

COPPA Rule Changes Will Expand Privacy's Reach, Costs

By **Allison Grande**

Law360, New York (September 21, 2011, 4:53 PM ET) -- The Federal Trade Commission's proposed amendments to its online privacy rule for children expand the definition of covered personal information to include mobile technology and social media, and will likely create new privacy hurdles by replacing a popular consent mechanism with more invasive options, attorneys say.

After more than a year of review and public input, the FTC on Sept. 15 proposed several changes to the Children's Online Privacy Protection Act, which was implemented in 2000 and gives parents control over what personal information websites may collect from children under 13 years old.

These proposed revisions — on which the agency is seeking public comment until Nov. 28 — would revise the current COPPA rule to take into consideration the new technology that has been introduced during the last decade and the validity of the existing mechanisms for gaining parental consent for the collection of protected information from children.

“The proposed changes send a clear message that the FTC is focused on not just the Internet but also on mobile technology and social media,” Andy Serwin, founding chair of Foley & Lardner LLP's privacy, security and information management practice, told Law360. “The revisions will certainly force companies to adjust to new requirements if they become effective; the debate is whether the accompanying additional costs to companies are reasonable or not.”

In announcing the proposed revisions, FTC Chairman Jon Leibowitz said the agency's objective was to “ensure that the COPPA rule is effective in helping parents protect their children online, without unnecessarily burdening online businesses.”

While some of the proposed measures — such as changing the definition of companies that collect personal information from a “100 percent deletion standard” to a “reasonable measures” standard — seem to be relatively business-friendly, other significant revisions to the definition of personal information and how parental consent is gained will be more difficult for companies to adopt, according to attorneys.

“What can be seen in these revisions is something that is somewhat typical in the last several agency initiatives: that there are seemingly reasonable measures front-loaded in the proposal, and then the proposal essentially back-loads burdens on businesses and self-regulation,” said John Feldman, partner in Reed Smith LLP's advertising, technology and media practice.

The proposed expansion of the definition of personal information to include geolocation information and persistent identifiers such as Internet Protocol addresses and tracking cookies used for behavioral advertising, and the elimination of the “email plus” mechanism, in which a site can obtain consent by receiving an email from a parent and then sending a delayed response confirming consent, will present the greatest widespread challenges to compliance, according to attorneys.

“While it is reasonable for the FTC to expand its rules to cover online services, there is some concern that by expanding the definition of personal information and eliminating email plus verification, the proposed revisions may not strike the right balance and will instead be overly burdensome on companies,” said Timothy Tobin, a member of Hogan Lovells' privacy and information management practice.

The proposed broadening of the definition of personal information — which for the first time aligns with the personal information standards of the European Union — would impact companies by forcing them to protect and gain consent for a more expansive range of information, according to attorneys.

“What we've seen in the last few years with respect to privacy in general is that the commission has a lot of interest in expanding protection for users online,” said Dana Rosenfeld, chair of the privacy and information security practice at Kelley Drye & Warren LLP. “I wouldn't be surprised if the commission takes the same position in terms of defining personal information with other online protection initiatives in the future.”

In its recent COPPA enforcement actions, the agency has shown its willingness to expand its standards to reflect the understanding of how children's use of emerging technology has changed, attorneys said. These actions include the August fine of W3 Innovations LLC in the commission's first case involving mobile applications, and the \$3 million settlement against online game developer Playdom Inc. in May.

The elimination of the widely used email plus consent program — which the FTC said in its proposal had “outlived its usefulness” and was an impediment to the development of other types of consent programs — will leave companies scrambling to revamp consent mechanisms, even though several attorneys said the agency had failed to provide actual evidence of the consent mechanism's ineffectiveness.

“It's unclear if there's evidence that taking away a cost-effective means of protecting children's privacy would spur innovation,” Feldman said. “The agency appears to want people to innovate in a direction that the government thinks is necessary without providing any evidence of harm [relating to the email plus program].”

The agency proposed several alternatives to the email plus program, including allowing parents to send electronic scans of signed consent forms, using video conferencing to signal consent, and providing government-issued identification numbers that the operator could check against a database.

But these options may create additional privacy and data security risks by placing extra responsibility on companies to protect additional sensitive information, such as parents' ID numbers, according to attorneys.

“This shouldn't be a problem for companies that have strong data protection measures in place, but from a data security perspective, the less sensitive information you possess, the better,” Tobin said.

Proskauer Rose LLP technology, media and communications group co-head Jeffrey Neuburger said setting up these new consent vehicles could hit smaller companies particularly hard.

"It's unclear if these new consent mechanisms are practical," Neuburger said. "While they may offer opportunities for new businesses to come in and create technology, smaller website owners aren't going to have the resources to have a robust video chat parental approval process or other mechanisms in place."

The FTC's changes strengthening its oversight of the COPPA safe harbor program and requiring safe harbor regulatory bodies to submit annual operator reviews to the FTC could also negatively impact the industry, attorneys said.

"The FTC achieves greater compliance when more companies join safe harbor programs, but imposing onerous obligations on companies that want to sign up lessens their incentive to do so and may hurt compliance," Rosenfeld said.

No matter what form the agency's final rule revision takes, attorneys agree that the commission will continue to be active in this area, which Neuburger noted involves an issue that could find "strong bipartisan support in an era of divisive politics."

"Everyone wants the same thing, which is a safe environment for children age 12 and under," Serwin said. "The question will be, what is the best way to get there?"

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