



April 17, 2024

Committee on Energy and Commerce
Subcommittee on Innovation, Data, and Commerce
2125 Rayburn House Office Building
Washington, D.C. 20515

VIA EMAIL

Re: Hearing titled “Legislative Solutions To Protect Kids Online And Ensure Americans’ Data Privacy Rights.”

Honorable Members of the Subcommittee on Innovation, Data, and Commerce:

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. Startups are creating new and innovative products that better the lives of users of all ages, improving the way individuals learn, work, and play. As a nonprofit that works to advance a policy environment where startups can succeed, we appreciate your attention to issues important to them, including the experiences of their customers.

Startups take seriously their commitments to their users to create beneficial products and services while protecting their privacy and working to ensure a safe, relevant, and healthy user experience, including by upholding their obligations under current law and employing industry best practices. However, the current regulatory landscape around data privacy is fractured and undermines the competitiveness of startups. We write to call attention to the ways legislation considered in this hearing would exacerbate those problems and to applaud the ways the legislation would solve them.

H.R. _____, American Privacy Rights Act (APRA) discussion draft

Startups have encountered increasing burdens from a growing patchwork of unique state privacy laws,¹ and the uniform national standard to be created by this legislation would be a welcome step. We believe that this draft can continue to be improved to mitigate adverse impacts on U.S. startups.

¹ *Patchwork Privacy Problem*, Engine (March 2023), <https://static1.squarespace.com/static/571681753c44d835a440c8b5/t/6414a45f5001941e519492ff/1679074400513/Privacy+Patchwork+Problem+Report.pdf>.

- *Startups are not successfully exempted and small business exemption should be accordingly revised.* The draft includes a 3-part definition: (1) have \$40,000,000 or less in annual revenue; (2) collect, process, retain, or transfer the covered data of 200,000 or fewer individuals; *and* (emphasis added) (3) do not earn revenue from the transfer of covered data to third parties. Part (1) is likely close to a sufficiently high revenue number, almost certainly ruling out startups that are Series B or smaller. Contrastingly, part (2) is too low. Many startups, even some pre-revenue startups may have covered data from more than 200,000 individuals. (Depending on business model, startups can reach 200,000 user accounts before generating much revenue, and some startups use waitlists to understand what features they should develop or to demonstrate consumer interest to investors). (Part (3) is not particularly relevant for startups). This definition will exempt many conventional small businesses but many startups will quickly find themselves in-scope.

Most state laws have thresholds for personal information of 100,000 individuals or more, except a few smaller states that lowered it because of their small populations.² The threshold in the APRA is only twice what most of the states have enacted, but in percentage terms, it is much lower. The average U.S. state has a population of about 5.7 million, and 100,000 is about 1.75 percent of that. The population of the U.S. is about 333.3 Million, and 200,000 is about 0.06 percent. To remain on parity with state exemptions, this threshold would need to be revised upward to well over 5 million.

Most startups will be in scope of the APRA, or otherwise plan to grow to a point where they will be and, should it become law, will build their companies with the APRA in mind. To mitigate the negative impacts of scoping in startups so soon, there are a variety of options: change “and” to “or” in the definition of small business, remove the 200,000 element of the definition, or alternatively revise the individuals’ data threshold significantly upward.

- *Obligations under the APRA may cause new burdens for startups.* While some of the requirements in the draft law may be familiar, several will be new to startups and may alter their business plans, competitiveness, and trajectory. For example, some startups — especially those in the early stages and those that offer free services to consumers — often rely on data-driven advertising revenue or reach consumers through such advertisements. The draft’s changes to this type of advertising would impact those companies. Some startups’ main product is to provide an algorithm that leads to better or different outcomes for those categories, like credit or employment. It is unclear if startups will be able to facilitate alternatives for those decisions, and not providing them is unlikely to be an option since that could be considered retaliation, which is prohibited. Finally, data minimization may impact future product development for startups, particularly those in data-driven spaces, like AI, or those looking to enhance their current offerings with AI in the future. For example, many startups can order content manually or with a basic algorithm at launch and will look to build machine learning algorithms to personalize ordering of content in the future. Revising the small business exemption or revisiting many

² *E.g.*, lower population states include Montana, New Hampshire, and Delaware.

requirements in the discussion draft with the impact on startups in mind is essential to lessen headwinds to be created for startups.

- *Enforcement by private lawsuits is poised to enable bad-faith litigation.* Creating a private right of action is particularly concerning for startups, who have few resources and who don't have in-house counsel. The earlier American Data Privacy and Protection Act (H.R.8152 - 117th Congress) also included enforcement by private lawsuits, but that bill had some safeguards (and a longer cure period) that drafters thought could curb abusive or bad-faith litigation. Under that bill, an individual (or class of individuals) that wanted to sue needed to first confer with their state attorney general and the FTC, who had 60 days to determine if their agencies would independently take action. Only if neither enforcer decided to pursue the case, could the individual continue with their lawsuit. That was still somewhat problematic because it would lead to a selection problem where the least meritorious private lawsuits could proceed, but the APRA does not even have these safeguards.

The APRA could set up a “privacy troll” problem impacting startups.³ Private lawsuits — or even the threat of lawsuits — negatively impact startups, which don't have the resources to withstand litigation that can cost hundreds of thousands of dollars. To mitigate the threat of abuse, particularly against startups, enforcement should be left to expert agencies, or, at a minimum, meaningful safeguards should be added to the private method of enforcement.

H.R. 7890, Children and Teens' Online Privacy Protection (COPPA 2.0) Act

This legislation will expand the amount of startups subject to COPPA, create new burdens and exacerbate costs for such operators, and create incentives that either lead to age verification or fewer services for ages newly covered under COPPA.⁴ Startups need clear, bright-line rules that are easily implementable. Actual knowledge is exactly that, enabling startups to more easily comply with the COPPA Rule. This legislation changes and muddies the clarity of the knowledge standard. Knowledge fairly implied amounts to a “you should have known” standard, and a totality of circumstances test is exactly the opposite of a clear, bright line rule. Startups look to predictable, consistent methods of compliance, because they need to focus their limited resources on fundamental business activities. As a consequence, for startups, implementing this standard is likely to involve reliance on age verification technology. In spite of it being explicitly not required by the legislation, it will likely be necessary in practice. That is problematic because age verification is expensive to procure, is time consuming to integrate, reduces services' growth, and poses fundamental problems for individuals' privacy.⁵

³ *The Coming Privacy Troll Problem*, Engine (May 31, 2019), <https://engineadvocacyfoundation.medium.com/the-coming-privacy-troll-problem-4363695220d6>.

⁴ *More than just a number: How determining user age impacts startups*, Engine (Feb. 2024), <https://static1.squarespace.com/static/571681753c44d835a440c8b5/t/65d8b6ab876bfd5b70f8795e/1708701355604/FINAL+-+2024+More+Than+Just+A+Number.pdf>.

⁵ *Id.*

H.R. 7891, Kids Online Safety Act

This legislation has gone through many iterations in this and previous Congresses in the Senate, and we remain concerned about how the bill would impact content made available online, and introduce new burdens about how to design services and moderate content online. Like concerns about the scope of definitions above, the bill's approach to defining "know" includes a high revenue threshold that scopes out startups of higher obligations, but a 200,000 individuals element that would include many. The bill seems to acknowledge that actual knowledge is important as a clear, implementable standard for startups and small covered platforms. Unfortunately they might be subject to higher standards regardless. Startups performing age verification is problematic for all the reasons outlined above, and the drawbacks of this technology cut against the goals of this bill and startup competitiveness—leaving the large competitors that Members are most worried about as the primary offerings in the marketplace.

We appreciate the committee's work to bolster consumer protections online and strongly support efforts to create uniform federal privacy standards that provide clarity for startups and strong protections for their users of all ages. We encourage the committee to pursue legislation that protects consumers while avoiding the unintended consequences to startups, consumer privacy, data security, and online expression described above, and we look forward to engaging with the committee to improve this legislation impacting startups.

Sincerely,

Engine

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