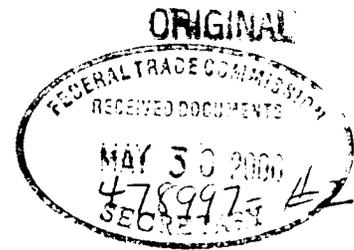


— CARU Safe Harbor Proposal Comment - P004504

Donald S. Clark
Secretary
Federal Trade Commission
Room H-159, 600 Pennsylvania Avenue, NW
Washington, DC 20580



RE: CARU Safe Harbor Proposal -- Comment, P004504

Dear Mr. Clark:

The Center for Media Education, the Consumer Federation of America, the American Academy of Child and Adolescent Psychiatry, Junkbusters Corporation, National Association of Elementary School Principals, Privacy Times and Public Advocacy for Kids (hereinafter "CME/CFA, *et al.*") respectfully submit these comments in response to the Federal Trade Commission's ("FTC" or "Commission") Notice of Proposed "Safe Harbor" Guidelines and Request for Public Comment. 65 Fed. Reg. 24960 (April 28, 2000) ("Safe Harbor Notice"). CME/CFA, *et al.* include a broad coalition of child advocacy, education, health and parents groups dedicated to improving the quality of electronic media, especially on behalf of children and their families.

The Children's Advertising Review Unit ("CARU") of the Council of Better Business Bureaus proposed self-regulatory guidelines ("guidelines") are one of the first to be submitted for approval under the Safe Harbor provisions of the Children's Online Privacy Protection Rule ("COPPR"). *See* 16 C.F.R. § 312.10. Thus, the FTC's response to CARU's guidelines will help set the standard for approval of proposed guidelines submitted in the future. Moreover, CARU's members include major national children's

advertisers and many of the leading online services that provide content directed towards children, such as MaMaMedia, Microsoft, America Online and others. Approval of inadequate guidelines would set a dangerous precedent that may undermine the goal of protecting children's privacy in the online environment. Therefore, it is important that the FTC carefully review CARU's proposed guidelines to ensure that they completely comply with the FTC's rules and with the underlying purpose of the Children's Online Privacy Protection Act ("COPPA"), i.e., to prohibit the collection of personal information from children without the verifiable informed consent of their parents.

CARU's safe harbor proposal fails to adequately protect children's privacy. Specifically, the proposal is deficient because it: 1) fails to make clear what provisions websites must comply with in order to come within the safe harbor protections; 2) fails to provide the "same or greater protection" as Sections 312.2-312.8 of COPPA require; and 3) does not provide adequate provisions for ensuring compliance. For these reasons, CME/CFA, *et al.* urge the FTC to deny approval of CARU's proposed "Safe Harbor" Guidelines unless and until all of the above deficiencies are remedied.

I. The CARU Proposal Fails to Clearly Indicate the Text Constituting the Safe Harbor Proposal for which Approval is Sought

At the outset, CME/CFA, *et al.* note that after reviewing CARU's application, it is not entirely clear exactly what portions of CARU's proposal constitutes the safe harbor guidelines with which children's websites must comply. This lack of clarity makes it difficult to assess the sufficiency of CARU's proposal. In addition, because of this uncertainty, websites wishing to join CARU's self-regulatory program cannot assess

exactly ~~what~~ will be required of them.

Pursuant to Section 312.10 (c)(1)(i) of COPPR, which requires that requests for approval of self-regulatory guidelines include “a copy of the full text of the guidelines for which approval is sought,” Children’s Online Privacy Protection Rule, 64 Fed. Reg. 59915, CARU attaches a copy of its “Self-Regulatory Guidelines for Children’s Advertising” as Exhibit C. *Proposal* at 5. CARU notes that these Guidelines include a section entitled the Guidelines for Interactive Electronic Media [IEM Guidelines], which are to be read within the context of the overall guidelines applicable to all media. *Id.*

Having guidelines within guidelines is confusing to begin with. This confusion is compounded by the fact that both the general Guidelines and the IEM Guidelines are split into “Guidelines” and “Principles.” The distinction between “Guidelines” and “Principles” is not always clear. CARU itself appears to get the terminology mixed up. For example, on page 8 of the proposal, Principle 1 on page 10 of Exhibit C is referred to as “Guideline 1”.

CARU must make clear and explicit to websites what they must do in order to comply with their guidelines. CARU states that “[w]here no specific Guideline addresses the issues of concern to CARU, it is these broader Principles that CARU applies in evaluating advertising directed to...child audience[s]”. *Exhibit C at 2*. This language suggests that if a guideline and a principle both address a similar area of concern, it is the Guideline, *and not the Principle*, that member websites need to follow.¹ If this is what

¹ Although the IEM Guidelines state that websites “should adhere to the following principles”, after listing the 5 principles, the IEM Guidelines go on to state that “in

CARU intends, it is not acceptable because the Guidelines are less stringent than the Principles.² Thus, CARU must make clear that websites are bound by both the Guidelines and Principles. CARU should require websites to comply with a combination of the strongest and more explicit rules from both, otherwise compliance is not guaranteed.

II. CARU's Guidelines Do Not Contain Requirements that provide the "Same or Greater" Protections as those in COPPR

Even if one assumes that websites seeking the safe harbor protection are bound by both the Principles and Guidelines, these provisions do not provide "the same or greater protections for children' as those contained in Sections 312.3 - 312.8 of the Rule." *See* 65

furtherance of the above principles, advertisers should adhere to the following guidelines..." Exhibit C at 10-11. Again, the implication is that following the guidelines is all that is required.

² For instance, Principle 1 and Guideline 2 both address what website operators are required to disclose in their Privacy Notices. However, Principle 1 is much more detailed and complete than Guideline 2. Principle 1 states:

In all cases, the information collection or tracking practices and information uses must be clearly disclosed, along with the means of correcting or removing the information. The disclosure notice should be prominent and readily accessible before any information is collected. For instance, in the case of passive tracking, the notice should be on the page where the child enters the site. A heading such as 'Privacy', 'Our Privacy Policy', 'Not to Parents', or similar designation which allows an adult to click on to obtain additional information on the site's information collection and tracking practices and information uses is acceptable.

Exhibit C at 10. Guideline 2 simply requires an operator Notice to disclose "in language easily understood by a child, why the information is being requested...and whether the information is intended to be shared, sold or distributed outside of the collecting advertiser company." *Id* at 11.

Fed. Reg. ~~24960~~ (Apr. 28, 2000). Indeed, CARU claims only that the IEM Guidelines “generally contain the requisite components of §§ 312.3-312.8.” *Proposal* at 5. The Rule, however, requires that the guidelines themselves must include “a requirement that operators...implement substantially similar requirements that provide the *same or greater* protections for children” as contained in the Rule. *See* §312.10 (b)(1). CARU’s Guidelines do not provide the same or greater protections in multiple respects.

A. CARU’s Proposed Guidelines Fail to Meet Section 312.4’s Requirements regarding Notice.

Section 312.4(a) of COPPR requires that notices “must be clearly and understandably written, be complete, and must contain no unrelated, confusing, or contradictory materials.” Other subsections address the placement and content of the notice. CARU’s safe harbor proposal fails to meet the standards established by this rule.

CARU asserts that “because we base our definition of ‘notice’ on the language in the Rule, our Guidelines necessarily comport with the Rule.” *Proposal* at 6. But the IEM Guidelines do not contain a definition of notice, or even incorporate the language of 312.4(a). Instead they state that “CARU’s aim is that the Guidelines will always support ‘notice,’ ‘choice’ and ‘consent’ as defined by the FTC.” *Id. quoting Exhibit C* at 9. However, the “aim” of the CARU guidelines is irrelevant. The guidelines themselves must *in fact* meet or exceed the definition of adequate notice as defined by the FTC. In this case, they fail to do so.

In addition, CARU instructions to websites about the substance of notices to parents are insufficient. While the CARU Guidelines state that, “in all cases, the

information collection or tracking practices and information uses must be clearly disclosed...” *Exhibit C* at 10, they fail to require that the notice “be complete” and not include any “unrelated, confusing, or contradictory materials.”

Moreover, the CARU Guidelines state that the disclosure notice should be written “in language easily understood by a child.” *Id.* at 11. It would seem that CARU intends that any notice, including notices to a parent, must be written for a child. The notice requirements of the Rule were clearly aimed at “ensur[ing] that *parents* receive all the information that they would find material when reviewing a site.” Children’s Online Privacy Protection Rule 64 Fed. Reg. 59894. To require notices to be written for a child audience defeats this “core principle” underlying the entire consent-based scheme of the Rule. A notice that describes a website’s information practices in such a way as to be “clearly understandable” to children may leave out much of what is most relevant to *parents* in deciding whether to provide consent to the collection and use of their child’s personal information. Such a rule could allow scrupulous web sites to purposely omit essential information under the guise that, under CARU’s rules, a child would not understand it. As written, CARU’s guidelines could also allow a website operator to exclude vital information as whether the information is gathered “actively or passively” and the types of businesses of any third parties that have access to the information.

1. CARU Guidelines do not ensure adequate placement of the Notice

COPPR requires that websites place a link to the notice on the home page of the website and at each area on the website where children directly provide, or are asked to

provide, ~~personal~~ information. See § 312.4(b)(1)(ii-iii). CARU guidelines do not include a similar requirement, but simply state that the notice “should be prominent and readily accessible before any information is collected.” *Exhibit C* at 10. Missing is the crucial requirement that the link to the notice be included at *each* area where children are asked to, or actually do, provide personal information. Also missing is the requirement that websites provide a link to their notice on the home page.

In addition, CARU’s guidelines do not contain a requirement that the link to the privacy policy be clearly labeled as a policy *with regard to children*. Section 312.4(b)(1)(i) of COPPR requires that the “link to the notice must be clearly labeled as a notice of the website or online service’s information practices with regard to children.” Without a clear indication that the link is to a notice of the website’s information practices *with regard to children*, the goal of informed parental consent will be frustrated. For example, a conspicuously located link which consists of “Our Privacy Policy” would seemingly meet the Guidelines’ requirements. See *Exhibit C* at 10. A parent that visits a general interest site with a separate children’s area that displays the “Our Privacy Policy” link in both the main area and in the separate children’s area may not be aware that the website’s privacy policy for children differs from the website’s general privacy policy. Thus, a parent may not gain “a clear idea of what the operator intends to do” with his/her child’s personal information. 64 Fed. Reg. at 59894.

2. CARU Guidelines do not ensure that Notices contain the content required by the Rules

Section 312.4(b)(2) of COPPR details six elements that website operators *must*

include in their notice for the notice “to be complete.” The inclusion of the information listed in 312.4(b)(2) is required by COPPR because it “would be material to parents in deciding whether to consent to their child’s participation in a site.” 64 Fed. Reg. 59895.

CARU’s proposed guidelines lack several of these essential elements, including: 1) the contact information of *all* operators collecting or maintaining personal information from children through the website required by §312.4(b)(2)(i) ; 2) where information is disclosed to third parties, the types of businesses engaged in by the third parties and the purposes for which those businesses will use the information, and whether they have agreed to maintain the confidentiality, security and integrity of the information as required by §312.4(b)(2)(iv); 3) the fact that a parent has option to consent to collection and use of the information w/o consenting to the disclosure to third parties as required by §312.4(b)(2)(iv); 4) the fact that the operator is prohibited from conditioning a child’s participation in a game on disclosing more personal information than is necessary as required by §312.4(b)(2)(v); and 5) the fact that a parent can refuse to permit further collection of the information as required by §312.4(b)(2)(vi).

3. CARU Guidelines do not Ensure Adequate Notice to Parents

The CARU guidelines fail to comply with section 312.4(c) of COPPR, which requires that any notices sent directly to parents include all of the information required by § 312.4(b)(2). Notices to obtain verifiable parental consent must state that the parent’s consent is “required for the collection, use and/or disclosure of the [child’s] information” and the means by which parent can provide that consent. §312.4(c)(1)(B)(ii). CARU simply fails to include these requirements in its guidelines.

COPPR also requires that website operators ensure that parents receive notice of any

material change in the collection, use, disclosure practices to which the parent has previously consented. §312.4(c). Again, CARU guidelines fail to include a similar requirement.

COPPR also requires websites to notify a parent when their child's information was used to respond directly more than once to a specific request by the child.

§312.4(c)(1)(iii). COPPR requires notices to include some additional information if it is sent under the exception to verifiable parental consent outlined in §312.5(c)(3). CARU's guidelines require notices to include the "nature and intended uses and permit access to the information sufficient to permit a parent to remove or correct the information."

Exhibit C at 11. However, this provision of CARU's guidelines does not require many of the disclosures required by 312.4(c), including disclosures that: 1) the requested information will require more than one contact with the child. §312.4(c)(1)(iii)(A); 2) the parent may refuse to permit further contact and require deletion of the material and how the parent can do so. 312.4(c)(1)(iii)(B); and 3) if the parent fails to respond, the operator may use the information for the purposes stated in the notice 312.4(c)(1)(iii)(C).

Finally, CARU's guidelines do not contain *any* requirements that relate to §312.4(c)(1)(iv) of COPPR which addresses the collection of information reasonably necessary to protect the safety of children.

B. CARU's Guidelines Fail to Meet § 312.5's Provisions regarding Parental Consent

Section 312.5 generally requires operators to obtain verifiable parental consent before collecting, using or disclosing personal information from children. CARU's

Guidelines themselves do not offer any requirements regarding what constitutes verifiable parental consent. Although CARU's statement accompanying the guidelines claim that, "CARU currently requires that site operators obtain verifiable parental consent either through toll free numbers...credit card registrations, or signed consent forms received through postal mail or via facsimile" (*Proposal* at 11), as requirements are not included in the guidelines themselves. For websites to be fully informed of CARU's self-regulatory program and for consumers to be able to evaluate a website's compliance with the terms of that program, its requirements regarding obtaining verifiable parental consent must be clearly disclosed in the *guidelines themselves*, and not simply asserted in a document submitted to the FTC.

Only two provisions in the IEM Guidelines even address the right of parental review. Principle 1 states "[i]n all cases, the information collection or tracking practices and information uses must be clearly disclosed, along with the means of correcting or removing the information." Principle 5 states that when a website responds more than once to a specific request from a child, "the company must ...permit access to the information sufficient to permit a parent to remove or correct the information." *Exhibit C* at 10-11.

Again, CARU's guidelines do not provide the same or greater protections as the requirements contained in COPPR. CARU's IEM Guidelines fail to require websites to give parents the opportunity to prohibit any further collections of the information as required by § 312.6 (a)(2). In addition, the IEM Guidelines fail to include the requirement that the means employed to correct or remove information must "ensure that the requestor is a parent of that child, taking into account available technology" as required by §312.6(a)(3)(i). Without this

rule, or a similar requirement, website operators may not take the necessary precautions that would prevent a “non-parent from obtaining information from the operator that would enable him to contact the child offline.” Children’s Online Privacy Protection Rule 64 Fed. Reg. 59905.

In sum, CARU’s safe harbor proposal lacks many of the requirements that the Commission has deemed “material to parents in deciding whether to consent to their child’s participation in a site.” Children’s Online Privacy Protection Rule 64 Fed. Reg. 59895. As written, it cannot be considered to “provide the *same or greater* protections for children” as contained in COPPR.

III. CARU’s Proposed Compliance Assessment Mechanisms and Agreements and Incentives for Compliance are Inadequate

Section 312.10 of COPPR states that “[t]o be approved by the Commission, *guidelines* must include ... an effective, mandatory mechanism for the independent assessment of subject operators’ compliance with the guidelines...and...effective incentives for subject operators’ compliance with the guidelines.” [emphasis added]. None of the discussion of what CARU intends to do to assess and to provide incentives for compliance is contained in the proposed guidelines themselves, however, but in separate statements submitted to the FTC. *See Proposal at 4.*³ CME/CFA, *et al.* is concerned that because CARU’s Guidelines *themselves*

³ For example, CARU states that to assess compliance, it will first conduct an initial site review to ensure that the site has a privacy policy that “include[s] all components outlined in the Guidelines and as defined by the Rule,” (*Proposal at 17*) and to ensure that the information practices themselves are consistent with its stated privacy policy. As part of this initial review, CARU states it will also require website operators to provide a “self-assessment document further explaining the [site’s] information practices.” *Id. at*

do not contain the compliance assessment mechanisms and incentives that COPPR requires of parties granted safe harbor status, consumers may not be able to fully evaluate whether a website in CARU's safe harbor program is complying with all the requirements of that program.

But even if the compliance provisions and incentives were included in the Guidelines themselves, CME/CFA, *et al.* still question their adequacy. First, the complex and technical requirements of the dispute resolution process may dissuade many consumers from filing complaints. The rights and obligations of a consumer that files a complaint are defined in sections 2.2, 2.4 - 2.9, 3.1- 3.3, 3.5, and 4.1 of the dispute resolution procedures. *See Exhibit A* at 5. These extensive rights and obligations are not written in language easily understandable to a lay-person. They also often contain mandatory time requirements for filing, such as a 10 day window allotted for a consumer to reply to a website's response to a complaint, which is final and not subject to review. *See Exhibit A* at 6, 8.

Second, the extreme and broad discretion given to CARU to decide whether the complaint has merit may leave many legitimate consumer complaints unresolved. CARU reserves the right to refuse to open an investigation of the alleged complaint if CARU concludes that the practice complained of is "of such a technical character that...CARU...could not conduct a meaningful analysis of the issue" or "without sufficient merit to warrant the expenditure of

18. This self-assessment document must be resubmitted to the CARU staff annually. *Id.* After this initial site review is complete, CARU pledges to "conduct routine monitoring and patrolling periodically throughout the year to ensure continued compliance." *Id.* CARU also pledges to "data-seed" any sites that seek to participate in CARU's Safe Harbor program. *Id.* at 19. However, none of these claims are part of the guidelines themselves.

NAD/CARU's resources." See *Exhibit A* at 4. Thus, it appears some *legitimate* complaints may be dismissed by CARU simply because they deal with technical issues outside of CARU's expertise (a situation likely to arise in the increasingly dynamic and technical world of the Internet), or do not warrant the expenditure of CARU's limited resources.

That legitimate complaints may be dismissed because they are deemed by CARU to be "without sufficient merit to warrant the expenditure" of CARU's resources is especially troubling, and raises additional concern regarding CARU's ability to adequately monitor and police the potentially large number of websites participating in its safe harbor program. The limits of CARU's resources becomes obvious when one considers the small number of informal inquiries and formal cases regarding children's websites reported by CARU in the past several years.

CARU's IEM Guidelines have been in place, roughly in their current form, since 1996. CARU claims "widespread acceptance" of the Guidelines (*Proposal* at 2), and asserts that CARU "routinely patrols the World Wide Web to monitor sites with content directed at children to foster compliance with our Guidelines." *Id.* at 3. Despite these "routine patrols," however, CARU initiated only 10 informal inquiries and 2 formal cases⁴ involving "online issues" in 1998.⁵ That same year, a survey of websites directed towards children conducted by the FTC found that 46% of the surveyed websites did not include any disclosure regarding

⁴ Both of the formal cases brought against children's websites in 1998 were closed based upon assurances by the website operator that the website would be modified. See 28 NAD Case Reports at 225, 244 (1998).

⁵ See "About the Children's Advertising Review Unit" <<http://www.caru.org/childrensMonitor.asp>> (last visited May 8, 2000); 28 NAD Case Reports 355 (1998-1999).

their collection and use of personal information, despite the fact that 89% of the 212 sites surveyed collected one or more types of personal information from children.⁶ The fact that CARU's "routine patrols" to foster compliance with the IEM Guidelines resulted in only a dozen inquiries in a year in which almost half of websites directed towards children were not in compliance with those Guidelines suggests that perhaps CARU's ability to adequately monitor for compliance is already hindered by its lack of resources.⁷ Grant of the safe harbor application would stretch these already inadequate resources even further.

Third, consumers with legitimate complaints about potentially harmful information practices face a dilemma that may endanger other children during the dispute resolution process at CARU. Any consumer complaints must be held confidential during the entire dispute resolution process.⁸ Therefore, a consumer that has a meritorious complaint is placed in a potential dangerous Catch-22: she can file a complaint and neglect to inform others of the potential danger to children, or inform their communities about the danger and risk losing the ability to have the complaint resolved through CARU.

⁶ See "Privacy Online: A Report to Congress" at 31, 34. The FTC's report of those findings cited CARU's guidelines with approval, but noted that "while CARU has worked to encourage Web sites to adhere to its privacy guidelines with respect to the collection of personal information from children online, to date it has not achieved the same widespread adherence it has achieved in other media." See *id.* at 17.

⁷ CARU's 1999 activity, despite the rapid increase in websites directed towards children, continued to produce a small number of inquiries. CARU performed less than 30 informal inquiries, formal cases and pre-screening activities regarding children's websites in 1999. See 29 NAD Case Reports No. 1-10 (1999).

⁸ CARU reserves the "right to refuse to open or to continue to handle a case where a party to a ... proceeding publicizes, or otherwise announces, to third parties not directly related to the case the fact that specific advertising will be, is being, or has been, referred to CARU for resolution." See *id.*

Conclusion

CME/CFA, *et al.* urge the FTC to deny safe harbor status to CARU's proposed guidelines unless major modifications are undertaken as suggested above. As now written, CARU's Guidelines fail to meet the statutory and regulatory standards. Specifically, the proposal is deficient because it: 1) fails to make clear what provisions websites must comply with in order to come within the safe harbor protections; 2) fails to provide the "same or greater protection" as those contained in COPPR regarding notice and parental consent; 3) does not provide adequate provisions for ensuring compliance.

Respectfully submitted,



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APPENDIX A

Center for Media Education (CME), founded in 1991, is a non-profit advocacy organization that works on behalf of children and families to promote public accessibility and accountability by the media. CME has been working for several years to protect the rights of children online. CME's 1996 report *Web of Deception* prompted the FTC to launch its initial inquiry into the practices of Web sites that target children.

Consumer Federation of America (CFA) is a non-profit association of some 260 pro-consumer groups, with a combined membership of 50 million, that was founded in 1968 to advance the consumer interest through advocacy and education. CFA has worked closely with CME to defend the rights of children's privacy online and jointly published a consumer education brochure for parents and children entitled, *The Internet, Privacy and Your Child What You Need to Know as a Parent/Keeping Secrets About You on the Internet A Kid's Guide to Internet Privacy*.

The American Academy of Child and Adolescent Psychiatry (AACAP) is a nonprofit professional organization representing over 6,500 child and adolescent psychiatrists. Its members are physicians with at least five years of additional training beyond medical school in general and child and adolescent psychiatry. Its members actively research, diagnose and treat psychiatric disorders affecting children adolescents, and their families. The AACAP is committed to protecting the well-being and rights of children and their families.

Junkbusters Corp. helps consumers defend themselves against intrusive marketing and protect their privacy online. At <http://www.junkbusters.com>, the company provides extensive free resources for stopping telemarketing calls, unwanted physical mail, junk email, and commercial invasions of privacy on the Internet.

The National Alliance for Non-violent Programming (NANP) is a not-for-profit network of organizations with a long history of effective community involvement and education. Member organizations include the American Medical Women's Association, Jack and Jill of America, Inc., Jewish Women International, the Links, Inc., the National Association of Women Business Owners, National Council of LaRaza, Soroptimist International of the Americas, and YWCA of the U.S.A. With the capacity to reach two million people, NANP builds and supports community initiatives to promote and teach media literacy and non-violence. NANP headquarters in Greensboro, NC serves as the information, technical assistance, materials distribution and network center for member organizations, local initiatives and the general public.

National Association of Elementary School Principals is dedicated to assuring that all children receive the best education and to the educational excellence and high professional standards among K-8 educators. NAESP serves 28,000 elementary and middle school principals nationwide in Canada and overseas.

Public Advocacy for Kids is a non-profit child advocacy organization devoted to education, health, telecommunication, and parental involvement issues at the federal level. Services provided on a consulting basis include advocacy training, child policy development, organizing for local and federal action, and communications development.

Privacy Times is a Washington-based newsletter that covers the information world, is designed for professionals and attorneys who need to follow the legislation, court rulings, and industry developments that frame the ongoing debate about information privacy. Privacy Times covers such issues as the FTC's developing policy for the Internet, credit reports, Caller ID, medical records, "identity theft," the Freedom of Information Act, direct marketing and the European Union's Directive On Data Protection.