

1 TO THE HONORABLE SENATE:

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

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

8 Subchapter 6. Age-Appropriate Design Code

9 § 2449a. DEFINITIONS

10 As used in this subchapter:

11 (1) “Affiliate” means any person that, directly or indirectly, controls, is
12 controlled by, or is under common control with another person. As used in this
13 subdivision, “control” means ownership of, or the power to vote, more than
14 50 percent of the outstanding shares of any class of voting security of a
15 covered entity; control in any manner over the election of a majority of the
16 directors or of individuals exercising similar functions; or the power to
17 exercise a controlling influence over the management of a covered entity.

18 (2) “Age-appropriate” means a recognition of the distinct needs and
19 diversities of children at different age ranges. In order to help support the
20 design of online services, products, and features, covered entities should take
21 into account the unique needs and diversities of different age ranges, including

1 the following developmental stages: zero to five years of age or “preliterate
2 and early literacy”; six to nine years of age or “core primary school years”; 10
3 to 12 years of age or “transition years”; 13 to 15 years of age or “early teens”;
4 and 16 to 17 years or age or “approaching adulthood.”

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

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

11 (5) “Covered entity” means:

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

15 (B) An affiliate of a covered entity that shares common branding
16 with the covered entity. As used in this subdivision (5)(B), “common
17 branding” means a shared name, servicemark, or trademark that the average
18 consumer would understand that two or more entities are commonly owned.
19 For purposes of this subchapter, for a joint venture or partnership composed of
20 covered entities in which each covered entity has at least a 40 percent interest,
21 the joint venture or partnership and each covered entity that composes the joint

1 venture or partnership shall separately be considered a single covered entity,
2 except that personal data in the possession of each covered entity and disclosed
3 to the joint venture or partnership shall not be shared with the other covered
4 entity.

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

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

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

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

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

19 (C) contractually obligates any recipients of the data to comply with
20 all provisions of this subchapter.

1 (9) “Derived data” means data that is created by the derivation of
2 information, data, assumptions, correlations, inferences, predictions, or
3 conclusions from facts, evidence, or another source of information or data
4 about a minor consumer or a minor consumer’s device.

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

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

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

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

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

16 (B) a broadband internet access service as defined in 3 V.S.A.
17 § 348(d); or

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

19 (13) “Personal data” means any information, including derived data, that
20 is linked or reasonably linkable, alone or in combination with other
21 information, to an identified or identifiable consumer. Personal data does not

1 include deidentified data or publicly available information. As used in this
2 subdivision, “publicly available information” means information that:

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

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

7 (14) “Precise geolocation” means any data that is derived from a device
8 and that is used or intended to be used to locate a consumer within a
9 geographic area that is equal to or less than the area of a circle with a radius of
10 1,850 feet.

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

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

20 “Profiling” does not include the processing of information that does not result
21 in an assessment or judgment about a consumer.

1 (17) “Reasonably likely to be accessed” means an online service,
2 product, or feature that is likely to be accessed by minor consumers based on
3 any of the following indicators:

4 (A) the online service, product, or feature is directed to children, as
5 defined by the Children’s Online Privacy Protection Act, 15 U.S.C. §§ 6501–
6 6506 and the Federal Trade Commission rules implementing that Act;

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

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

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

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

19 (F) the covered entity knew or should have known that at least two
20 percent of the audience of the online service, product, or feature includes
21 minor consumers two through under 18 years of age, provided that, in making

1 this assessment, the covered entity shall not collect or process any personal
2 data that is not reasonably necessary to provide an online service, product, or
3 feature with which a minor consumer is actively and knowingly engaged.

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

6 It does not include the following:

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

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

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

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

17 (E) the disclosure or transfer of personal data to a third party as an
18 asset that is part of a completed or proposed merger, acquisition, bankruptcy,
19 or other transaction in which the third party assumes control of all or part of
20 the covered entity’s assets.

1 (19)(A) “Social media platform” means a public or semi-public internet-
2 based service or application that is primarily intended to connect and allow a
3 user to socially interact within such service or application and enables a user
4 to:

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

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

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

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

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

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

20 (iii) is used by and under the direction of an educational entity,
21 including a learning management system or a student engagement program.

1 (20) “Third party” means a natural or legal person, public authority,
2 agency, or body other than the consumer or the covered entity.

3 § 2449b. SCOPE; EXCLUSIONS

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

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

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

10 (3) operates in Vermont; and

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

14 (b) This subchapter does not apply to:

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

19 (2) a covered entity governed by the privacy, security, and breach
20 notification rules issued by the U.S. Department of Health and Human
21 Services, 45 C.F.R. Parts 160 and 164, to the extent the provider or covered

1 entity maintains patient information in the same manner as medical
2 information or protected health information as described in subdivision (1) of
3 this subsection;

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

10 (4) a business whose primary purpose is journalism as defined in
11 12 V.S.A. § 1615(a)(2) and that has a majority of its workforce consisting of
12 individuals engaging in journalism.

13 § 2449c. MINIMUM DUTY OF CARE

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

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

20 (1) reasonably foreseeable and material physical or financial injury to a
21 minor consumer;

1 (2) reasonably foreseeable emotional distress as defined in 13 V.S.A. §
2 1061(2) to a minor consumer;

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

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

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

10 § 2449d. COVERED ENTITY OBLIGATIONS

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

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

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

18 (3) provide prominent, accessible, and responsive tools to help a minor
19 consumer or, if applicable, their parents or guardians to exercise their privacy
20 rights and report concerns to the covered entity;

1 (4) honor the request of a minor consumer to unpublish the minor
2 consumer’s social media platform account not later than 15 business days after
3 a covered entity receives such a request from a minor consumer; and

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

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

9 § 2449e. COVERED ENTITY PROHIBITIONS

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

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

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

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

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

21 (5) profile a minor consumer, unless:

1 (A) the covered entity can demonstrate it has appropriate safeguards
2 in place to ensure that profiling does not violate the minimum duty of care;

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

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

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

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

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

18 (9) use dark patterns; or

19 (10) permit a parent or guardian of a minor consumer, or any other
20 consumer, to monitor the online activity of a minor consumer or to track the

1 location of the minor consumer without providing a conspicuous signal to the
2 minor consumer when the minor consumer is being monitored or tracked.

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

5 § 2449f. ATTORNEY GENERAL ENFORCEMENT

6 (a) A covered entity that violates this subchapter or rules adopted
7 pursuant to this subchapter commits an unfair and deceptive act in
8 commerce in violation of section 2453 of this title.

9 (b) The Attorney General may, prior to initiating any action for a
10 violation of any provision of this subchapter, issue a notice of violation to a
11 covered entity if the Attorney General determines that a covered entity is in
12 substantial compliance or that a cure by a covered entity is possible.

13 (c) The Attorney General may consider the following in determining
14 whether to grant a covered entity the opportunity to cure an alleged violation
15 described in subsection (b) of this section:

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

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

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

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

20 (5) the safety of persons or property;

1 (6) whether the alleged violation was likely caused by human or
2 technical error; and

3 (7) the sensitivity of the data.

4 § 2449g. LIMITATIONS

5 Nothing in this subchapter shall be interpreted or construed to:

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

7 § 230;

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

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

12 § 2449h. RIGHTS AND FREEDOMS OF CHILDREN

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

18 § 2449i. RULES

19 The Attorney General may adopt by rule any standards or procedures the
20 Attorney General deems necessary to implement the purpose and policies of
21 this subchapter.

1 Sec. 2. EFFECTIVE DATE

2 This act shall take effect on July 1, 2024.

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6 (Committee vote: _____)

7

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Senator _____

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FOR THE COMMITTEE