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Are You Violating COPPA?

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Widespread use of the Internet as a marketing vehicle and a national focus on consumer privacy issues and the protection of children resulted in the enactment of a piece of Federal legislation known as the Children's Online Privacy Protection Act ("COPPA") which went into effect April 1, 2000.

In short, COPPA regulates the collection, use, and disclosure of personal information obtained from children on the Internet. COPPA applies to a website or other on-line promotion directed at children. It is also triggered when an operator of any website or an on-line service knowingly collects personal information from a child even if the website or promotion is not directed at children.

Once subject to COPPA, the marketer must obtain parental permission prior to collecting personal information from a child. Depending upon whether the personal information will be kept internal or shared with others, the parental consent is provided either by mail, email, or via the telephone.

COPPA defines a "child" as one under the age of 13. Personal information includes individually identifiable information about a child including information that may appear to be innocuous such as a child's name, address, phone number, or email address.

Triggering Regulatory Scrutiny

An email marketer can subject itself to COPPA by sending an email targeted to children which requests a response and the provision of personal information. Additionally, even if an email marketer sends email to a general audience but, by virtue of a response, learns that a child under 13 has responded and provided personal information, COPPA could be triggered. In addition, if an email provides a hot link to a website directed at children or provides such a website's URL, it can also trigger COPPA if the website requests any personal information from a child.

When the email marketer directs an offering to children, to avoid COPPA, it must take care to ensure that it can sustain a position that it is directed at children older than 13. Since this is often a subjective determination, this is an area where extreme care should be taken. In making their subjective determination as to whether the offering is directed at children under 13, among other things, regulators will focus on the nature of the product or service offered, the language of the promotion and even the graphics used.

Another concern involves the selection of an email list. When the email marketer purchases an email list, attention must be paid to any descriptions of that list that could suggest that anyone on the list could be under 13. Even if there is no indication that the list contains email addresses of children under 13, if any response from a recipient then reveals that a respondent is under the age of 13, the email marketer could become subject to COPPA. It must then either comply with COPPA (and obtain parental consent to collect and maintain the information, along with posting a comprehensive privacy policy on its website) or discard the information collected from the child.

Enforcement of COPPA

If a website operator is found to violate COPPA, it can be subject to fines of up to \$11,000 per violation. Additionally, a Federal Court can issue an injunction against the marketer as a result of COPPA violations. Although COPPA is a relatively new law, enforcement has resulted in at least six settlement agreements between the Federal Trade Commission ("FTC") and COPPA violators and many investigations are pending. The most recent settlement with the FTC involved the Ohio Art Company.

In a complaint filed by the FTC, the Ohio Art Company was accused of collecting personal information from children on its website without first obtaining parental consent. The website invited children to join a birthday club where they could win a toy on their birthday. In order to join the club, they were asked to provide their name, address, email address, age, and date of birth. The website instructed the children to get their parent's consent before submitting the personal information. However, this directive to the children fell short of the COPPA requirements. The Ohio Art Company entered into a settlement agreement with the FTC which, among other things, provides for the payment of fines in the sum of \$35,000.

Be Careful!

The FTC is aggressively enforcing COPPA. With the potentially large fines facing violators, marketers should take great care to ensure they either comply with COPPA or are outside of its scope. Such care should include: making sure that the email promotion and/or related website comply with COPPA, dealing with an email list owner who itself is COPPA compliant, using reputable brokers who understand COPPA and its implications, and, where possible, obtaining agreements when renting email lists which provide appropriate indemnification for COPPA penalties. Furthermore, it is crucial that marketers who do choose to collect personal information from children under 13 comply with COPPA by obtaining parental consent and posting a compliant privacy policy on their website.

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