

BBB NP REPORT:
TWENTY YEARS OF SUCCESSFUL
CO-REGULATION UNDER COPPA

A Model for Fostering Consumer Privacy

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* BBB National Programs, Inc. (BBB NP) administers independent self-regulatory and dispute resolution programs including the Children’s Advertising Review Unit (CARU), BBB EU Privacy Shield, and the Digital Advertising Accountability Program. BBB NP is a mission-driven non-profit, with programs funded by businesses and associations that share our mission in promoting trust in the marketplace. This paper was written and produced by C. Lee Peeler, Executive Vice President, Policy & Program Development and Cobun Zweifel-Keegan, Deputy Director, Privacy Initiatives.

In 1996, the U.S. Federal Trade Commission (FTC) stepped forward to advocate in favor of first-of-its-kind legislation for the protection of children’s privacy online. One unique provision of that groundbreaking legislation was the inclusion of a safe harbor to recognize the good faith efforts of companies that participated in FTC-approved self-regulatory programs. This paper examines how that provision arose, and how it has operated over the past two decades in complement with the entire COPPA framework to benefit children and parents, government, and businesses alike.

I. Background: The Creation of COPPA

In 1996, responding to the FTC’s inaugural hearings on privacy under the leadership of Robert Pitofsky,¹ a study by the Center for Media Education (CME) flagged the emerging issue of the online collection of personal information from children.² The CME study described information collection involving formats that are quaint when compared to today’s sophisticated data collection technologies but nonetheless raised concerns about the erosion of children’s privacy leading to “new forms of manipulation and exploitation.”³ This and similar reports raised a new set of consumer protection issues for what was then a fledging new media—and sparked a flurry of regulatory and legislative activity.

Central to the response to the CME study were concerns about child safety, fairness, and appropriateness. Over the twenty-five prior years, a robust consensus had emerged across government and industry that young children were a vulnerable audience entitled to special protections and high standards of fair dealing.⁴ A key pillar to that approach was the belief that marketers should *never* insert themselves between parents and young children. The eye-opening CME study, the FTC’s ensuing hearing,⁵ and further investigative work by FTC staff culminating in a report to Congress all showed that this most basic principle was at risk in the new online

¹ U.S. Fed. Trade Comm’n, Public Workshop on Consumer Privacy on the Global Information Infrastructure, 61 Fed. Reg. 24,499 (May 15, 1996), <https://www.ftc.gov/news-events/events-calendar/1996/06/consumer-privacy-global-information-infrastructure>. The Pitofsky FTC had begun to explore online privacy issues during its 1995 Global and Innovation-Based Competition Hearings through a panel titled “Privacy in Cyberspace.” See U.S. FED. TRADE COMM’N, ANTICIPATING THE 21ST CENTURY: CONSUMER PROTECTION POLICY IN THE NEW HIGH-TECH, GLOBAL MARKETPLACE (May 1996).

² CTR. FOR MEDIA EDUC., WEB OF DECEPTION: THREATS TO CHILDREN FROM ONLINE MARKETING (1996), [<https://web.archive.org/web/20030916002258/http://www.cme.org/children/marketing/deception.pdf>]. The Center for Digital Democracy is the successor organization to CME.

³ *Id.* at 19.

⁴ See, e.g., CHILDREN’S ADVERT. REVIEW UNIT, SELF-REGULATORY GUIDELINES FOR CHILDREN’S ADVERTISING (1996) (“The Children’s Advertising Guidelines have been in existence since 1974 when they were published by the Association of National Advertisers, Inc. to encourage truthful and accurate advertising sensitive to the special nature of children. Subsequently, the advertising community established CARU to serve as an independent manager of the industry’s self-regulatory programs.”).

⁵ U.S. Fed. Trade Comm’n, Public Workshop on Consumer Information Privacy, 62 Fed. Reg. 10,271–276 (Mar. 6, 1997).

environment, where the FTC’s review showed the vast majority of child-directed websites were collecting personal information without providing notice or mechanisms for parental consent.⁶

Even in an era when the prevailing regulatory principle was “hands off the Internet,” the response was swift.⁷ Senators Bryan and McCain as well as then Representative Markey spearheaded the development of a law designed to protect child safety and mitigate the new privacy risks brought about by children’s use of the Internet, while preserving the many potential benefits of this new technology for kids.⁸ The legislative development process included government, industry, and public interest groups to quickly develop and enact a set of legislative principles governing the online collection of personal information from young children.⁹ These principles, including the groundbreaking co-regulatory component of the legislation, have proved to be durable and effective.¹⁰ Fittingly for the issue, the Children’s Online Privacy Protection Act (COPPA) was developed collaboratively and on a bi-partisan basis.¹¹ It is remarkable to note that the legislation was signed into law on October 21, 1998, less than four months after the first legislative hearing.¹²

⁶ U.S. FED. TRADE COMM’N, PRIVACY ONLINE: A REPORT TO CONGRESS (June 1998), <https://www.ftc.gov/sites/default/files/documents/reports/privacy-online-report-congress/priv-23a.pdf> (“In the specific area of children’s online privacy, however, the Commission now recommends that Congress develop legislation placing parents in control of the online collection and use of personal information from their children. Such legislation would set out the basic standards of practice governing the online collection and use of information from children.”).

⁷ Compare Sandra Sobrieraj, *Clinton Issues ‘Hands Off’ Policy on Internet Commerce*, N.Y. TIMES WEB, Nov. 4, 1997, <http://movies2.nytimes.com/library/cyber/week/070297commerce.html> (highlighting the Clinton administration’s support of a hands-off approach), with Jeri Clausing, *Guidelines Are Sought for Internet Privacy*, N.Y. TIMES, June 5, 1998, at D2 (describing calls for regulation of children’s privacy, including within the administration, after publication of the FTC’s *Privacy Online* report).

⁸ See Noah J. Phillips, Comm’r, Fed. Trade Comm’n, Remarks at the Future of the COPPA Rule FTC Staff Workshop (Oct. 7, 2019), https://www.ftc.gov/system/files/documents/public_statements/1547700/phillips_-_coppa_workshop_remarks_10-7-19.pdf, quoting 144 CONG. REC. S11,657 (daily ed. Oct. 7, 1998) (statement of Sen. Bryan).

⁹ See *Children’s Online Privacy Protection Act: Hearing on S. 2326 before the Subcomm. on Communications of the S. Comm. on Commerce, Science, & Transp.*, 105 Cong. (1998) (testimony from Robert Pitofsky, Chairman, Federal Trade Commission; Jill Lesser, America Online; Deirdre Mulligan, Center for Democracy and Technology; Kathryn Montgomery, on behalf of the Center for Media Education and Consumer Federation of America; and Arthur B. Sackler, Time Warner, Inc.).

¹⁰ Although the statute is regularly reexamined and the implementing regulations updated, the basic framework has remained consistent, even as online and mobile technology has proliferated and become ever more complex.

¹¹ See 144 CONG. REC. S12,787–89 (daily ed. Oct. 21, 1998) (statement of Sen. Bryan), <https://www.congress.gov/congressional-record/1998/10/21/senate-section/article/s12741-4> (“In a matter of only a few months ... we have been able to achieve a remarkable consensus. This is due in large part to the recognition by a wide range of constituencies that the issue is an important one that requires prompt attention by Congress. It is also due to revisions to our original bill that were worked out carefully with the participation of the marketing and online industries, the Federal Trade Commission, privacy groups, and First Amendment organizations.”). See also 144 CONG. REC. H9,902–11 (daily ed. Oct. 7, 1998), <https://www.congress.gov/congressional-record/1998/10/7/house-section/article/H9902-1>.

¹² Children’s Online Privacy Protection Act of 1998, 15 U.S.C. §§ 6501–6506 (1998).

II. The COPPA Safe Harbor: A Successful Co-Regulatory Experiment

Though COPPA was the first legislation specifically directed to online commercial data collection, it adopted what was by then already a well-developed enforcement paradigm. The law and its implementing rules could be enforced by the FTC, utilizing its authority to seek civil penalties for rule violations.¹³ And FTC enforcement was complemented by enforcement by state attorneys general.¹⁴ This enforcement approach reflected the same successful model contained in the then recently enacted Telemarketing and Consumer Fraud and Abuse Prevention Act.¹⁵

In addition to government enforcement, COPPA contained an innovative provision designed to encourage development and participation in self-regulatory programs by industry members.¹⁶ Under this approach, the FTC deems a business to be in compliance with COPPA if the business is in compliance with the FTC-approved guidelines of a self-regulatory program that provides the same or greater protection as COPPA.¹⁷ The FTC's COPPA Rule explicitly adopted this safe harbor provision, and specified the additional requirements that safe harbor programs must demonstrate, including routine independent assessments and disciplinary mechanisms such as reporting of non-compliance or referral to the FTC.¹⁸

The COPPA safe harbor provision recognized and was designed to leverage the role of self-regulation in protecting children in traditional media. In fact, in response to the CME report, the Children's Advertising Review Unit (CARU, at the time operated by the Council of Better Business Bureaus¹⁹) had already stepped forward to create and begin enforcing guidelines for the responsible collection of children's personal information online.²⁰ CARU was empowered as an independent enforcement agent by the advertising industry in 1974 and had demonstrated a leadership role in delivering robust enforcement of self-regulatory principles in this industry. Its mission-driven work helped create a bi-partisan consensus at the FTC that, *done correctly*, self-regulation could provide an important complement to government enforcement.

¹³ 15 U.S.C. § 6502(c).

¹⁴ 15 U.S.C. § 6504.

¹⁵ Telemarketing and Consumer Fraud and Abuse Prevention Act, Pub. L. No. 103-297, H.R. 868, 103rd Cong. (1994).

¹⁶ 15 U.S.C. § 6503. *See* 105 CONG. REC. S12,789 (summary of the bill's provisions) ("This section requires the FTC to provide incentives for industry self-regulation to implement the requirements of Section 203(b). Among these incentives is a safe harbor through which operators may satisfy the requirements of Section 203 by complying with self-regulatory guidelines that are approved by the Commission under this section.").

¹⁷ 15 U.S.C. § 6503(b)(2).

¹⁸ 16 C.F.R. § 312.11(b) (2019).

¹⁹ As of June 1, 2019, CARU is operated by BBB National Programs, Inc.

²⁰ CHILDREN'S ADVERT. REVIEW UNIT, SELF-REGULATORY GUIDELINES FOR CHILDREN'S ADVERTISING (1996). These guidelines included provisions requiring clear up-front notice about the collection of personal information for marketing purposes, parental consent, and opt-out choices, among others. *Id.* at 14–16.

For the FTC, self-regulation “done correctly” has always meant programs that articulate clear principles, are administered impartially, transparently report results, and provide mechanisms of accountability—that is, consequences—for non-compliance.²¹ From the outset of its efforts to find a legislative solution, the FTC supported incentivizing the creation of such safe harbor programs in the children’s online privacy space in its testimony and legislative recommendations on the proposed legislation that became COPPA.²² The idea was to encourage meaningful self-regulation; promote compliance and, most fundamentally, provide an additional level of protection for children.

III. How Does Co-Regulation under COPPA Work?

COPPA introduced a full-featured co-regulatory toolkit, empowering the FTC as an expert agency to clarify the rules and adapt to new technologies, laying the foundation for a safe harbor mechanism, and encouraging robust enforcement by federal, state, and self-regulatory actors alike. The COPPA safe harbor is an important part of getting this balance right, aligning incentives to encourage compliance, providing businesses with a way to distinguish themselves as putting consumers first, and reducing the enforcement burden on government actors. CARU, as both a

²¹ See Maureen K. Ohlhausen, Acting Chairman, Fed. Trade Comm’n, Opening Remarks for the 2017 DSA Fall Conference (Nov. 7, 2017) (describing effective self-regulation as that which is adequately funded, independent, based on clear principles, and motivated by protecting consumers). See also Deborah Platt Majoras, Chairman, Fed. Trade Comm’n, Self-Regulation in the Infomercial Industry: Moving Forward, Remarks before the Electronic Retailers Self-Regulatory Program (Apr. 26, 2006) (“The Commission has expressed support for effective advertising industry self regulation consistently for the last thirty years.”) citing Deborah Platt Majoras, Chairman, Fed. Trade Comm’n, Self-Regulatory Organizations and the FTC, Address Before the Council of Better Business Bureaus (Apr. 11, 2005); Timothy J. Muris, Chairman, Fed. Trade Comm’n, Do the Right Thing (Apologies to Spike Lee), Remarks Before the CableTelevision Advertising Bureau, (Feb. 11, 2003); Robert Pitofsky, Chairman, Fed. Trade Comm’n, Self-Regulation and Antitrust, Prepared Remarks at the D.C. Bar Association Symposium (Feb. 18, 1998); Roscoe B. Starek III, Comm’r, Fed. Trade Comm’n, National Advertising: Issues and Priorities at the FTC, Prepared Remarks Before the National Advertising Review Board (Dec. 8, 1993); Janet D. Steiger, Chairman, Fed. Trade Comm’n, Address at the National Advertising Review Board 1992 Annual Meeting (Dec.9, 1992); Deborah K. Owen, Comm’r, Fed. Trade Comm’n, The Challenge of Advertising Regulation, Remarks Before the National Advertising Review Board (Dec. 7, 1990); Daniel Oliver, Chairman, Fed. Trade Comm’n, The Coming of Age in Advertising Regulation, Address Before the Council of Better Business Bureaus (Sept. 22, 1986); James C. Miller III, Chairman, Fed. Trade Comm’n, Maximizing the Benefits of Self-Regulation, Address Before the White House Conference on Association Self-Regulation (Oct. 3, 1984); Michael Pertschuk, Chairman, Fed. Trade Comm’n, Advertising and Inflation, Speech Before the Annual Meeting of National Advertising Review Board (Nov. 8, 1978).

²² Robert Pitofsky, Chairman, Fed. Trade Comm’n, *Protection of Children’s Privacy on the World Wide Web*, testimony at *Hearing on S. 2326 before the Subcomm. on Communications of the S. Comm. on Commerce, Science, & Transp.*, 105 Cong. (1998), https://www.ftc.gov/sites/default/files/documents/public_statements/prepared-statement-federal-trade-commission-protection-childrens-privacy-world-wide-web/priva998.pdf.

COPPA safe harbor and self-regulatory initiative, has demonstrated a successful model for the role of independent accountability agents in the privacy space.

A. The COPPA safe harbor provision has enhanced the effectiveness of this time-tested co-regulatory structure.

CARU became the first COPPA safe harbor program approved by the FTC on February 1, 2001.²³ Since then, six additional safe harbor programs have been approved.

Over the succeeding two decades, the co-regulatory framework pioneered by COPPA has paid repeated dividends for children and parents, businesses, and society. Most directly, children’s privacy has benefited from the growing number of businesses that actively choose to participate in self-regulation by joining a safe harbor program, resulting in prompt discontinuance of non-compliance when it is detected. These businesses demonstrate a commitment to compliance by funding third-party review of their websites and apps, in addition to their own internal monitoring programs, raising the bar on best practices and contributing to a more trustworthy industry. Most importantly, every voluntary correction made through these programs’ evaluations and monitoring of their participants’ practices provides an extra level of protection that, without the safe harbor program, parents and children would not have received.

Safe harbor programs also benefit participating businesses by providing an expert set of third-party eyes to check procedures, while continuing to be able to bring innovative products to market with reduced uncertainty about missing the mark on compliance.

CARU’s COPPA safe harbor program (the “CARU Safe Harbor”) has endeavored to embrace standards that require COPPA compliance among its participants, while focusing on impartiality in its operations and annual reviews. The CARU Safe Harbor is operated in tandem with its self-regulatory program for children’s advertising, which publishes guidelines that are updated routinely to address new technologies.²⁴ Participating businesses in the CARU Safe Harbor agree to abide by the self-regulatory guidelines and to be subject to BBB NP’s procedures for complaints,

²³ Press Release, Fed. Trade Comm’n, First “Safe Harbor” Approved for Children’s Online Privacy Protection Act, Feb. 1, 2001, <https://www.ftc.gov/news-events/press-releases/2001/02/first-safe-harbor-approved-childrens-online-privacy-protection>. See also CARU, CARU’s Request for Commission Approval of Continuance of Safe Harbor Status (July 1, 2013), <https://www.ftc.gov/system/files/attachments/press-releases/revised-childrens-online-privacy-protection-rule-goes-effect-today/130701carusafeharborapp.pdf>.

²⁴ CARU, SELF-REGULATORY PROGRAM FOR CHILDREN’S ADVERTISING (2014) (“CARU Guidelines”), <https://www.asrcreviews.org/wp-content/uploads/2012/04/Self-Regulatory-Program-for-Childrens-Advertising-Revised-2014-.pdf>. Part II describes “Guidelines for Online Privacy Protection” consistent with COPPA and the COPPA Rule. *Id.* at 14–18.

appeals, and enforcement of compliance.²⁵In addition, CARU maintains a public web page where parents can file complaints against any child-directed advertiser or marketer, regardless of whether the business is a CARU supporter or CARU safe harbor participant. The complaint portal is posted on the CARU website and also receives relevant complaints from the BBB Online Complaint System.²⁶ Each complaint filed with CARU is individually reviewed by CARU staff.

In addition, the CARU Safe Harbor has consistently demonstrated a commitment to encouraging its participants to embrace best practices that exceed the minimum guidelines of the COPPA safe harbor. For example, years prior to the FTC rules update in 2013, CARU Guidelines provided for neutral age screening on sites where there was a reasonable expectation that a significant number of children would be visiting the site.²⁷ This approach was incorporated into the FTC's amended COPPA Rule, which went into effect in 2013.²⁸ CARU Guidelines also addressed the practice of hyperlinks on child-directed sites that link to general audience sites such as Facebook.²⁹

While concerns have been expressed that the COPPA safe harbor provision could be manipulated by an unscrupulous safe harbor provider, to date there has been no evidence of this occurring. More importantly, both the statute and the FTC's regulation have built-in protections against such an outcome. Before it approves a safe harbor provider, the FTC must determine that the program provides "substantially the same or greater protections" as those of COPPA, plus routine independent assessments and disciplinary actions such as mandatory reporting of non-compliance or referral to the FTC.³⁰ On the business side, in order to avail itself of safe harbor protection, a business must demonstrate that it follows the safe harbor program's standards.³¹

²⁵ BBB NAT'L PROGRAMS, THE ADVERTISING INDUSTRY'S PROCESS OF VOLUNTARY SELF-REGULATION: PROCEDURES FOR NAD, CARU, AND NARB (2019), <https://asrcreviews.org/wp-content/uploads/2019/06/BBBNP-NAD-CARU-NARB-Procedures-Effective-June-1-2019-2.pdf>.

²⁶ The BBB Online Complaint System is managed by the International Association of Better Business Bureaus. Consumers that indicate that their complaint is related to a business advertising to children are directed to the CARU complaint form.

²⁷ CARU, SELF-REGULATORY PROGRAM FOR CHILDREN'S ADVERTISING (6th Ed., 2000), at 11 ("In Websites not specifically targeted to children where there is a reasonable expectation that children will be visiting, age-screening mechanisms should be employed to determine whether verifiable parental consent or notice and opt-out is necessitated per the Data Collection section of the Guidelines. Care should be taken so that screening questions are asked in a neutral manner so as not to encourage children to provide inaccurate information to avoid obtaining parental permission.").

²⁸ Children's Online Privacy Protection Rule, 78 Fed. Reg. 3,972, 3,983 (Jan. 17, 2013) (codified at 16 C.F.R. pt. 312).

²⁹ CARU Guidelines 6th Ed., supra note 27 at 11 ("Advertisers who maintain sites for children should not knowingly link their sites to pages of other sites that do not comply with CARU's Guidelines.").

³⁰ 16 C.F.R. § 312.11(b)(1).

³¹ 16 C.F.R. § 312.11(g).

B. Active self-regulation and government enforcement backstop the safe harbor program.

Significantly, the benefits provided by the COPPA safe harbor structure have been obtained with no costs to the enforceability of COPPA by either the FTC or state attorneys general. After almost twenty years, there are no reported instances of safe harbor programs interfering with an enforcement action. Although the FTC's safe harbor regulations say that the Commission will "take into account" the business's participation in a safe harbor program, non-compliant behavior on the part of the business or the safe harbor provider could still result in FTC enforcement, including the revocation of the safe harbor program's approval.³² The FTC and state attorneys general have demonstrated their willingness to proceed against providers of independent privacy certification services if those providers fail to live up to their promises of routine monitoring and third-party verification.³³

In addition, Congress's policy of encouraging self-regulation of COPPA has paid off through more than 200 public enforcement actions taken by CARU alone via its active independent monitoring of the industry.³⁴ In addition to its work as a safe harbor provider, CARU and its sister program the Digital Advertising Accountability Program³⁵ monitor the online marketplace in general to identify potential COPPA violations. Almost all such cases result in prompt, voluntary correction.³⁶ In those few cases where businesses refuse to align their practices with COPPA, they are referred to the FTC. Only a handful of cases have resulted in referrals. Most recently CARU

³² 16 C.F.R. § 312.11(f).

³³ See, e.g., Press Release, N.Y. State Office of the Att'y Gen., A.G. Schneiderman Announces \$100,000 Settlement With TRUSTe Over Flawed Privacy Certification Program For Popular Children's Websites (Apr. 6, 2017), <https://ag.ny.gov/press-release/2017/ag-schneiderman-announces-100000-settlement-truste-over-flawed-privacy>; Press Release, Fed. Trade Comm'n, TRUSTe Settles FTC Charges it Deceived Consumers Through Its Privacy Seal Program, (Nov. 17, 2014), <https://www.ftc.gov/news-events/press-releases/2014/11/truste-settles-ftc-charges-it-deceived-consumers-through-its>.

³⁴ CARU Staff, *20 Years Young: The History and Maturing of COPPA in a Privacy-Conscious Age*, CARU BLOG, Apr. 20, 2019, <https://carunews.blogspot.com/2019/04/20-years-young-history-and-maturing-of.html>.

³⁵ Formerly known as the Online Interest-Based Advertising Accountability Program. See CARU's Request for Commission Approval of Continuance of Safe Harbor Status, supra note 23 at 1 ("CARU will work with its sister ASRC program, the Online Internet-Based Advertising Accountability Program, to provide monitoring and oversight with respect to changes to the regulations governing the collection of online and mobile data by third parties for advertising and other purposes, as well as the collection of newly defined forms of personal information that are within the scope of the Accountability Program's expertise."). COPPA compliance is incorporated by reference in the principles enforced by the Digital Advertising Accountability Program. See DIGITAL ADVERTISING ALLIANCE, SELF-REGULATORY PRINCIPLES FOR ONLINE BEHAVIORAL ADVERTISING at VI(A) (2009).

³⁶ As part of CARU's commitment to transparency, all case decisions may be viewed in the BBB National Programs Case Report at <https://case-report.bbbnp.org/>.

referred Musical.ly to the FTC.³⁷ The FTC acknowledged CARU's action in helping bring attention to this matter when it announced its then record-breaking \$5.7 million settlement with the company.³⁸

IV. Conclusion

A close review of the last twenty years of experience with the COPPA safe harbor provision demonstrates two important facts. First, that this portion of the law provides tangible benefits to children, parents, and businesses. Second, that these benefits have been delivered without any lessening of the enforceability of the important safeguards provided by the statute, including the ample protections against potential manipulation by businesses or safe harbor providers.

When Congress enacted the COPPA safe harbor provisions, its goal was to increase compliance by leveraging industry self-regulatory resources, thus protecting children. By any measure, these goals have been accomplished. All that is left is to encourage wider adoption by providing incentives for businesses to hold themselves to safe harbor standards. In the area of children's online privacy, the safe harbor approach has been successful in promoting compliance, reducing regulatory uncertainty, and promoting the protection of consumer privacy. Similar co-regulatory structures could be equally successful in other policy areas.

³⁷ Press Release, BBB National Programs, CARU Refers Musical.ly to FTC After App Operator Declines to Comply with CARU's Privacy Recommendations (Apr. 24, 2018), <https://asrcreviews.org/caru-refers-musical-ly-to-ftc-after-app-operator-declines-to-comply-with-carus-privacy-recommendations/>.

³⁸ Press Release, Fed. Trade Comm'n, Video Social Networking App Musical.ly Agrees to Settle FTC Allegations That it Violated Children's Privacy Law (Feb. 27, 2019), <https://www.ftc.gov/news-events/press-releases/2019/02/video-social-networking-app-musically-agrees-settle-ftc>.