

**Before the
Federal Trade Commission
Washington, DC 20580**

FTC Seek Comments on the Children’s) Comments from Public Knowledge¹
Online Privacy Protection Rule)
)
Document Number: CFPB-2024-28569)
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Introduction

Public Knowledge submits these comments in response to the Federal Trade Commission’s (FTC) proposed rules updating the COPPA Safe Harbor program provision. The current ineffectiveness of the Safe Harbor programs creates a weaker FTC enforcement environment, challenges for parents in identifying compliant online services, and low industry participation overall. We applaud the FTC’s proposals to enhance oversight of, and transparency regarding, the safe harbor program. Additionally, Public Knowledge believes that the FTC must make additional modifications to further strengthen the COPPA Rule’s safe harbor program.

The Current COPPA Safe Harbor Program Is Not Effective

The FTC established the Safe Harbor program as a self-regulatory mechanism to complement government enforcement of COPPA. The FTC-approved Safe Harbor programs

¹ Special thanks to Qianda Rao for assisting in researching and assembling these comments.

oversee operators' online services for COPPA compliance, shielding enrolled companies from FTC enforcement actions.²

Past conflicts have arisen because regulated entities fund the organizations tasked with regulating them, leading to removal from self-regulatory lists.³ The same conflict-of-interest exists here. Because the Safe Harbor programs enroll and charge fees to “operators,” concerns arise over whether those programs see operators as clients, rather than entities to regulate, especially when offering COPPA consulting services⁴. Incentives drive programs to adopt less rigorous guidelines to attract more industry participants, potentially compromising child safety. Ultimately, if all programs signify the same level of safety, companies are likely to opt for the program with the least restrictions to participate in. Thus, the Safe Harbor programs often simply mirror COPPA requirements, lacking regulatory flexibility.⁵ Far from encouraging a “dynamic marketplace,” the COPPA Safe Harbor program has encouraged companies to stagnate on child privacy protections.⁶

Weaker FTC Enforcement

² Rohit Chopra, Commissioner, Fed. Trade Comm'n, Remarks at the Common Sense Media Truth About Tech Conference at Georgetown University (Apr. 4, 2019).

³ *Aristotle Removed from List of FTC-Approved Children's Privacy Self-Regulatory Programs* (Aug. 4, 2021), <https://www.ftc.gov/news-events/news/press-releases/2021/08/aristotle-removed-list-ftc-approved-childrens-privacy-self-regulatory-programs>.

⁴ See Rohit Chopra, *Regarding Miniclip and the COPPA Safe Harbors Commission File No. 1923129*, FED. TRADE COMM'N (May 18, 2020),

https://www.ftc.gov/system/files/documents/public_statements/1575579/192_3129_miniclip_-_statement_of_cmr_chopra.pdf (Commissioner Chopra suggests to limit “conflicts of interest by COPPA Safe Harbors by restricting additional fee-based consulting offered by affiliates of the Safe Harbor to participating websites and apps[.]”); see also Rohit Chopra, Commissioner, Fed Trade Comm'n, Remarks at the Common Sense Media Truth About Tech Conference at Georgetown University (Apr. 4, 2019),

https://www.ftc.gov/system/files/documents/public_statements/1512078/chopra_-_truth_about_tech_4-4-19.pdf (Commissioner Chopra shares concerns regarding the conflicting incentives in the Safe Harbor programs, particularly for-profit programs. She points out that this self-regulatory program “could lead to online services paying private organizations primarily to avoid legal consequences when they violate the law.”).

⁵ Brandon Golob, *How Safe are Safe Harbors? The Difficulties of Self-Regulatory Children's Online Privacy Protection Act Programs*, 9 INTERNATIONAL JOURNAL OF COMMUNICATION 3469, 3471 (2015), <https://ijoc.org/index.php/ijoc/article/viewFile/3327/1497>.

⁶ *Id.*

Without robust enforcement mechanisms and FTC oversight, Safe Harbor programs struggle to function effectively. Firstly, programs are not required to disclose violators' names in annual reports, hindering regulation. For example, Miniclip falsely claimed participation in CARU's COPPA Safe Harbor program until mid-2019 despite termination in 2015⁷, highlighting enforcement and transparency issues. Former Commissioner Chopra particularly highlighted the potential difficulty in obtaining civil penalties if terminations are not promptly investigated due to the five-year statute of limitations.⁸

Secondly, there is no obligation for programs to publicly list subject operators⁹ or disclose annual reports¹⁰, limiting transparency and public access to vital information for evaluation. Without such information, organizations working in the field of children's online privacy protection cannot provide informed suggestions for improvement, programs lack incentives to enhance compliance and parents struggle to discern compliant websites.

Thirdly, transparency in the FTC's evaluation criteria is lacking, with only conclusive decisions provided upon program approval, rejection, or modification requests. For example, in 2021, the FTC removed Aristotle from the program for a lack of sufficiency in monitoring its member companies to ensure their compliance.¹¹ In 2010, the FTC rejected i-SAFE to operate as

⁷ Miniclip S.A., a corporation, Docket No. C-4722 (2020), <https://www.ftc.gov/system/files/documents/cases/1923129c4722miniclipcomplaint.pdf>.

⁸ Rohit Chopra, *Regarding Miniclip and the COPPA Safe Harbors Commission File No. 1923129*, FED. TRADE COMM'N (May 18, 2020), https://www.ftc.gov/system/files/documents/public_statements/1575579/192_3129_miniclip_-_statement_of_cmr_chopra.pdf.

⁹ Laura Moy ET AL., *Comments of Campaign for a Commercial-Free Childhood*, INSTITUTE FOR PUBLIC REPRESENTATION, p. 16 (Dec. 11, 2019), <https://fairplayforkids.org/wp-content/uploads/2019/12/CCFC-COPPA-comments.pdf>; see also CARU, *Re: COPPA Rule Review 16 C.F.R. Part 312, Project No. P195404* (Dec. 11, 2019), https://bbbnp-bbbp-stf-use1-01.s3.amazonaws.com/docs/default-source/caru/caru-coppa-rule-comments-submitted-to-ftc-12-9-19.pdf?sfvrsn=35c05433_7 (In 2019, CARU responded to the FTC's seek of comments regarding COPPA Safe Harbor program. CARU demonstrated that its annual reports "will not specify company names, websites or apps or any other identifiable information," and suggests that "the FTC require similar transparency by all safe harbors.").

¹⁰ *Supra* note 4, at 3472.

¹¹ *Supra* note 2.

a Safe Harbor program because i-SAFE proposed safe harbor guidelines would result in lesser protections for children than provided by COPPA itself.¹² And in 2017, the FTC approved TRUSTe's updated guidelines, even when several children's advocacy organizations argued that the changes were insufficient.¹³ The FTC infrequently monitors programs and only intervenes when significant issues arise, rendering its monitoring approach reactive rather than proactive. Furthermore, the lack of clarity from the FTC regarding monitoring requirements leaves the public unsure about the program standards. Without a clear idea of what the FTC would accept as satisfactory guidelines, the Safe Harbor programs would not function effectively.

Challenges For Parents In Identifying Compliant Online Services

The COPPA relies heavily on parental control over children's privacy, but the safe harbor program does not help to achieve that goal. Parents do not understand the safe harbors.¹⁴ It is difficult for parents to tell whether the website or app is a safe harbor participant because the seal may not be instructive or unified. Sometimes the seal is not displaced on the homepage of that website, so a parent would need to scroll to the bottom of the home page and click on the link for the children's privacy policy to find it.¹⁵ Furthermore, to determine not whether a certain website or app is covered, a parent must click on the seal and scroll through a list of covered services.¹⁶ Additionally, different FTC-approved Safe Harbor programs have different seals, and some of the programs have a range of seals that look similar but signify different things.¹⁷ However,

¹² FED. TRADE COMM'N, *FTC Approves Final Settlement Order with Dave & Busters; FTC Rejects COPPA Safe Harbor Application* (June 8, 2010), <https://www.ftc.gov/news-events/news/press-releases/2010/06/ftc-approves-final-settlement-order-dave-busters-ftc-rejects-coppa-safe-harbor-application>.

¹³ Laura Moy ET AL., *Comments of Campaign for a Commercial-Free Childhood*, INSTITUTE FOR PUBLIC REPRESENTATION, pp. 17–19 (Dec. 11, 2019), <https://fairplayforkids.org/wp-content/uploads/2019/12/CCFC-COPPA-comments.pdf>.

¹⁴ *Id.* at 17.

¹⁵ *Id.* at 20.

¹⁶ *Id.* at 21.

¹⁷ *Id.*

parents may not be familiar with all these programs and may erroneously believe that the presence of a seal means that the website or service collects no personal information from children.¹⁸ Therefore, when parents need to make a quick decision to determine whether the website or app is safe for their children, they may not be able to make a good one. To address this issue, the FTC should require standardization of the appearance and placement of the seal.

Low Industry Participation

The low industry participation rate in Safe Harbor programs undermines their effectiveness in ensuring child safety. In 2015, Dr. Brandon Golob estimated that the industry participation should rather be low absent a study quantifying what percentage of children's websites is part of safe harbors.¹⁹ During the 2019 FTC's COPPA workshop, CARU, one of the FTC-approved Safe Harbor programs, estimated the participation rate to be less than ten percent of all online service operators to whom COPPA would apply.²⁰ CARU explained that this low participation rate is attributed in part to a market proliferated with non-compliance online services, regardless whether they participated in such programs.²¹ Improving the Safe Harbor program would make it a more valuable tool for companies, which would encourage higher participation rates.

¹⁸ *Id.*

¹⁹ *Supra* note 4, at 3471.

²⁰ FED. TRADE COMM'N, *The Future of the COPPA Rule: An FTC Workshop Part 1* (Oct. 7, 2019), https://www.ftc.gov/system/files/documents/public_events/1535372/transcript_of_coppa_workshop_part_1_1.pdf (Dona J. Fraser's remarks at the FTC's COPPA workshop.).

²¹ Dona J. Fraser, VP, CARU, Remarks at the FTC's COPPA workshop (Oct. 7, 2019) (transcript available on the FTC's website)

The Proposed Safe Harbor Amendments Enhance FTC Oversight and Promote Transparency

To enhance the FTC’s oversight, the Commission first suggests amending § 312.11(d)(1) to mandate more detailed annual reports from programs, including business models and disclosed additional services²² to identify potential conflicts early. Secondly, a new § 312.11(f) would require triennial reports on programs’ technological capabilities and mechanisms for assessing operators’ fitness²³, involving third-party oversight. Lastly, the Commission proposes the right to revoke approval from non-compliant programs²⁴, crucial for effective oversight and enforcement. Without the ability to penalize non-compliance, proposed revisions would lack teeth, rendering them ineffective.

To promote transparency, revisions to § 312.11(d)(4) would mandate Safe Harbor programs to identify operators and all approved websites or online services, updating this list every six months.²⁵ Additionally, programs would provide copies of consumer complaints related to violations and describe the disciplinary process.²⁶ These changes would strengthen internal regulation, empower parents to make informed decisions, and not significantly burden programs, as they already should submit annual reports and maintain up-to-date lists of their operators.

FTC Needs to Publicize the Programs’ Assessment and Standardize the Seal Program

Parental control is crucial in both COPPA and Safe Harbor programs, as they heavily depend on parents to make the final judgmental calls regarding their child’s privacy. However,

²² Children’s Online Privacy Protection Rule, 89 Fed. Reg. 2034, 2063 (Jan. 11, 2024) (to be codified at 16 C.F.R. pt. 312).

²³ *Id.* at 2064.

²⁴ *Id.*

²⁵ *Id.* at 2076.

²⁶ *Id.*

current practices within these programs are inadequate, and the amendments have not adequately addressed these issues. To facilitate quick and informed decisions for parents, Public Knowledge suggest publicizing the programs' assessment and standardizing the seal program.

Publicize The Programs' Assessment

While the Commission proposes enhancements to operator assessments²⁷, these assessments should be publicly accessible. Parents can make informed decisions when they are aware of which programs have the most stringent guidelines. Online services will be motivated to join the most protective programs because differences in assessments highlight the varying levels of safety. Safe Harbor programs will have an incentive to adjust their guidelines to compete for better ratings based on the FTC's public assessment. For these reasons, a higher bar for safe harbor status would promote transparency and competition, aligning with the original goal of fostering a dynamic marketplace.

Standardize The Seal Program

To ensure the effectiveness of the safe harbor program, parents must be able to easily find the seal, understand what the seal means, know that they have a right to complain and have their claim resolved, and have sufficient incentives to file a complaint if they believe the website or online service is violating COPPA.²⁸ As the FTC acknowledged, a coalition of consumer groups concerned about the Safe Harbor programs' current practices "with respect to whether and where subject operators display membership seals makes it difficult for parents...to determine whether websites or online services are participants of an FTC-approved COPPA Safe Harbor

²⁷ *Id.* at 2063.

²⁸ *See Supra* note 12, at 20–21.

program.”²⁹ However, the proposed amendments have not make enough efforts to solve these concerns.

Therefore, Public Knowledge suggest that the FTC should standardize publication requirements to simplify the process for parents. This entails establish clear criteria for list placement, methods of communication with the public, and frequency of updates. Also, the FTC should unify safe harbor seals, irrespective of the programs they authorize. Differentiation among seals should only occur based on varying safety levels identified through annual audits.

²⁹ *See Supra* note 21, at 2064.