the only interaction between players may be gameplay.

[21] 78 Fed. Reg. 3972, 3978 (emphasis added).

[22] *Id*. at 3979.

[23] *Id.* While the Commission has noted that the use of "personalization" in this context is limited to user-driven interactions, content recommendations and similar personalization that occurs within or across the operator's own sites and services that a reasonable consumer would understand to be affiliated would appear to be covered because such personalization is necessary to maintain and analyze the sites and services that consumers have come to expect and demand.

Further, as technology has become increasingly mobile, and with consumers of all ages playing video games across a variety of platforms, the ability to "transition between devices or access related properties across multiple platforms" has become ever more central to maintaining a dynamic and interactive gameplay environment. For example, many publishers allow a player to use the same screen name across multiple video game devices and platforms (*i.e.*, across a variety of video game consoles, handhelds, and other mobile devices) to allow the player to download the same game on different devices, aggregate game achievements, or maintain user settings and preferences across the publisher's various properties.

ESA encourages the Commission to continue to allow utilization of screen and user names for these and similar game-related functions when they are used in place of individually identifiable information. These functions encourage anonymization, minimize the collection, use, and disclosure of individually identifiable information, and simultaneously promote interactivity and privacy.

B. The definitions of "persistent identifier" and "support for the internal operations of the website or online service" are working well and should be retained.

The Commission also requested feedback on the (a) inclusion of a "persistent identifier that can be used to recognize a user over time and across different websites or online services" to the definition of "personal information;" and (b) modifications to the definition of "support for the internal operations of the website or online service."[24] These are closely related to the definition of "screen and user names" as discussed above. ESA would like to reiterate its support for these definitions, particularly with regard to the carve-out for persistent identifiers

[24] 84 Fed. Reg. 35842, 35844, Question 11.

that are collected alongside no other personal information and "for the sole purpose of providing support for the internal operations of the Web site or online service."[25] Video games contain a number of core features—which users have come to expect and value—that necessarily utilize persistent identifiers over time (more often than not across first-party services) and for supporting internal operations. These features include (but are not limited to) maintaining or analyzing the functioning of the platform or game, authenticating users for online gameplay, and personalizing content.

Specifically, ESA emphasizes that the definition of a "persistent identifier" should remain bounded to one "that can be used to recognize a user over time *and* across different Web sites or online services."[26] Upon publication of the 2013 COPPA Rule, the Commission emphasized that its adopted definition of a covered persistent identifier specifically took into account "concerns several commenters raised that using a persistent identifier *within* a site or service over time serves an important function in conducting site performance assessments and supporting intra-site preferences."[27]

This definition is key to the continued ability of video game platforms and publishers to offer users cohesive but pseudonymous online experiences within their branded offerings. For example, many platforms and publishers will rank users in online leaderboards, enable live gameplay against other users, or publicly display game-related statistics about users (such as which games a user has played or what achievements that user has unlocked) within the same

[25] 78 Fed. Reg. 3972, 4012, COPPA Rule § 312.5(7).

[26] 78 Fed. Reg. 3972, 4009, COPPA Rule § 312.2.

[27] 78 Fed. Reg. 3972, 3980 (emphasis added).

game, or across games within the same branded platform. These features improve the gameplay experience by allowing users to collect achievements over time and across commonly branded titles, as well as compete and interact with other users online, without any material privacy risk. The use of persistent identifiers is an essential facet of these features, as they allow the association of gameplay statistics with an individual player without linking any personal information to that player. The use of persistent identifiers is also critical to facilitate the ability for a player to play the same game across multiple devices, including maintaining game progress and "saves" across those devices. It is also ultimately a privacy-protective practice, because it minimizes the need for additional data collection. Both video game hardware manufacturers and software and app publishers often utilize persistent identifiers specifically in order to avoid the need to collect more sensitive types of personal information, such as a child's full name or email address (which would itself then necessitate the further collection of personal information from that child's parent or guardian).

The exception to notice for persistent identifiers used for supporting internal operations is also a key aspect of video game platforms' and publishers' offerings. The activities listed under the definition of "support for the internal operations of the Web site or online service" are ones in which game companies routinely engage in order to provide users with a seamless and ever-improving gameplay experience. For example, companies' standard business practices include (among others) maintaining gameplay and user preferences, conducting market research and product development, using analytics to improve site or service navigation and other aspects of the product, performance management, quality assurance, and crash reporting (including addressing any bugs in software code), providing product support and

responding to user requests, and serving contextual advertising. These activities fall squarely within those listed under the definition of "support for . . . internal operations," including "maintain[ing] or analyz[ing] the functioning of the Web site or online service," "perform[ing] network communications, and "authenticat[ing] users of, or personaliz[ing] the content on, the Web site or online service,"[28] "serv[ing] contextual advertising," and "fulfill[ing] a request of a child as permitted." These activities exponentially increase the quality of gameplay available to users, particularly to the extent that they allow platforms and publishers to assess how users are interacting with the device or game in question so that the experience can be maintained and improved.

These activities also improve the user experience outside of gameplay. In serving contextual advertising, for example, the use of persistent identifiers allow game companies to determine whether a particular advertisement led a user to download or sign up for a game or take some other significant step. Known as "attribution," this data allows companies to serve contextual advertisements which are most suitable for their target audiences. Attribution is a critical part of support for internal operations, allowing operators to measure and analyze the effectiveness of ad campaigns or to measure conversion and calculate and compensate partners for advertising or referral services. While ESA believes attribution already is covered under the existing support for internal operations exception, further clarification affirming this point could be useful.

[28] 78 Fed. Reg. 3972, 4009, COPPA Rule § 312.2.

To avoid disruption to the industry, ESA respectfully asks the Commission to retain the definitions of "personal identifier" and "support for . . . internal operations," because they provide video game console and handheld manufacturers and video game publishers and developers with both the certainty and flexibility necessary to continue offering key features that improve the gameplay experience without compromising users' privacy. As the Commission correctly noted in 2013, "the potential burden on child-directed sites . . . will be eased by the more limited definition of persistent identifiers, the more expansive definition of support for internal operations adopted in the Final Rule, and the newly-created exception to the Rule's notice and parental consent requirements that applies when an operator collects only a persistent identifier and only to support the operator's internal operations."[29] Although distinct aspects of the Rule, the definitions of "persistent identifiers" and "support for . . . internal operations" complement one another and must be considered together. Accordingly, ESA requests that the Commission maintain them both.

C. Any addition of "biometric information" to the definition of "personal information" should be narrowly crafted to include only individually identifiable information.

The Commission also asked whether additional categories should be expressly included in the definition of "personal information," "such as genetic data, fingerprints, retinal patterns, or other biometric data."[30] ESA acknowledges that biometric technologies have been increasingly leveraged across many industries over the past few years. At the same time, however, the term "biometrics" has often been used as a catch-all to describe a wide variety of

[29] 78 Fed. Reg. 3972, 3977.

[30] 84 Fed. Reg. 35842, 35844, Question 13.

different uses, sources of information, methods of collection, and degrees of specificity as to identification. Applications vary widely in their utilization of so-called "biometric" technology, from precise measurements of palm prints and faces in order to identify a specific individual (*e.g.*, by law enforcement personnel to track suspects or for logging into a device such as a mobile phone), to the mere detection of *a* hand or *a* face in order to determine whether a human figure is within a device's responsive range (*e.g.*, to assess whether the player of a video game is within the playable range of a Virtual Reality or other gameplay system).

The video game industry has long been a proponent of exploring motion-sensing input devices to give players new options for interacting with their games, presenting novel opportunities for dynamic and immersive gameplay. In the last half decade, particularly, the popularity of these devices and the games that use them have soared exponentially. From accelerometers and gyroscopes in smartphones to motion-sensing cameras paired with virtual reality headsets, advancements in body and motion capture technology have made these kinds of games more widely available and playable. These inputs allow for a wide range of immersive gameplay experiences, including for therapeutic purposes. For example, virtual reality video games have been found to help manage pain and improve functionality in burn victims.[31] Using a camera, a sensor embedded in a controller, or a microphone, this technology might apply facial, body, or voice detection to receive inputs from the player. These kinds of scans and recordings, however, are *not* used to authenticate the identity of the individual, as other

[31] "Video Games Can Help Treat Burn Victims" (last visited Nov. 7, 2019), https://advancedtissue.com/2016/02/video-games-can-help-treat-burn-victims/.

biometric technology is designed to do. They usually are not stored (unless at the direction of the player) or used for any purpose other than to direct gameplay.

ESA is concerned that the addition of "biometric information" to the definition of "personal information"—without a clear definition that excludes those uses which do *not* identify the individual player or that do not pertain to sensitive data (such as body height and weight)—would significantly raise the costs of publishing these kinds of motion-based games. It also would dis-incentivize developers from using such technology in their games for fear of being held liable under COPPA and harm consumers (for example, players with disabilities who may use these innovative technologies to facilitate gameplay). This would severely hamper a fast-growing segment of the industry and deprive children of novel, immersive gameplay experiences even where no privacy risk to children exists. Should the Commission decide to add biometric information to the definition of personal information, therefore, ESA urges it to consider the distinction between facial, body, or voice scans which are *not* used to identify the individual but merely to detect shape, movement, or presence or to create in-game avatars or characters for gameplay purposes (for example), from those which are used for the purpose of identifying a specific person.

Some states have recognized this distinction and have passed biometric laws emphasizing the individually identifiable and sensitive nature of biometric information. Illinois's Biometric Information Privacy Act, for example, defines "biometric information" as "any information, regardless of how it is captured, converted, stored, or shared, based on an

individual's biometric identifier *used to identify an individual*."[32] Similarly, Washington's biometric law defines "biometric identifier" as "data generated by automatic measurements of an individual's biological characteristics, such as a fingerprint, voiceprint, eye retinas, irises, or other *unique biological patterns or characteristics* that is u*sed to identify a specific individual*."[33] And California's Consumer Privacy Act defines "biometric information" as "an individual's physiological, biological or behavioral characteristics, including an individual's deoxyribonucleic acid (DNA), that can be used, singly or in combination with each other or with other identifying data, *to establish individual identity*."[34]

In the same vein, to the extent the COPPA Rule might be revised to include biometric information as a category under personal information, ESA would propose that the definition specifically exclude uses of body, face, or voice scans which do not individually identify the child, which do not collect sensitive biological information (such as DNA, for example), and which are not retained by the operator for purposes other than internal operations (such as gameplay). This would help ensure that players (of all ages) are able to enjoy the continued development of novel and immersive gameplay experiences, without sacrificing children's privacy in cases where real risk of identification exists or where sensitive biological data is collected.

For similar reasons, we would also support formalizing the approach articulated in the Commission's 2017 Enforcement Policy Statement with respect to the collection and use of

[32] Illinois Public Act 95-994, Section 10 (emphasis added).

[33] Revised Code of Washington 19.375.010(1) (emphasis added).

[34] California Civil Code Section 1798.140(d) (emphasis added).

voice recordings solely as replacements for written words and held for a brief time. We would further support the extension of this exception to more flexible uses, such as permitting limited use of that information for product improvement. Because the recordings would only be held for a brief time and would only be used to support internal operations, we do not think it should be necessary to de-identify these audio files.

D. The definition of "personal information" should not be expanded to include inferences about children.

Further, the Commission asked whether "personal information that is inferred about, but not directly collected from, children" should be added to the definition of "personal information."[35] The ESA urges the Commission to refrain from expanding the definition to include such inferences. As a threshold matter, the COPPA Statute prohibits covered operators from "collect[ing] personal information *from* a child in a manner that violates the [COPPA Rule]."[36] As such, the addition of inferences "about, but not directly collected from, children" would plainly be outside the scope of the Commission's statutory authority.

The scope of information that could be "inferred about" children would also be extremely overbroad, as it would sweep in large swaths of information about other non-child individuals. For example, information about a child could arguably be inferred from the purchasing behavior of that child's parent or guardian, but the extent to which specific items should be included in those inferences is unclear—from toys to groceries to household goods, almost any purchase made by a parent or guardian could be a possible inference "about" a

[35] 84 Fed. Reg. 35842, 35844, Question 13.

[36] 15 U.S.C. § 6502(a)(1).

child. These types of inferences are clearly outside the scope of COPPA, as they would not advance the Act's goal of limiting information collected from children, and they would make the Rule unfeasible to enforce.

IV. The Commission should consider new forms of verifiable parental consent that are aligned with the developing digital marketplace.

Current methods that have been recognized by the Commission as "reasonably calculated in light of available technology to ensure that the person providing consent is the child's parent" are limited and could be more aptly aligned with the current state of the digital marketplace. Many game developers—particularly small businesses—have not adopted some of the currently approved VPC methods because their requirements are seen as unnecessarily excessive for parents and consumers. For example, the collection of a driver's license or credit card in connection with a transaction may appear particularly cumbersome in the context of a free mobile app that does not require registration and that collects and uses only limited types of information within the app. Such methods would be more appropriate for games or apps that offer paid or subscription-based products with account creation or registration.

We encourage the Commission to consider additional avenues for seeking and obtaining verifiable parental consent, such as expanding the "email plus" method to allow "text plus" and similar text/SMS methods where this information is collected directly from the parent rather than the child.[37] Since most parents have a mobile phone nearby and could respond easily to an SMS/text message, these methods would be more in sync with current technology and

[37] As explained above, information collected "from" a parent, rather than "from" the child, is not subject to COPPA. *See also* Federal Trade Commission, *Complying with COPPA: Frequently Asked Questions*, A.10, https://www.ftc.gov/tips-advice/business-center/guidance/complying-coppa-frequently-asked-questions.

parental expectations. The Commission could also clarify whether the collection of a valid credit card without an actual transaction could be a method for verifiable parental consent in circumstances where the operator provides notice of the parental consent through other channels (such as notifications through the parent's separate account). After all, the existence of an actual monetary charge, by itself, is no more reliable indicia that a parent is involved in the transaction than the operator's assessment that the credit card presented is a valid account. Having the added requirement that an actual transaction must occur is a significant obstacle for parents who want their children to access free child-directed content. And the Commission should build on its "sliding scale" approach to verifiable parental consent by expanding the permissible methods for purely internal uses beyond email plus and considering whether additional tiers of consent mechanisms might be appropriate where the type of information is less sensitive or the use or disclosure is limited.

ESA also reiterates that the current exceptions to verifiable parental consent are essential. As COPPA has evolved, many companies offering child-directed content have embraced "data minimization" practices and have developed engaging, interactive content that children can enjoy without triggering the need to obtain verifiable parental consent. The existing exceptions to verifiable parental consent are a critical component of this privacy-protective approach and should be retained. This includes the one-time use and multi-use "newsletter" exceptions, which are often used for contests and other promotions, consumer service responses, and online newsletters. These exceptions should be retained and possibly even expanded to recognize "online contact" methods such as text or SMS messages, as long as the information is not retained for ongoing or different uses. These would (for example) allow

a child to send a text in connection with a sweepstakes, promotion, or consumer service request and the operator to respond on a one-time or multiple-time basis without the burdens associated with seeking and obtaining verifiable parental consent.

V. Content providers that upload content onto a general audience platform should not be considered "operators" if the providers do not control the platform's data practices.

In the wake of recent enforcement actions, the Commission has made known its intention to hold individual content providers strictly liable for child-directed content uploaded onto general audience platforms. ESA is concerned that that this approach places an undue burden on content providers who, as a practical matter, may have no ability to identify or control the general audience platform's data handling practices. Content providers are unlikely to have sufficient information or power about whether the platform's architecture or practices are fully COPPA-compliant. This is further exacerbated by situations in which the platform may impose an internal ratings system that does not align with COPPA's child-directed factors and over which content providers have no input; in such cases, providers of child-appropriate (but not necessarily child-directed) content might consider themselves exposed to potential liability and choose to not upload content at all.[38] Therefore, ESA urges the Commission to consider holding content providers strictly liable for their child-*directed* content on a general audience platform only where those providers have a reasonable degree of control over the platform's data practices and COPPA compliance.

[38] This further underscores the need to rely, first and foremost, on a holistic interpretation of the child-directed factors. As noted, child-friendly content may be intended for a multi-generational audience. As such, no assumption should be made that child-*friendly* content is child-*directed* content without an assessment of the child-directed factors.

VI. We support the Commission's longstanding position that the statutory definition of a "child" under COPPA is "an individual under the age of 13."

Finally, as discussed during the previous rulemaking process, COPPA's protections should not be broadened to cover adolescents aged 13 and older. ESA agrees with and emphasizes the Commission's longstanding position that—as noted in the 2011 Supplemental Notice of Proposed Rulemaking—although "COPPA's parental notice and consent model works fairly well for young children . . . it would be less effective or appropriate for adolescents."[39] The Commission cited a number of reasons for this, including practical and constitutional issues. Practically speaking, the COPPA model would be much less effective when applied to teenagers, as it relies on children providing operators with parental contact information in order to initiate the consent process. But, as the Commission observed, teenagers "would be less likely than young children to provide their parents' contact information, and more likely to falsify this information or lie about their ages in order to participate in online activities."[40] Additionally, "adolescents are more likely than young children to spend a greater proportion of their time on Web sites and online services that also appeal to adults,"[41] particularly those that are targeted at general audiences. This results in "practical difficulties in expanding COPPA's reach . . . [which] might unintentionally burden the right of adults to engage in online speech."[42] It would also likely burden the speech rights of adolescents, who (as courts have recognized) "have an

[39] 76 Fed. Reg. 59804, 59805.

[40] *Id.*

[41] *Id.*

[42] *Id.*

increased constitutional right to access information and express themselves publicly" as they age.[43]

Increasing COPPA's age threshold would make it much more difficult for video game developers to determine whether their sites or services are "child-directed," since lines between what is directed to children as opposed to adults would be further blurred. This could lead to developers excluding children (which would include adolescents) from sites, services, and games altogether due to regulatory uncertainty and difficulties with compliance, thereby decreasing interactive opportunities available to children.

VII. Conclusion

ESA and its members are deeply committed to the goals of protecting children's privacy and safety online and harnessing innovative technologies to give children novel interactive experiences. We believe that the COPPA statute and the COPPA Rule are important tools for advancing these goals, and we look forward to working with the Commission in its assessment of the Rule going forward.

Respectfully submitted,

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[43] *Id.*