TO THE HONORABLE SENATE:

The Committee on Economic Development, Housing and General Affairs to which was referred Senate Bill No. 289 entitled “An act relating to age-appropriate design code” respectfully reports that it has considered the same and recommends that the bill be amended by striking out all after the enacting clause and inserting in lieu thereof the following:

Sec. 1. 9 V.S.A. chapter 62, subchapter 6 is added to read:

Subchapter 6. Age-Appropriate Design Code

§ 2449a. DEFINITIONS

As used in this subchapter:

(1) “Affiliate” means any person that, directly or indirectly, controls, is controlled by, or is under common control with another person. As used in this subdivision, “control” means ownership of, or the power to vote, more than 50 percent of the outstanding shares of any class of voting security of a covered entity; control in any manner over the election of a majority of the directors or of individuals exercising similar functions; or the power to exercise a controlling influence over the management of a covered entity.

(2) “Age-appropriate” means a recognition of the distinct needs and diversities of children at different age ranges. In order to help support the design of online services, products, and features, covered entities should take into account the unique needs and diversities of different age ranges, including
the following developmental stages: zero to five years of age or “preliterate
and early literacy”; six to nine years of age or “core primary school years”; 10
to 12 years of age or “transition years”; 13 to 15 years of age or “early teens”;
and 16 to 17 years of age or “approaching adulthood.”

(3) “Collect” means buying, renting, gathering, obtaining, receiving, or
accessing any personal data pertaining to a consumer by any means. This
includes receiving data from the consumer, either actively or passively, or by
observing the consumer’s behavior.

(4) “Consumer” means a individual who is a Vermont resident, and who
provides consideration for goods or services either for sale or not for sale.

(5) “Covered entity” means:

(A) A sole proprietorship, partnership, limited liability company,
corporation, association, or other legal entity that is organized or operated for
the profit or financial benefit of its shareholders or other owners.

(B) An affiliate of a covered entity that shares common branding
with the covered entity. As used in this subdivision (5)(B), “common
branding” means a shared name, servicemark, or trademark that the average
consumer would understand that two or more entities are commonly owned.

For purposes of this subchapter, for a joint venture or partnership composed of
covered entities in which each covered entity has at least a 40 percent interest,
the joint venture or partnership and each covered entity that composes the joint
venture or partnership shall separately be considered a single covered entity, except that personal data in the possession of each covered entity and disclosed to the joint venture or partnership shall not be shared with the other covered entity.

(6) “Dark pattern” means a user interface designed or manipulated with the effect of subverting or impairing user autonomy, decision making, or choice, and includes any practice the Federal Trade Commission categorizes as a “dark pattern.”

(7) “Default” means a preselected option adopted by the covered entity for the online service, product, or feature.

(8) “Deidentified” means data that cannot reasonably be used to infer information about, or otherwise be linked to, an identified or identifiable consumer, or a device linked to such consumer, provided that the covered entity that possesses the data:

(A) takes reasonable measures to ensure that the data cannot be associated with a consumer;

(B) publicly commits to maintain and use the data only in a deidentified fashion and not attempt to re-identify the data; and

(C) contractually obligates any recipients of the data to comply with all provisions of this subchapter.
(9) “Derived data” means data that is created by the derivation of information, data, assumptions, correlations, inferences, predictions, or conclusions from facts, evidence, or another source of information or data about a minor consumer or a minor consumer’s device.

(10)(A) “Low-friction variable reward” means a design feature or virtual item that intermittently rewards consumers for scrolling, tapping, opening, or continuing to engage in an online service, product, or feature.

(B) Examples of low-friction variable reward designs include endless scroll, auto play, and nudges meant to encourage reengagement.

(11) “Minor consumer” means a natural person under 18 years of age, who is a Vermont resident and who provides consideration for goods or services either for sale or not for sale.

(12) “Online service, product, or feature” does not mean any of the following:

(A) telecommunications service, as defined in 47 U.S.C. § 153;

(B) a broadband internet access service as defined in 3 V.S.A. § 348(d); or

(C) the sale, delivery, or use of a physical product.

(13) “Personal data” means any information, including derived data, that is linked or reasonably linkable, alone or in combination with other information, to an identified or identifiable consumer. Personal data does not
include deidentified data or publicly available information. As used in this
subdivision, “publicly available information” means information that:

(A) is lawfully made available from federal, State, or local
government records or widely distributed media; and

(B) a covered entity has a reasonable basis to believe a consumer has
lawfully made available to the public.

(14) “Precise geolocation” means any data that is derived from a device
and that is used or intended to be used to locate a consumer within a
geographic area that is equal to or less than the area of a circle with a radius of
1,850 feet.

(15) “Process” or “processing” means to conduct or direct any operation
or set of operations performed, whether by manual or automated means, on
personal data or on sets of personal data, such as the collection, use, storage,
disclosure, analysis, deletion, modification, or otherwise handling of personal
data.

(16) “Profile” or “profiling” means any form of automated processing of
personal data to evaluate, analyze, or predict personal aspects concerning an
identified or identifiable consumer’s economic situation, health, personal
preferences, interests, reliability, behavior, location, or movements.

“Profiling” does not include the processing of information that does not result
in an assessment or judgment about a consumer.
(17) “Reasonably likely to be accessed” means an online service, product, or feature that is likely to be accessed by minor consumers based on any of the following indicators:

(A) the online service, product, or feature is directed to children, as defined by the Children’s Online Privacy Protection Act, 15 U.S.C. §§ 6501–6506 and the Federal Trade Commission rules implementing that Act;

(B) the online service, product, or feature is determined, based on competent and reliable evidence regarding audience composition, to be routinely accessed by an audience that is composed of at least two percent of minor consumers two through under 18 years of age;

(C) the online service, product, or feature contains advertisements marketed to minor consumers;

(D) the online service, product, or feature is substantially similar or the same as an online service, product, or feature subject to subdivision (B) of this subdivision (17);

(E) the audience of the online service, product, or feature is determined, based on internal company research, to be composed of at least two percent of minor consumers two through under 18 years of age; or

(F) the covered entity knew or should have known that at least two percent of the audience of the online service, product, or feature includes minor consumers two through under 18 years of age, provided that, in making
this assessment, the covered entity shall not collect or process any personal
data that is not reasonably necessary to provide an online service, product, or
feature with which a minor consumer is actively and knowingly engaged.

   (18) “Sale,” “sell,” or “sold” means the exchange of personal data for
monetary or other valuable consideration by a covered entity to a third party.

   It does not include the following:

   (A) the disclosure of personal data to a third party who processes the
personal data on behalf of the covered entity;

   (B) the disclosure of personal data to a third party with whom the
consumer has a direct relationship for purposes of providing a product or
service requested by the consumer;

   (C) the disclosure or transfer of personal data to an affiliate of the
covered entity;

   (D) the disclosure of data that the consumer intentionally made
available to the general public via a channel of mass media and did not restrict
to a specific audience; or

   (E) the disclosure or transfer of personal data to a third party as an
asset that is part of a completed or proposed merger, acquisition, bankruptcy,
or other transaction in which the third party assumes control of all or part of
the covered entity’s assets.
1 (19)(A) “Social media platform” means a public or semi-public internet-based service or application that is primarily intended to connect and allow a user to socially interact within such service or application and enables a user to:

2 (i) construct a public or semi-public profile for the purposes of signing into and using such service or application;

3 (ii) populate a public list of other users with whom the user shares a social connection within such service or application; and

4 (iii) create or post content that is viewable by other users, including content on message boards and in chat rooms, and that presents the user with content generated by other users.

(B) “Social media platform” does not mean a public or semi-public internet-based service or application that:

1 (i) exclusively provides electronic mail or direct messaging services;

2 (ii) primarily consists of news, sports, entertainment, interactive video games, electronic commerce, or content that is preselected by the provider for which any interactive functionality is incidental to, directly related to, or dependent on the provision of such content; or

3 (iii) is used by and under the direction of an educational entity, including a learning management system or a student engagement program.
(20) “Third party” means a natural or legal person, public authority, agency, or body other than the consumer or the covered entity.

§ 2449b. SCOPE; EXCLUSIONS

(a) A person is considered a covered entity for the purposes of this subchapter if it:

(1) collects consumers’ personal data or has consumers’ personal data collected on its behalf by a third party;

(2) alone or jointly with others, determines the purposes and means of the processing of consumers’ personal data;

(3) operates in Vermont; and

(4) alone or in combination, annually buys, receives for the covered entity’s commercial purposes, sells, or shares for commercial purposes, alone or in combination, the personal data of at least 50 percent of its consumers.

(b) This subchapter does not apply to:

(1) protected health information that is collected by a covered entity or covered entity associate governed by the privacy, security, and breach notification rules issued by the U.S. Department of Health and Human Services, 45 C.F.R. Parts 160 and 164;

(2) a covered entity governed by the privacy, security, and breach notification rules issued by the U.S. Department of Health and Human Services, 45 C.F.R. Parts 160 and 164, to the extent the provider or covered
entity maintains patient information in the same manner as medical
information or protected health information as described in subdivision (1) of
this subsection;

(3) information collected as part of a clinical trial subject to the Federal
Policy for the Protection of Human Subjects, also known as the Common Rule,
pursuant to good clinical practice guidelines issued by the International
Council for Harmonisation of Technical Requirements for Pharmaceuticals for
Human Use or pursuant to human subject protection requirements of the U.S.
Food and Drug Administration; and

(4) a business whose primary purpose is journalism as defined in
12 V.S.A. § 1615(a)(2) and that has a majority of its workforce consisting of
individuals engaging in journalism.

§ 2449c. MINIMUM DUTY OF CARE

(a) A covered entity that processes a minor consumer’s data in any capacity
owes a minimum duty of care to the minor consumer.

(b) As used in this subchapter, “a minimum duty of care” means the use of
the personal data of a minor consumer and the design of an online service,
product, or feature will not benefit the covered entity to the detriment of a
minor consumer and will not result in:

(1) reasonably foreseeable and material physical or financial injury to a
minor consumer;
(2) reasonably foreseeable emotional distress as defined in 13 V.S.A. § 1061(2) to a minor consumer;

(3) a highly offensive intrusion on the reasonable privacy expectations of a minor consumer;

(4) the encouragement of excessive or compulsive use of the online service, product, or feature by a minor consumer; or

(5) discrimination against the minor consumer based upon race, ethnicity, sex, disability, sexual orientation, gender identity, gender expression, or national origin.

§ 2449d. COVERED ENTITY OBLIGATIONS

(a) A covered entity subject to this subchapter shall:

(1) configure all default privacy settings provided to a minor consumer through the online service, product, or feature to a high level of privacy;

(2) provide privacy information, terms of service, policies, and community standards concisely, prominently, and in language suited to the age of a minor consumer reasonably likely to access that online service, product, or feature;

(3) provide prominent, accessible, and responsive tools to help a minor consumer or, if applicable, their parents or guardians to exercise their privacy rights and report concerns to the covered entity;
(4) honor the request of a minor consumer to unpublish the minor consumer’s social media platform account not later than 15 business days after a covered entity receives such a request from a minor consumer; and

(5) provide easily accessible and age-appropriate tools for a minor consumer to limit the ability of users or covered entities to send unsolicited communications.

(b) A violation of this section constitutes a violation of the minimum duty of care as provided in section 2449c of this subchapter.

§ 2449e. COVERED ENTITY PROHIBITIONS

(a) A covered entity subject to this subchapter shall not:

(1) use low-friction variable reward design features that encourage excessive and compulsive use by a minor consumer;

(2) permit, by default, an unknown adult to contact a minor consumer on its platform without the minor consumer first initiating that contact;

(3) permit a minor consumer to be exploited by a contract on the online service, product, or feature;

(4) process personal data of a minor consumer unless it is reasonably necessary in providing an online service, product, or feature requested by a minor consumer with which a minor consumer is actively and knowingly engaged;

(5) profile a minor consumer, unless:
(A) the covered entity can demonstrate it has appropriate safeguards in place to ensure that profiling does not violate the minimum duty of care;

(B) profiling is necessary to provide the online service, product, or feature requested and only with respect to the aspects of the online service, product, or feature with which a minor consumer is actively and knowingly engaged; or

(C) the covered entity can demonstrate a compelling reason that profiling will benefit a minor consumer;

(6) sell the personal data of a minor consumer;

(7) process any precise geolocation information of a minor consumer by default, unless the collection of that precise geolocation information is strictly necessary for the covered entity to provide the service, product, or feature requested by a minor consumer and is then only collected for the amount of time necessary to provide the service, product, or feature;

(8) process any precise geolocation information of a minor consumer without providing a conspicuous signal to the minor consumer for the duration of that collection that precise geolocation information is being collected;

(9) use dark patterns; or

(10) permit a parent or guardian of a minor consumer, or any other consumer, to monitor the online activity of a minor consumer or to track the
location of the minor consumer without providing a conspicuous signal to the

minor consumer when the minor consumer is being monitored or tracked.

(b) A violation of this section constitutes a violation of the minimum duty

of care as provided in section 2449c of this chapter.

§ 2449f. ATTORNEY GENERAL ENFORCEMENT

(a) A covered entity that violates this subchapter or rules adopted

pursuant to this subchapter commits an unfair and deceptive act in

commerce in violation of section 2453 of this title.

(b) The Attorney General may, prior to initiating any action for a

violation of any provision of this subchapter, issue a notice of violation to a

covered entity if the Attorney General determines that a covered entity is in

substantial compliance or that a cure by a covered entity is possible.

(c) The Attorney General may consider the following in determining

whether to grant a covered entity the opportunity to cure an alleged violation

described in subsection (b) of this section:

(1) the number of violations by the covered entity;

(2) the size and complexity of the covered entity controller;

(3) the nature and extent of the covered entity’s activities;

(4) the substantial likelihood of injury to the public;

(5) the safety of persons or property;
(6) whether the alleged violation was likely caused by human or technical error; and

(7) the sensitivity of the data.

§ 2449g. LIMITATIONS

Nothing in this subchapter shall be interpreted or construed to:

(1) impose liability in a manner that is inconsistent with 47 U.S.C. § 230;

(2) prevent or preclude any minor consumer from deliberately or independently searching for, or specifically requesting, content; or

(3) require a covered entity to implement an age verification requirement, such as age gating.

§ 2449h. RIGHTS AND FREEDOMS OF CHILDREN

It is the intent of the General Assembly that nothing in this act may be construed to infringe on the existing rights and freedoms of children or be construed to discriminate against the child based on race, ethnicity, sex, disability, sexual orientation, gender identity, gender expression, or national origin.

§ 2449i. RULES

The Attorney General may adopt by rule any standards or procedures the Attorney General deems necessary to implement the purpose and policies of this subchapter.
Sec. 2. EFFECTIVE DATE

This act shall take effect on July 1, 2024.

(Committee vote: ___________)

_______________________

Senator _________________

FOR THE COMMITTEE