



July 26, 2023

The Honorable Maria Cantwell  
Chair, Senate Commerce Committee  
United States Senate  
511 Hart Senate Office Building  
Washington, D.C. 20510

The Honorable Ted Cruz  
Ranking Member, Senate Commerce  
Committee  
United States Senate  
167 Russell Senate Office Building  
Washington, D.C. 20510

*Re: Kids Online Safety Act and the Children and Teens' Online Privacy Protection Act*

Dear Chair Cantwell and Ranking Member Cruz,

The Software & Information Industry Association (SIIA) writes today to request amendments to the language in the Kids Online Safety Act (KOSA) and the Children and Teens' Online Privacy Protection Act (COPPA 2.0). We appreciate the intent of sponsors to enact policies that protect children and teenagers online, but are concerned that both bills, as written, will unintentionally harm these vulnerable groups. Our members support protecting the privacy and safety of children and teens, and are working diligently to create safe and educational environments online. We hope policymakers will continue to refine language and that these bills can be passed with the support of all stakeholders.

By way of background, SIIA is the principal trade association for the software and digital content industry. Our members serve customers across the United States and include the nation's leading publishers and innovative developers of digital products and services for K-20 education, including digital instructional materials, education software and applications, online educational programs, professional development, and related technologies and services for use in education.

Our members are dedicated to ensuring Americans have a comprehensive experience at all points in their educational journey and have full access to reliable, factual information no matter their age. The proposed text in both KOSA and COPPA 2.0 is at odds with those principles. We are concerned that certain provisions in this legislation, as currently written, will unnecessarily prevent access to critical information. With some changes, however, these concerns could be mitigated: our suggestions are included in the annexes beginning on page 2 of this letter.

In a worst-case scenario, America's minors may fall behind others around the globe if they are left without access to educational information online to develop critical skills and knowledge and become fully engaged citizens after they turn 18. Skills for adulthood and the workforce require access to the internet and, while these bills attempt to foster the growth of an internet that does that, they unfortunately miss the mark.

We acknowledge and support the broad agreement by state and federal lawmakers about the need to protect children's privacy and safety. We agree that establishing legal guardrails for businesses is important work. We caution, however, that without a careful approach to balance all the rights afforded to Americans, some will be left behind.

We welcome an opportunity to work with the Committee to improve these bills to guarantee both security and educational opportunities for children and teens across the country.

Respectfully,

Paul Lekas  
Senior Vice President, Global Public Policy

Sara Kloek  
Vice President, Education & Children's  
Policy

### **Annex 1: Proposed Amendments to Kids Online Safety Act (S.1409)**

#### Scope

The definition of "online platform" and inclusion of "educational video game" in the definition of online video game is overly broad and could cover services used by children and minors at home for supplemental educational opportunities AND products designed to be used under contract with schools where the data is to be protected per federal and state laws. For example, a tool used by a school may help students share student generated content for group projects or may help students learn about historical trails used to cross the United States. Under the federal Family Educational Rights and Privacy Act, technology products used by schools and with access to student personally identifiable information, including educational video games, must be under the "direct control" of the school. These products are typically under contract with schools and have strict requirements on how the product may use, protect, and delete information. We believe educational technology in these cases should not be considered a covered platform under KOSA.

Further, it is unclear how educational technologies under contract with a school would meet both the obligations of this legislation and their obligations to schools under existing student privacy laws. Existing student privacy laws align to the spirit of the proposed Kids Online Safety Act so a simple clarification that those subject to the principles of existing laws are not subject to the terms of KOSA so long as they are in compliance with the requirements of student privacy laws would be appreciated.

## SUGGESTED LANGUAGE

Sec. 14 Relationship to other laws [replace section (1) and renumber accordingly]

- (1) The processing of personal data, to the extent that such data is subject to and processed in compliance with the Family Educational Rights and Privacy Act (20 U.S.C. 1232g; part 99 of title 34, Code of Federal Regulations) or a state law governing student privacy, is not subject to the provisions of this Act.
- (2) Nothing in this Act shall be construed to permit, allow, encourage, or authorize any Federal control over any aspect of any private, religious, or home school, whether or not a home school is treated as a private school or home school under State law.

### Duty of Care

We are concerned that certain provisions in this legislation, as currently written, may unnecessarily prevent access to critical information and harm the well-being of minors on the internet. Requirements may lead businesses to take steps to mitigate legal risk and aggressively block online content no matter the newsworthiness, appropriateness, or educational value of the information. We suggest minimal changes to the language to ensure minors will be able to access information on the internet.

## SUGGESTED LANGUAGE

### Sec. 3. Duty of Care

(a) PREVENTION OF HARM TO MINORS.—A covered platform shall take reasonable measures in the design and operation of any product, service, or feature that the covered platform knows is used by minors to ~~prevent and~~ mitigate the following harms to minors:

- (1) Consistent with evidence-informed medical information, the following mental health disorders: anxiety, depression, eating disorders, substance use disorders, and suicidal behaviors.
- (2) Patterns of use that indicate or encourage addiction-like behaviors.
- (3) Physical violence, online bullying, and harassment of the minor.
- (4) Sexual exploitation and abuse.
- (5) Promotion and marketing of narcotic drugs (as defined in section 102 of the Controlled Substances Act ([21 U.S.C. 802](#))), tobacco products, gambling, or alcohol.

(6) Predatory, unfair, or deceptive marketing practices, or other financial harms.

(b) LIMITATION.—Nothing in subsection (a) shall be construed to require a covered platform to prevent or preclude—

(1) prevent or preclude any minor from deliberately and independently searching for, or specifically requesting, content; ~~or~~

(2) prevent or preclude the covered platform or individuals on the platform from providing resources for the prevention or mitigation of the harms described in subsection (a), including evidence-informed information and clinical resources; or

(3) monitor content, communications, or user behavior on its service.

### Personalized Recommendation Systems

We are also concerned about KOSA's restrictions on personalized recommendation systems. Personalization is essential for organizing the vast amount of information on the internet and the functioning of many online products and services.

For kids and teens, personalized recommendations can help connect younger users to high-quality, developmentally appropriate content that is best-suited to their individual needs and interests.

In a school setting, personalized learning and adaptive learning can help students advance through learning objectives at their own pace or identify areas where they need help.

While we appreciate the new rule of construction saying nothing shall be construed to prevent a covered platform from using a personalized recommendation system to display content to a minor under certain circumstances, a covered platform may still not be able to deliver recommendations based on a user's search query, device type, or time of day, as that could all be considered personal information.

In addition, the requirement in Sec. 4(a)(1)(D)(i) that covered platforms still allow the display of content based on a chronological format for users that opt out will only help bad actors eager to take advantage of chronological ordering to reach more consumers with spam and other low-quality or harmful content. We urge the Committee to strike this requirement.

SUGGESTED LANGUAGE

*Page 12 of Substitute*

Sec. 4 (a)(1)

(D) control personalized recommendation systems, including the ability for a minor to have at least 1 of the following options—

- (i) opt out of such personalized recommendation systems, ~~while still allowing the display of content based on a chronological format~~; or
- (ii) limit types or categories of recommendations from such systems;

- *And move (D) to Sec. 4(a)(2) "Options" so personalized recommendation systems do not have to be off by default per the requirement in Sec. 4(a)(3) that a covered platform provide "the most protective level of control that is offered by a platform over privacy and safety for that user."*

Sec. 4 (e)(3) Rules of Construction.—Nothing in this section shall be construed to—

[...]

(C) prevent a covered platform from using a personalized recommendation system to display content to a minor if the system only uses information on—

- (i) the language spoken by the minor;
- (ii) the geolocation of the minor; ~~or~~
- (iii) the minor's age;
- (iv) the minor's search query;
- (v) the minor's device type; or
- (vi) the time of day.

Preemption

We recommend adding language to address the growing patchwork of state laws relating to kids' online safety and establish one clear, national standard that brings clarity for children, families and industry.

SUGGESTED LANGUAGE

*Page 45 of Substitute*

*Insert the following new paragraph in Sec. 14. Rules of Construction and Other Matters (and renumber subsequent paragraphs accordingly)*

*(b) Relationship to State Laws.—No State or political subdivision of a State may adopt, maintain, enforce, prescribe, or continue in effect any law, regulation, rule, standard, requirement, or other provision having the force and effect of law of any State, or political subdivision of a State, related to the provisions of this Act, or a rule, regulation, or*

requirement promulgated under this Act. For purposes of this subsection, the term "State" means any of the 50 States, the District of Columbia, and any Territory of the United States.

### Knowledge Standard

The bill directs the Federal Trade Commission to "issue guidance to provide information, including best practices and examples, for covered platforms to understand the Commission's determination of whether a covered platform "had knowledge fairly implied on the basis of objective circumstances...". The phrase "knowledge fairly implied" is a term of art as used in FTC enforcement actions under section 5(a) of the FTC Act. The term of art is subject to regular judicial interpretation and was developed to apply in an enforcement context to a range of practices distinct from those of children's privacy. This bill would direct organizations to consider ahead of time steps necessary to carry out the bill's requirements. Using an enforcement standard designed for a different purpose that has evolved (and will continue to evolve) makes ex ante compliance nearly impossible. At the same time, it makes it difficult for parents, children, and teens to understand their rights and what to expect in an online environment. We strongly recommend that the bill be amended to include a more precise knowledge standard that does not defer details to agency rulemaking.

## **Annex 2: Proposed Amendments to Children and Teens' Online Privacy Protection Act (S.1418)**

### Contextual Advertising

We are concerned that the definition of individual-specific advertising may sweep in contextual advertising that is essential to ensuring the availability of free, high-quality content for children and teens, regardless of ability to pay.

The updated definition of contextual advertising in the substitute specifies that the advertisement "does not vary based on the personal information related to the viewer" but "personal information" is still defined very broadly. We recommend clarifying that contextual advertisements simply should not vary based on "age, gender, or interests of the user." This would allow platforms to use general geographic location, language settings, search query, device type, and time of day in their successful delivery of privacy preserving, contextual ads.

SUGGESTED LANGUAGE

*Page 11 of Substitute*

## (18) Individual-Specific Advertising to Children or Teens

"(B) (ii) contextual advertising, such as when an advertisement is displayed based on the content of the website, online service, online application, mobile application, or connected device in which the advertisement appears and does not vary based on ~~the personal information related to the viewer~~ age, gender, or interests of the user.

### Personal Information

The current definition of "personal information" could include aggregated or pseudonymous information, or other pieces of personal information not truly directly related to the user or held in a secondary user's account information. This broad definition would trigger significant obligations on covered platforms without providing any meaningful privacy benefits for children or teens.

### SUGGESTED LANGUAGE

#### *Page 5 of Substitute*

(x) information ~~directly attributable~~ ~~linked or reasonably linkable~~ to a child or teen; or

### Knowledge Standard

The bill uses the phrase "knowledge fairly implied" which is a term of art as used in FTC enforcement actions under section 5(a) of the FTC Act. The term of art is subject to regular judicial interpretation and was developed to apply in an enforcement context to a range of practices distinct from those of children's privacy. This bill would direct organizations to consider ahead of time steps necessary to carry out the bill's requirements. Using an enforcement standard designed for a different purpose that has evolved (and will continue to evolve) makes ex ante compliance nearly impossible. At the same time, it makes it difficult for parents, children, and teens to understand their rights and what to expect in an online environment. We strongly recommend that the bill be amended to include a more precise knowledge standard that does not defer details to agency rulemaking.