

***Before the***  
**FEDERAL TRADE COMMISSION**  
**Washington, DC 20580**

In the Matter of )  
 )  
True Ultimate Standards Everywhere, Inc., a ) File No. 132 32193  
corporations, d/b/a TRUSTe, Inc. – Consent )  
Agreement )

**COMMENTS ON PROPOSED AGREEMENT AND CONSENT ORDER**

The Center for Digital Democracy (“CDD”), through its counsel the Institute for Public Representation, along with American Academy of Child and Adolescent Psychiatry, Campaign for a Commercial Free Childhood, Consumer Action, Consumer Federation of America, Consumer Watchdog, and The Rudd Center for Food Policy and Obesity (“CDD, *et al.*”) comment on the proposed *Agreement and Consent Order* between the Federal Trade Commission (“FTC”) and True Ultimate Standards Everywhere, Inc. (“TRUSTe”).<sup>1</sup> While CDD, *et al.* appreciate that the FTC has taken an enforcement action designed to ensure that one of the largest COPPA safe harbor programs stops misrepresenting important information, we urge the FTC to revise and strengthen the *Consent Order*’s requirements and penalties to ensure they effectively protect children’s privacy.

Assessing the extent of the harm caused by TRUSTe’s misrepresentations is difficult due to the lack of information provided by the FTC. Nonetheless, it is clear that the misrepresentations were serious and widespread and the proposed \$200,000 payment to the U.S. Treasury is far too low to deter future violations. Also, while CDD, *et al.* support the proposal to impose additional reporting and record keeping requirements on TRUSTe, these reports, along with the regular annual reports that COPPA safe harbor operators are already required to file with the FTC, should be made available to the public. Without public disclosure, parents cannot know that a website or online service displaying the TRUSTe “Kids Privacy” seal actually complies with COPPA.

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<sup>1</sup> 79 Fed. Reg. 69850 (Nov. 24, 2014).

## I. Background

Safe harbors such as TRUSTe play a pivotal role in protecting children’s privacy by prohibiting the collection, use, and disclosure of personal information without meaningful notice to parents and verifiable parental consent, limiting the amount of data collected from children, and protecting the security of data that is collected. Congress established safe harbors to “provide incentives for self-regulation by operators to implement the protections afforded children.”<sup>2</sup> COPPA specifies that “[s]uch incentives shall include provisions for ensuring that a person will be deemed to be in compliance with the requirements of the regulations under section 6502 of this title if that person complies with guidelines that, after notice and comment, are approved by the Commission upon making a determination that the guidelines meet the requirements of the regulations issued under section 6502 of this title.”<sup>3</sup>

The FTC rule implementing COPPA requires that safe harbors “provide substantially the same or greater protections for children” as those contained in the COPPA Rule.<sup>4</sup> In its recent update of the COPPA Rule, the FTC amended its reporting and record keeping requirements to require approved safe harbor programs to

By July 1, 2014, and annually thereafter, submit a report to the Commission containing, at a minimum, an aggregated summary of the results of the independent assessments conducted under paragraph (b)(2) of this section, a description of any disciplinary action taken against any subject operator under paragraph (b)(3) of this section, and a description of any approvals of member operators’ use of a parental consent mechanism, pursuant to § 312.5(b)(4).<sup>5</sup>

The revised rule also requires that safe harbor operators maintain certain records for three years and to make additional information available to the FTC promptly upon request.<sup>6</sup>

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<sup>2</sup> 15 USC § 6503(b)(1).

<sup>3</sup> 15 USC § 6503(b)(2).

<sup>4</sup> 16 CFR § 312.11(b)(1).

<sup>5</sup> 16 CFR § 312.11(d)(1).

<sup>6</sup> 16 CFR § 312.11(d)(2)-(3).

The FTC originally certified TRUSTe’s COPPA safe harbor program 2001.<sup>7</sup> TRUSTe filed for recertification on June 25, 2013.<sup>8</sup> As of 2010, TRUSTe “service[d] the largest number of companies and websites among the . . . safe harbor programs.”<sup>9</sup> TRUSTe certified over 7,600 online properties in 2013 and over 7800 in 2012.<sup>10</sup> These numbers include all of TRUSTe’s seal programs, including its “Kids Privacy” COPPA safe harbor seal, which account for roughly 150 online properties.<sup>11</sup> Websites displaying TRUSTe’s “Kids Privacy” COPPA seal include many of the most popular children’s websites including Disney’s children’s websites<sup>12</sup> and Primary Games.<sup>13</sup>

#### **A. The FTC’s Complaint**

The Commission’s complaint alleges that TRUSTe operates a variety of privacy seal programs, including but not limited to “COPPA/Children’s Privacy (2001), which certifies compliance with the FTC’s Children’s Online Privacy Protection Act Rule; EU Safe Harbor (2002), which assists with certification to the EU-US Safe Harbor framework for transatlantic data transfers; TRUSTed Downloads (2006), which certifies software; TRUSTed Cloud (2011),

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<sup>7</sup> Letter from Donald S. Clark, Secretary, FTC, to Rebecca Richards, Dir. Compliance and Policy, TRUSTe, Application of TRUSTe, Children’s Online Privacy Protection Rule Safe Harbor Program, May 21, 2001, *available at* <http://www.ftc.gov/system/files/attachments/press-releases/truste-earns-safe-harbor-status/010521appoftruste.pdf>.

<sup>8</sup> Letter from Tim Sullivan, Chief Financial Officer, TRUSTe, to Office of the Secretary, FTC, Submission of TRUSTe’s Updated Children’s Privacy Program Under Section 312.11(e) of the Children’s Privacy Protection Rule, June 25, 2013, <https://www.ftc.gov/sites/default/files/attachments/press-releases/revised-childrens-online-privacy-protection-rule-goes-effect-today/130701tustecoppaapplication.pdf>.

<sup>9</sup> TRUSTe Comments, July 12, 2010, *available at* [http://www.ftc.gov/sites/default/files/documents/public\\_comments/2010-childrens-online-privacy-protection-act-rule-review-547597-00073%20A0/547597-00073-54984.pdf](http://www.ftc.gov/sites/default/files/documents/public_comments/2010-childrens-online-privacy-protection-act-rule-review-547597-00073%20A0/547597-00073-54984.pdf).

<sup>10</sup> TRUSTe Transparency Report: 2013, May 2014, *available at* <http://www.truste.com/window.php?url=http://download.truste.com/TVarsTf=3L0AXBj0-470>.

<sup>11</sup> Letter from Tim Sullivan, *supra* note 8, at 1. Neither the FTC nor TRUSTe has disclosed the identity of those 150 properties.

<sup>12</sup> Children’s Online Privacy Policy, Disney, <https://disneyprivacycenter.com/kids-privacy-policy/english> (last visited Dec. 17, 2014).

<sup>13</sup> Primary Games, <http://www.primarygames.com> (last visited Dec. 17, 2014).

which certifies data processing services through cloud platforms; TRUSTed Apps (2011), which certifies mobile applications; and TRUSTed Data (2011), which certifies data collection practices of non-consumer facing entities.”<sup>14</sup> It further alleges that TRUSTe represented to the public that it recertified websites and services displaying a TRUSTe seal on an annual basis to, among other things, check compliance with “external third-party program requirements (e.g., Federal Trade Commission Children’s Online Privacy Protection Act safe harbor . . . .”<sup>15</sup> In the case of the COPPA seal, TRUSTe has made these representations since 2001.<sup>16</sup>

The Complaint alleges two counts of misrepresentation in violation of Section 5 of the FTC Act. The first count alleges that despite TRUSTe’s representations that it recertified its members annually, “[i]n fact, from 2006 until January 2013, Respondent did not conduct annual recertifications for all companies holding TRUSTe Certified Privacy Seals. In over 1,000 instances, TRUSTe conducted no annual review of the company’s compliance with applicable Program Requirements.”<sup>17</sup> The “Analysis of Proposed Consent Order To Aid Public Comment” in the Federal Register states, somewhat inconsistently, that “the complaint alleges that from *June 1997* until January 2013, respondent failed to conduct annual recertifications for *almost* 1,000 companies holding respondent’s TRUSTed Websites, COPPA/Children’s Privacy, EU Safe Harbor, TRUSTed Cloud, TRUSTed Apps, TRUSTed Data, and TRUSTed Smart Grid seals.”<sup>18</sup>

The second count of misrepresentation charges that TRUSTe “furnished the means and instrumentalities” for member companies to misrepresent TRUSTe’s corporate status. The

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<sup>14</sup> FTC Complaint, at 2.

<sup>15</sup> FTC Complaint, at 3.

<sup>16</sup> FTC Complaint, at 3.

<sup>17</sup> From 2006-2011, TRUSTe claimed that “[p]articipant[s] must seek recertification by TRUSTe annually.” FTC Complaint, at 3. From 2011-2013, TRUSTe stated that “[p]articipant[s] shall undergo recertification to verify ongoing compliance with these Program Requirements annually.” FTC Complaint, at 4.

<sup>18</sup> 79 Fed. Reg. 69850, 69851 (Nov. 24, 2014) (emphasis added).

Complaint alleged that even after TRUSTe became a for-profit company in 2008, TRUSTe allowed its member sites to describe TRUSTe as a non-profit.<sup>19</sup>

**B. The proposed *Consent Order***

Parts I and II of the proposed *Consent Order* prohibit TRUSTe from directly or indirectly misrepresenting its practices regarding its seal certification programs, including its practices regarding evaluation, certification, review or recertification, or corporate status, or providing the means and instrumentalities to any person or entity to do so. Part III of the *Consent Order* requires TRUSTe to file with the FTC the following information as part of its COPPA annual report for the next ten years:

- The total number of new seals awarded in the prior year, and
- A detailed explanation of the mechanisms used by TRUSTe to assess fitness of new applicants and existing participants.

Part IV of the *Consent Order* requires TRUSTe to retain, for ten years, the following information regarding its COPPA safe harbor program:

- A detailed explanation of assessments TRUSTe conducted during the prior year to determine the fitness of new applicants and existing participants,
- Any documents related to consumer complaints,
- Any documents related to disciplinary actions taken against member operators, and
- Any documents related to approvals of parental consent mechanisms.

Part VI requires TRUSTe to retain for five years promotional materials, consumer complaints, communications with law enforcement, and all other documents relating to the compliance with the order. Part V requires that TRUSTe “pay \$200,000 to the United States Treasury as disgorgement.”

**II. Although assessing the harm caused by TRUSTe’s misrepresentations is difficult due to the lack of information provided by the FTC, it is clear that the misrepresentations were serious and widespread.**

As a general matter, the FTC’s lack of transparency regarding COPPA safe harbor programs makes commenting on the efficacy of the *Consent Order* difficult. While the FTC

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<sup>19</sup> FTC Complaint, at 4-5.

sought public comment on TRUSTe's initial application in 2001, it did not seek public comment on TRUSTe's recertification request filed in 2013. Nor has the FTC made publicly available any of the reports required by the revised COPPA rule. CDD filed a FOIA request for these annual reports in July 2014. When the FTC failed to comply by December 2014 (well beyond the statutory twenty-day deadline), CDD filed a complaint in the District Court of the District of Columbia.

The Complaint, proposed *Consent Order*, and "Analysis of Proposed Consent Order To Aid Public Comment" in the Federal Register provide little detail. They do not specify which of the TRUSTe seal programs failed to conduct annual certifications. They do not identify which websites or online services were not reviewed annually but displayed TRUSTe seals, nor which websites or online services falsely described TRUSTe as a non-profit organization. Other important questions that are not answered include how many consumers did these violations affect? how long did websites go without recertification? how long were websites or services misrepresenting TRUSTe as a non-profit organization when it was not? how much revenue did TRUSTe earn from falsely certifying websites or service?

Nonetheless, there are good reasons to believe that TRUSTe's "Kids Privacy" COPPA safe harbor program was responsible for many of the misrepresentations at issue. First, the COPPA safe harbor is the only TRUSTe seal program required to report to the FTC. The FTC filed the complaint approximately four months after TRUSTe filed its first COPPA safe harbor annual report. Second, the violations date back to either 2006 or 1997, and TRUSTe's COPPA safe harbor program has been operating since May 2001, longer than many of TRUSTe's other seal programs. Finally, all of the reporting and recordkeeping provisions of the proposed consent decree pertain to the COPPA safe harbor.

Even though the extent of misrepresentations regarding TRUSTe's COPPA safe harbor program is unclear, any misrepresentation should be of serious concern. Parents want to protect their children from the risks of online profiling, having their child's personal information collected and used for behavior advertising, or having that personal information be disclosed to

third parties. Yet, because of the complexity and length of privacy policies, parents are more apt to allow children to use websites with an FTC-approved COPPA safe harbor seal. TRUSTe, in particular, is probably the best known provider of privacy certifications given its size. It also matters to parents whether the entity conducting the review of a website's privacy practices is a non-profit organization or whether the safe harbor has a financial incentive to certify members. For each website displaying a misleading TRUSTe seal, many thousands of consumers including parents were likely misled.

In addition to misleading many consumers, TRUSTe lied to the Commission by claiming it was recertifying its members annually. In its June 2013 application for reapproval as a safe harbor, TRUSTe stated that all participants in its COPPA safe harbor program "shall undergo re-certification to verify ongoing compliance" at least annually.<sup>20</sup> If the FTC is going to rely on safe harbor programs to enforce COPPA and to "deem" companies displaying safe harbor seals to be in compliance, it is important that the FTC have complete confidence in the accuracy and truthfulness of statements made by the safe harbor operator.

### **III. The FTC should require TRUSTe to disgorge more of its profits.**

Given the seriousness and extent of TRUSTe's misrepresentations, imposing a payment of only \$200,000 is far too low. Disgorgement is "designed to deprive a wrongdoer of his unjust enrichment and to deter others" from future violations.<sup>21</sup> The \$200,000 payment, which amounts to \$200 per violation, is too little to deprive TRUSTe of its unjust enrichment.<sup>22</sup> Further, the payment will not deter other safe harbor programs because COPPA safe harbors are likely to regard such a minimal payment as a cost of doing business. If safe harbor programs are not meticulous in administering their guidelines, millions of children and parents will be at risk across potentially hundreds or thousands of child-directed websites.

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<sup>20</sup> Letter from Tim Sullivan, *supra* note 8, App'x A at 6.

<sup>21</sup> *SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1230 (D.C. Cir. 1989).

<sup>22</sup> This is based on 1,000 violations and a \$200,000 payment. If there were more than 1,000 violations, as the FTC Complaint indicates, then the disgorgement is below \$200 per violation.

The proposed payment is much lower than payments assessed on other companies that were alleged to have violated COPPA. These include

- \$1 million against Artist's Arena for allowing children to publicly post information on fansites,<sup>23</sup>
- \$800,000 against Path, Inc. for collecting personal information from users' mobile phones without their knowledge and consent,<sup>24</sup>
- \$300,000 against TinyCo. for collecting children's emails,<sup>25</sup> and
- \$450,000 against Yelp for collecting registration information with actual knowledge that some users were children.<sup>26</sup>

These companies are individual operators responsible only for their individual websites and services. TRUSTe, on the other hand, is a safe harbor organization, whose very purpose is to monitor the websites carrying its seals and whose member websites are immune to direct FTC enforcement. The fact that these individual operators were fined more than the FTC proposes to fine TRUSTe calls into question the effectiveness of the safe harbor program and the FTC's oversight of it.

**IV. The FTC should require annual reports from TRUSTe for the full term of the *Consent Order* and should require TRUSTe to publicly disclose that information; the FTC should also change its practices regarding public disclosure of safe harbor reports.**

The reporting and record keeping requirements should remain in effect throughout the entire twenty year term of the *Consent Order* rather than only the first ten years as proposed. If the reporting does not coincide with the term of a consent decree, it undermines the purpose of a

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<sup>23</sup> Operator of Celebrity Fan Websites to Pay \$1 Million to Settle FTC Charges that It Illegally Collected Children's Information Without Their Parents' Consent, Federal Trade Commission (Oct. 4, 2012), <http://www.ftc.gov/news-events/press-releases/2012/10/operator-celebrity-fan-websites-pay-1-million-settle-ftc-charges>.

<sup>24</sup> Path Social Networking App Settles FTC Charges it Deceived Consumers and Improperly Collected Personal Information from Users' Mobile Address Books, Federal Trade Commission (Feb. 1, 2013), *available at* <http://www.ftc.gov/news-events/press-releases/2013/02/path-social-networking-app-settles-ftc-charges-it-deceived>.

<sup>25</sup> Yelp, TinyCo Settle FTC Charges Their Apps Improperly Collected Children's Personal Information, Federal Trade Commission (Sept. 17, 2014), *available at* <http://www.ftc.gov/news-events/press-releases/2014/09/yelp-tinyco-settle-ftc-charges-their-apps-improperly-collected>.

<sup>26</sup> *Id.*



consent decree to make it easier for the FTC to obtain enforcement. Moreover, the ten year timeframe does not comport with other recent consent orders. For example, in the consent decree resulting from Google's misrepresentations about Google Buzz,<sup>27</sup> the FTC required Google to obtain biennial assessments of its privacy policies by an independent third party for the full twenty-year period. The FTC imposed this requirement even though Google's misrepresentations occurred over a short period of time compared to TRUSTe.<sup>28</sup>

Finally, because TRUSTe's misrepresentations were numerous and occurred over a long period of time, CDD, *et al.* cannot help but question the FTC's willingness and ability to closely monitor the activities of the COPPA safe harbors. It is unfair for parents to have no alternative but to rely on the FTC's sporadic enforcement efforts to be sure that TRUSTe's (and other safe harbors') representations are correct. Yet, that is exactly what will result if the FTC approves the consent decree as proposed. Instead, the FTC should, as a condition of settlement, clarify that all reports filed by TRUSTe with respect to COPPA and this *Consent Order* will be made available to the public on the FTC's website in a timely manner. TRUSTe already discloses similar information in its transparency reports so this should impose no burden. Further, the FTC should change its general practice to require public disclosure of all COPPA safe harbor reports under 16 CFR § 312.11(d). If the FTC were to make all annual reports public, then the public could take a more active role in assisting the FTC's compliance efforts.

### **Conclusion**

For the reasons stated above, CDD, *et al.* urge the FTC to revise the proposed *Consent Order* to increase the amount of the payment and to require reporting to both the FTC and the public for the entire term of the proposed decree.

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<sup>27</sup> FTC Gives Final Approval to Settlement with Google over Buzz Rollout, Federal Trade Commission (Oct. 24, 2011), <http://www.ftc.gov/news-events/press-releases/2011/10/ftc-gives-final-approval-settlement-google-over-buzz-rollout>.

<sup>28</sup> Decision and Order at 3-5, *In the Matter of Google Inc.*, FTC, <http://www.ftc.gov/sites/default/files/documents/cases/2011/10/111024googlebuzzdo.pdf>.

Respectfully submitted,

/s/

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