



March 11, 2024

Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue NW
Suite CC-5610 (Annex E)
Washington, DC 20580

VIA ONLINE SUBMISSION

Re: Comments of Engine Advocacy regarding COPPA Rule Review, Project No. P195404

To whom it may concern:

Engine is a non-profit technology policy, research, and advocacy organization that bridges the gap between policymakers and startups. Engine works with government and a community of thousands of high-technology, growth-oriented startups across the nation to support the development of technology entrepreneurship. Technology startups innovate and create products in a wide range of areas—that may be directed to children, to a mixed audience, for a general audience, or to further education (or none of these, like those for enterprise or providing infrastructure)—and they all need clear, straightforward rules around children’s privacy in order to succeed and compete with large industry players. Accordingly, we appreciate the ability to comment as the Commission continues its work to ensure its COPPA rules remain up-to-date.

I. Startups and determining their users and responsibilities under COPPA.

As a general matter, a startup needs to understand who their users are to understand where they fit into the COPPA Rule, and clarity is essential to arrive at good outcomes for both services and their users. For example, the operator of a service directed to children understands that they must comply with the Rule. General audience services (which describes most consumer-facing startups) understand that they must take appropriate actions for users they have actual knowledge are under the age of 13. That is presently a clear standard and we appreciate the Commission’s acknowledgement in the Notice of our earlier comments highlighting how “moving from the “bright-line” standard of actual knowledge to a less clear constructive knowledge standard could disproportionately burden small companies and start-ups.”¹ Likewise, the Commission proposes a definition of mixed audience, which is designed to increase clarity, and helpfully recognizes those

¹ Children’s Online Privacy Protection Rule, 89 Fed. Reg. 2037 at Part II.B (Jan 11, 2024) (to be codified at 16 CFR Part 312), <https://www.govinfo.gov/content/pkg/FR-2024-01-11/pdf/2023-28569.pdf>.

services for which children are an audience, but not a primary audience. The Commission also critically recognizes the importance of continuing to extend flexibility to services in how they determine if users are under the age of 13. This is important especially for startups who may suffer from prescriptive requirements about which methods they must use, because some are prohibitively expensive or otherwise unworkable for services of their size.²

II. Third parties should be disclosed as categories in the online notice.

Internet companies, especially startups, rely on many types of third parties to build and make their services available to end users—for example, to provide cloud hosting, storage, or other infrastructure.³ Many of the third parties in a startups technology stack are unlikely to be familiar to parents, like content delivery networks or software development kits, etc. In the interest of maintaining clear and concise direct notices that both ease burdens on startups and place parents’ attention on truly important disclosures, this information should be relayed in the online notice. Moreover, the particular third-party services, so long as they maintain the confidentiality, security, and integrity assurances required by other areas of the COPPA rule, are unlikely to be important to parents, and therefore make most sense disclosed as categories.

III. Clarify product development under school exception.

School is an important place children encounter and learn to use technology, and encouraging and enabling its proper and responsible use is critical. Likewise, many startups develop and make available education technology that is used in the classroom to enhance learning. Enabling schools to authorize data collection for educational purposes is the most efficient way to obtain consent in an educational setting, which is why we appreciate the Commission proposing to include the school exception in the COPPA Rule.

In narrowly tailoring the exception, and despite providing some context for how it views the exception, however, the Commission may be limiting product development that is beneficial for students and should provide further clarity or perhaps broaden the exception. In discussing the exception, the Notice highlights how operators are permitted to “improve the service, for example, by [...] adding new features, or develop a new version of the service” but they “may not use the information it collected from one educational service to develop or improve a different service.”⁴ How a service is construed (as *different* or a *new version*) may mean beneficial and straightforward uses of data might be foreclosed, and the difference is not particularly clear. Consider, for example, how

² *More than just a number: How determining user age impacts startups*, Engine (Feb. 2024), <https://static1.squarespace.com/static/571681753c44d835a440c8b5/t/65d8b6ab876bfd5b70f8795e/1708701355604/ENAL+-+2024+More+Than+Just+A+Number.pdf>.

³ *Tools to Compete: Lower Costs, More Resources, and the Symbiosis of the Tech Ecosystem*, Engine and the Computer & Communications Industry Association Research Center (Jan. 2023), https://static1.squarespace.com/static/571681753c44d835a440c8b5/t/63d2b8d5bec96f502264fd1f/1674754266044/ENAL_CCIA-Engine_Tools-To-Compete.pdf.

⁴ *Notice*, *supra* note 1, at Part IV.C.3.a.ii.

the contours of the exception may prohibit (as a range of possibilities) a math game startup from developing a science game that integrates a student's math knowledge, from developing new math games, but for a different grade that the same student is advancing into, or from tracking student's progress over time. Contrast those examples with using that data to develop a racing entertainment game, which would be an unexpected use to develop an unrelated service. The Commission rightly wants to mitigate abuse of the exception, and it can more clearly draw the line while enabling beneficial product improvements by proscribing the use of information for development of an *unrelated* service.

IV. Facilitation of contextual advertising should continue to be permitted.

Startups, including those subject to obligations under the COPPA Rule, utilize a range of business models, including by serving advertisements. Contextual advertising is a needed avenue of monetization for those services that rely upon it, and it is permitted under the current COPPA Rule as the Notice underscores. Somewhat alarmingly, however, the Notice contemplates changing the treatment of contextual advertising. The Commission should decline to impinge on the facilitation of contextual advertising because doing so would upend business models relied upon by some startups and shrink the universe of services available.

V. Safe harbors are critical for startups.

Safe Harbor programs are an integral to how many startups subject to COPPA approach, achieve, and maintain compliance with the COPPA Rule. Low resourced companies, like startups, are helped by Safe Harbor programs' expertise and familiarity with the Rule (and, often, how it interacts with other privacy statutes), which can comparatively lower compliance burdens while providing a valuable signal to parents and others about the quality, privacy, and security of the service. Of course, startup participants in Safe Harbors also benefit from the enforcement shield they provide. The Commission has proposed several expansions of disclosure and other requirements for Safe Harbor programs. These new requirements are likely to add both practical and monetary burdens to programs themselves, which are likely to consequently impact their constituent subject operators. The Commission should pay particular attention to how program operators expect to respond to these proposed changes—e.g., by increasing fees—and how those responses will impact accessibility and participation for startups.

VI. Recognize disproportionate burdens and competitive impacts for startups.

The proposed Rule would create many new disclosure and other requirements for operators, leading to increased costs, and the economic burdens of these requirements would fall disproportionately upon startups. By the Commission's estimation, there are likely to be more than 4,500 small

entities—many of them likely startups—subject to the COPPA Rule.⁵ Startups do not have in-house legal departments to consult (as larger entities and competitors often do) and instead must rely upon more expensive outside counsel.⁶ Startups are often operating on severely constrained budgets or might not yet be revenue generating, meaning each additional expense shortens their runway, or the amount of time before they need to raise additional capital or cease operations.⁷ Moreover, those resources—and the time of the startup’s leadership—spent on compliance are limited time and resources not spent on other critical business activities central to a small startup’s growth and success. The Commission should recognize that the economic costs of the Rule fall disproportionately upon startups and can negatively impact their competitiveness.

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Thank you for considering our feedback as the Commission considers updates to the COPPA Rule. Startups have a vested stake in the outcome of the Commission’s proposed updates because they need the rules around children’s privacy to be clear, practical, and straightforward in order to succeed and compete with large industry players. We look forward to engaging with the Commission as the process continues.

Sincerely,

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⁵ Notice, *supra* note 1, at VI-VII.

⁶ *Privacy Patchwork Problem: Costs, Burdens, and Barriers Encountered by Startups*, Engine (Mar. 2023), <https://static1.squarespace.com/static/571681753c44d835a440c8b5/t/6414a45f5001941e519492ff/1679074400513/Privacy+Patchwork+Problem+Report.pdf>, (discussing legal costs with regard to privacy policy).

⁷ *the State of the Startup Ecosystem*, Engine (Apr. 2021), <https://static1.squarespace.com/static/571681753c44d835a440c8b5/t/60819983b7f8be1a2a99972d/1619106194054/The+State+of+the+Startup+Ecosystem.pdf>, (discussing the resources, lifecycle, priorities and tradeoffs encountered by startups).