

Upcoming COPPA Enforcement Will Possibly Affect More Cos.

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Federal and state regulators increasingly turned to the Children's Online Privacy Protection Act in 2019 to prosecute companies whose online services reached children.[1] On Feb. 20, the New Mexico attorney general sued [Google Inc.](#) for allegedly violating the Children's Online Privacy Protection Act and New Mexico's Unfair Practices Act.[2]

COPPA does not provide private causes of action, but plaintiffs lawyers are also using COPPA to sue for common law, privacy-related actions and statutory consumer protection violations.[3]

In July 2019, the [Federal Trade Commission](#) announced that it was seeking public comment on the effectiveness of its 2013 COPPA Rule and held a workshop in October, hearing from stakeholders on the effectiveness of the 2013 COPPA Rule and on how it could be improved.

Comments have now closed, but how the FTC will amend its 2013 COPPA Rule remains a matter of speculation. Given the growing enforcement actions and pending regulatory changes, more companies, such as education technology providers and general online platforms, will likely be swept into COPPA's purview.

We [previously discussed](#) COPPA's statutory protections, requirements and increase in COPPA enforcement actions.[4] Here we will address a few takeaways from the significant number of comments the FTC received regarding the 2013 COPPA Rule and regulatory changes companies may face.

FTC's Request for Comments

The FTC typically reviews its regulations every 10 years. Because of issues related to the educational technology sector, voice-enabled devices and general audience platforms hosting third-party child-directed content, the FTC instead requested comments on the 2013 COPPA Rule four years prior to the review period.[5] It also requested comments regarding the efficacy of the COPPA Rule in general and whether definitions should be revisited.[6]

At the October workshop, industry players advocated for clear, simple-to-follow rules and cautioned against the effects of over-regulation, i.e., hampering technological growth, dissuading companies and persons from creating new content and benefitting established/well-funded companies to the detriment of small/startup companies that cannot affordably comply with cumbersome regulations.

Consumer advocates stressed the importance of children's privacy and safety, arguing for stringent protections, aggressive enforcement actions and that the benefits of protecting children outweighed the compliance costs companies would face.



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Experts tempered these polar opposites by discussing technological trends, i.e., the rise of contextual advertising, which avoids the data privacy concerns of behavioral targeted advertising, as well as new ways to identify the users' age without the self-reporting process children are widely known to lie about.

Stakeholders also urged the FTC to invoke its 6(b) study authority to gather information about how companies comply with COPPA and how they collect, use or disclose children's personal information.

The FTC may ultimately do little to change the COPPA Rule's current scope given the difficulties that remain with issues such as how to determine whether a website or online service is directed at children, which will continue to require a fact-intensive inquiry. Nevertheless, two areas the FTC is likely to address are COPPA's application to general audience platforms that host third-party child-directed content and COPPA's application to the educational technology sector.

1. General Audience Platforms Hosting Third-Party Child-Directed Content

COPPA applies to websites and online service operators that either direct their content to children under 13 or actually know they are collecting such information from children. In 2019, the FTC and New York attorney general alleged that [YouTube Inc.](#), a website operator, knew it was collecting children's PI. The settlement showcased the FTC's new and aggressive approach of enforcing COPPA by going after operators acting as service providers instead of only going after third-party content creators or website publishers that created content on another company's platform.

Per the settlement, YouTube is required to "develop, implement, and maintain a system that permits channel owners to identify their child-directed content on the YouTube platform so that YouTube can ensure it is complying with COPPA."^[7] The settlement also requires YouTube to notify channel owners that their content may be subject to COPPA.^[8]

Shortly after the settlement, YouTube announced that it would no longer allow behavioral targeted advertising on videos made for children, meaning that even if adults are watching child-directed YouTube channels, that information will be treated as though it were a child's PI. Consequently, certain channel owners will not be able to monetize their content through targeted behavioral advertising without first obtaining verifiable parental consent or confirmation that the user is not a child.

The settlement raised numerous questions regarding when a platform operator actually knows it is collecting children's PI, who bears the burden of COPPA compliance — the third-party content creator or the platform operator — and whether it is fair to treat all users of certain channels as children even if it stifles the creation of content.

SuperAwesome, a leading provider of child-friendly technology and services used by companies worldwide, asked the FTC to "[c]larify and articulate clearly the relative legal responsibilities of content owners vs the platforms hosting their content."^[9]

The FTC in its request for comments noted that currently, operators of general audience platforms, absent actual knowledge, are not liable under COPPA after collecting information

from users of child-directed content, which was uploaded onto their platform by third parties. Operators thus have an incentive to avoid gaining actual knowledge of the presence of child-directed content on their platform.

The FTC requested comments to determine whether it should modify the COPPA rule to encourage platform owners to take steps to identify and police child-directed content uploaded by others:

For example, should such platforms that identify and police child-directed content be able to rebut the presumption that all users of the child-directed third-party content are children thereby allowing the platform to treat under and over age 13 users differently? Given that most users of a general audience platform are adults, there may be a greater likelihood that adults are viewing or interacting with child-directed content than on traditional child-directed sites.[10]

Twenty-five state attorneys general signed a letter responding to this question, stating they “would not recommend a change to the COPPA framework that would permit general audience platforms to age screen users without robust processes in place to ensure that the user is at least 13 years old.”[11]

The state attorneys general suggested companies subject to COPPA should “ask during the account creation process whether a child ever uses the user’s device”[12] to minimize the risk that children are lying about their age to access content.

In a more strongly worded response, SuperAwesome stated that the likelihood that a significant number of adults view kids’ content is low. Regardless:

the idea that protecting those adult’s rights to be served personalized advertising and to be profiled outweighs the risk of capturing kids’ personal data and tracking them online is absurd.

Further, SuperAwesome noted it is doubtful operators can differentiate adults from kids because there is “currently no effective method of detecting whether a specific user is an adult or a child.”[13]

The FTC is seeking to address the issue of who should bear the burden of COPPA compliance, which will require the FTC to focus on issues of obtaining verifiable parental consent and assessing whether content creators and website operators can avoid COPPA by verifying that the user is not a child.

These issues may not ultimately be resolved, given technological limitations and difficulties in finding comprehensive, one-size-fits-all solutions. Still, the FTC is likely taking a hard look to see if it can find the right balance between protecting children’s privacy and issuing clear, reasonable regulations.

2. Educational Technologies

With schools using third-party online platforms for education, the FTC is now asking

whether an exception to COPPA's parental consent requirement is warranted for "the use of educational technology where the school provides consent of collection of [PI] from the child." [14]

The Family Educational Rights and Privacy Act allows school districts to disclose student information without parental consent to school officials, partly defined as "part[ies] to whom an agency or institution has outsourced institutional services or functions." [15]

School districts disclosing student information must provide parents with annual notices of criteria for who qualifies as a school official and the legitimate educational interest in disclosure. [16] COPPA, however, requires website operators or online service providers that collect, use or disclose children's PI to first obtain verifiable parental consent before collecting such information. Thus, there is tension between COPPA and FERPA for when an entity can collect, use or disclose children's information.

In its comments to the FTC, the National School Boards Association asked the FTC and the [U.S. Department of Education](#) to work together to harmonize the regulatory requirements under COPPA and FERPA. The NSBA is urging the FTC to, instead of requiring that schools obtain verifiable parental consent, allow online service providers "to presume that the school districts provided notice to parents of the online educational application it allows students to use." [17]

Otherwise:

If school districts are required to get actual parent consent, many districts would be unable to deliver the curriculum to students whose parents have not responded, creating inequities in addition to administrative burdens. [18]

Also, COPPA requires that, upon parents' requests, websites or online service providers delete collected children's PI. The NSBA, however, argues that "[p]arents should not be able to request operators to delete, access or change data that is being used by school districts in educational applications." [19]

Instead, the FTC should follow FERPA's model, granting parents the right to amend their children's school records that the parents believe are inaccurate, misleading or in violation of student privacy.

Recently, the New Mexico attorney general sued Google alleging that it illegally collected New Mexico children's PI without obtaining verifiable parental consent. [20] Google offers schools a service called G Suite for Education, which gives students access to Google's applications including Gmail, Google Calendar and Google Docs.

According to New Mexico's attorney general, Google misled parents, kids and schools about Google's data collection activities. Allegedly, Google accumulated data, created profiles for students and used those profiles for commercial purposes. Issues regarding verifiable parental consent and FERPA are likely to come up in this action.

Given these developments, increased pressure is on the FTC to provide regulatory

guidance for COPPA compliance in education technology platforms.

Conclusion

As a result of FTC's rulemaking and recent enforcement actions, COPPA may be applicable to a wider group of online platforms and content creators, and those who already have COPPA compliance on their radar may have new obligations to consider in the coming year. Stay tuned for additional information regarding new COPPA regulation or enforcement actions.

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[1] See Alissa Gardenswartz, Jonathan Sander, & Tony Arias, YouTube Fine Showcases Expanded Enforcement of COPPA, Law360 (September 10, 2019), available at <https://www.law360.com/articles/1197272>.

[2] See https://www.nmag.gov/uploads/PressRelease/48737699ae174b30ac51a7eb286e661f/AG_Balderas_Sues_Google_for_Illegally_Collecting_Personal_Data_of_New_Mexican_School_Children.pdf.

[3] See, e.g., T.K. et al. v. ByTedance et al., 19-cv-07915 (D. N. Ill. 2019); Rushing v. [Walt Disney](#) et al., 17-cv-04419 (D. N. Ca. 2017); Rushing v. [Viacom](#) et al., 17-cv-04492 (D. N. Ca. 2017); McDonald et al. v. Killoo Aps et al., 3:17-cv-04344 (D. N. Ca. 2017).

[4] See Alissa Gardenswartz et. al., supra fn. 1.

[5] See <https://www.federalregister.gov/documents/2019/07/25/2019-15754/request-for-public-comment-on-the-federal-trade-commissions-implementation-of-the-childrens-online>.

[6] Id.

[7] See <https://www.ftc.gov/news-events/press-releases/2019/09/google-youtube-will-pay-record-170-million-alleged-violations>.

[8] Id.

[9] See <https://www.regulations.gov/document?D=FTC-2019-0054-25091>.

[10] See <https://www.federalregister.gov/documents/2019/07/25/2019-15754/request-for>

[public-comment-on-the-federal-trade-commissions-implementation-of-the-childrens-online.](#)

[11] See <https://www.regulations.gov/document?D=FTC-2019-0054-21675>.

[12] Id.

[13] Id.

[14] Id.

[15] 34 C.F.R. § 99.31.

[16] Id.

[17] See <https://www.regulations.gov/document?D=FTC-2019-0054-0280>.

[18] Id.

[19] Id.

[20]

See https://www.nmag.gov/uploads/PressRelease/48737699ae174b30ac51a7eb286e661f/AG_Balderas_Sues_Google_for_Illegally_Collecting_Personal_Data_of_New_Mexican_School_Children.pdf.