

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 50
14 percent of the outstanding shares of any class of voting security of a covered
15 entity; control in any manner over the election of a majority of the directors or
16 of individuals exercising similar functions; or the power to exercise a
17 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: 0 to 5 years of age or “preliterate and
2 early literacy”; 6 to 9 years of age or “core primary school years”; 10 to 12
3 years of age or “transition years”; 13 to 15 years of age or “early teens”; and
4 16 to 17 years or age or “approaching adulthood.”

5 (3) “Child” means an individual who is under 18 years of age.

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

10 (5) “Consumer” means a natural person who is a Vermont resident,
11 however identified, including by any unique identifier.

12 (6) “Covered entity” means:

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

16 (B) An affiliate of a covered entity that shares common branding
17 with the covered entity. As used in this subdivision (6)(B), “common
18 branding” means a shared name, servicemark, or trademark that the average
19 consumer would understand that two or more entities are commonly owned.
20 For purposes of this subchapter, for a joint venture or partnership composed of
21 covered entities in which each covered entity has at least a 40 percent interest,

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

6 (7) “Dark pattern” means a user interface designed or manipulated with
7 the purpose of subverting or impairing user autonomy, decision making, or
8 choice.

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

11 (9) “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 (10) “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 child or a child’s device.

5 (11) “Legacy product” means any online service, product, or feature that
6 is likely to be accessed by children and that is offered to the public before July
7 1, 2024.

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

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

11 (B) a broadband internet access service as defined in 3 V.S.A.
12 § 348(d); or

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

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

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

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

3 (14) “Precise geolocation” means any data that is derived from a device
4 and that is used or intended to be used to locate a consumer within a
5 geographic area that is equal to or less than the area of a circle with a radius of
6 1,850 feet.

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

12 (16) “Product experimentation results” means the data that companies
13 collect to understand the experimental impact of their products.

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

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

1 (18) “Reasonably likely to be accessed” means an online service,
2 product, or feature that is likely to be accessed by children based on any of the
3 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 children two through under 18 years of age;

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

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 (18);

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 children 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 children two through under 18 years of age, provided that, in making this

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

4 (19) “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 (20) “Share” means sharing, renting, releasing, disclosing,
2 disseminating, making available, transferring, or otherwise communicating
3 orally, in writing, or by electronic or other means a consumer’s personal data
4 by the covered entity to a third party for cross-context behavioral advertising,
5 whether or not for monetary or other valuable consideration, including
6 transactions between a covered entity and a third party for cross-context
7 behavioral advertising for the benefit of a covered entity in which no money is
8 exchanged.

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

11 § 2449b. SCOPE; EXCLUSIONS

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

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

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

18 (3) operates in Vermont; and

19 (4) satisfies one or more of the following thresholds:

20 (A) has annual gross revenues in excess of \$25,000,000.00, as
21 adjusted every odd-numbered year to reflect the Consumer Price Index;

1 (4) alone or in combination, annually buys, receives for the covered
2 entity’s commercial purposes, sells, or shares for commercial purposes, alone
3 or in combination, the personal data of at least 50 percent of its consumers,
4 50,000 or more individuals, households, or devices; or
5 (C) derives 50 percent or more of its annual revenues from selling
6 individuals’ personal data.

7 (b) This subchapter does not apply to:

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

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

18 (3) information collected as part of a clinical trial subject to the Federal
19 Policy for the Protection of Human Subjects, also known as the Common Rule,
20 pursuant to good clinical practice guidelines issued by the International
21 Council for Harmonisation of Technical Requirements for Pharmaceuticals for

1 Human Use or pursuant to human subject protection requirements of the U.S.
2 Food and Drug Administration.

3 § 2449c. BEST INTERESTS OF CHILDREN

4 (a) All covered entities that process children’s data in any capacity shall do
5 so in a manner consistent with the best interests of children.

6 (b) As used in this section, “a manner consistent with the best interests of
7 children” means the use of the personal data of a child or the design of an
8 online service, product, or feature that:

9 (1) will not benefit the covered entity to the detriment of the child; and

10 (2) will not result in:

11 (A) reasonably foreseeable and material physical or financial harm to
12 the child;

13 (B) reasonably foreseeable and severe psychological or emotional
14 harm to the child;

15 (C) a highly offensive intrusion on the reasonable privacy
16 expectations of the child; or

17 (D) discrimination against the child based upon race, color, religion,
18 national origin, disability, sex, or sexual orientation.

19 § 2449d. COVERED ENTITY OBLIGATIONS

20 (a) A covered entity subject to this subchapter must:

1 (1) Complete a data protection impact assessment for an online service,
2 product, or feature that is reasonably likely to be to accessed by children and
3 maintain documentation of the data protection impact assessment for as long as
4 the online service, product, or feature is reasonably likely to be accessed by
5 children. A data protection impact assessment is a systematic survey to assess
6 compliance with the duty to act in the best interests of children and shall
7 include a plan to ensure that all online products, services, or features provided
8 by the covered entity are designed and offered in a manner consistent with the
9 best interests of children reasonably likely to access the online product,
10 service, or feature. Such a plan shall include a description of steps the covered
11 entity has taken and will take to comply with the duty to act in the best
12 interests of children.

13 (2) Review and modify all data protection impact assessments as
14 necessary to account for material changes to processing pertaining to the online
15 service, product, or feature within 90 days after such material changes.

16 (3) Within five days after receipt of a written request by the Attorney
17 General, provide to the Attorney General a list of all data protection impact
18 assessments the covered entity has completed.

19 (4) Within seven days after receipt of a written request by the Attorney
20 General, provide the Attorney General with a copy of a data protection impact
21 assessment, provided that the Attorney General may, in the Attorney General's

1 discretion, extend beyond seven days the amount of time allowed for a covered
2 entity to produce a data protection impact assessment.

3 (5) Configure all default privacy settings provided to children by the
4 online service, product, or feature to settings that offer a high level of privacy,
5 unless the covered entity can demonstrate a compelling reason that a different
6 setting is in the best interests of children.

7 (6) Provide any privacy information, terms of service, policies, and
8 community standards concisely, prominently, and using clear language suited
9 to the age of children reasonably likely to access that online service, product,
10 or feature.

11 (7) Provide prominent, accessible, and responsive tools to help children
12 in a form or manner required by the General Attorney, or, if applicable, their
13 parents or guardians, exercise their privacy rights and report concerns.

14 (b) A data protection impact assessment required by this subchapter must:

15 (1) identify the purpose of the online service, product, or feature;

16 (2) disclose how it uses children’s personal data; and

17 (3) determine whether the online service, product, or feature is designed
18 and offered in an age-appropriate manner consistent with the best interests of
19 children who are reasonably likely to access the online product by examining:

20 (A) whether the design of the online service, product, or feature
21 could lead to children experiencing or being targeted by contacts on the online

1 service, product, or feature that would result in reasonably foreseeable and
2 material physical or financial harm to the child; reasonably foreseeable and
3 severe psychological or emotional harm to the child; a highly offensive
4 intrusion on the reasonable privacy expectations of the child; or discrimination
5 against the child based upon race, color, religion, national origin, disability,
6 gender identity, sex, or sexual orientation;

7 (B) whether the design of the online service, product, or feature could
8 permit children to witness, participate in, or be subject to conduct on the online
9 service, product, or feature that would result in reasonably foreseeable and
10 material physical or financial harm to the child; reasonably foreseeable and
11 severe psychological or emotional harm to the child; a highly offensive
12 intrusion on the reasonable privacy expectations of the child; or discrimination
13 against the child based upon race, color, religion, national origin, disability,
14 gender identity, sex, or sexual orientation;

15 (C) whether the design of the online service, product, or feature is
16 reasonably expected to allow children to be party to or exploited by a contract
17 on the online service, product, or feature that would result in reasonably
18 foreseeable and material physical or financial harm to the child; reasonably
19 foreseeable and severe psychological or emotional harm to the child; a highly
20 offensive intrusion on the reasonable privacy expectations of the child; or

1 discrimination against the child based upon race, color, religion, national
2 origin, disability, gender identity, sex, or sexual orientation;

3 (D) whether algorithms used by the product, service, or feature could
4 harm children would result in reasonably foreseeable and material physical or
5 financial harm to the child; reasonably foreseeable and severe psychological or
6 emotional harm to the child; a highly offensive intrusion on the reasonable
7 privacy expectations of the child; or discrimination against the child based
8 upon race, color, religion, national origin, disability, gender identity, sex, or
9 sexual orientation;

10 (E) whether targeted advertising systems used by the online service,
11 product, or feature would result in reasonably foreseeable and material
12 physical or financial harm to the child; reasonably foreseeable and severe
13 psychological or emotional harm to the child; a highly offensive intrusion on
14 the reasonable privacy expectations of the child; or discrimination against the
15 child based upon race, color, religion, national origin, disability, gender
16 identity, sex, or sexual orientation;

17 (F) whether the online service, product, or feature uses system design
18 features to increase, sustain, or extend use of the online service, product, or
19 feature by children, including the automatic playing of media, rewards for time
20 spent, and notifications, that would result in reasonably foreseeable and
21 material physical or financial harm to the child; reasonably foreseeable and

1 severe psychological or emotional harm to the child; a highly offensive
2 intrusion on the reasonable privacy expectations of the child; or discrimination
3 against the child based upon race, color, religion, national origin, disability,
4 gender identity, sex, or sexual orientation;

5 (G) whether, how, and for what purpose the online product, service,
6 or feature collects or processes personal data of children and whether those
7 practices would result in reasonably foreseeable and material physical or
8 financial harm to the child; reasonably foreseeable and severe psychological or
9 emotional harm to the child; a highly offensive intrusion on the reasonable
10 privacy expectations of the child; or discrimination against the child based
11 upon race, color, religion, national origin, disability, gender identity, sex, or
12 sexual orientation; and

13 (H) whether and how product experimentation results for the online
14 product, service, or feature reveal data management or design practices that
15 would result in reasonably foreseeable and material physical or financial harm
16 to the child; reasonably foreseeable and extreme psychological or emotional
17 harm to the child; a highly offensive intrusion on the reasonable privacy
18 expectations of the child; or discrimination against the child based upon race,
19 color, religion, national origin, disability, gender identity, sex, or sexual
20 orientation.

1 (c) A data protection impact assessment conducted by a covered entity for
2 the purpose of compliance with any other law complies with this section if the
3 data protection impact assessment meets the requirements of this subchapter.

4 (d) A single data protection impact assessment may contain multiple
5 similar processing operations that present similar risk only if each relevant
6 online service, product, or feature is addressed separately.

7 (e) A covered entity may process only the personal data reasonably
8 necessary to provide an online service, product, or feature with which a child is
9 actively and knowingly engaged to estimate age.

10 (f) A data protection impact assessment created pursuant to this section is
11 exempt from public disclosure pursuant to the Public Records Act as set forth
12 in 1 V.S.A. § 318.

13 § 2449e. COVERED ENTITY PROHIBITIONS

14 A covered entity that provides an online service, product, or feature
15 reasonably likely to be accessed by children shall not:

16 (1) process the personal data of any child in a way that is inconsistent
17 with the best interests of children reasonably likely to access the online service,
18 product, or feature;

19 (2) profile a child by default unless both of the following criteria are
20 met:

1 (A) the covered entity can demonstrate it has appropriate safeguards
2 in place to ensure that profiling is consistent with the best interests of children
3 reasonably likely to access the online service, product, or feature; and

4 (B) either of the following is true:

5 (i) profiling is necessary to provide the online service, product, or
6 feature requested and only with respect to the aspects of the online service,
7 product, or feature with which a child is actively and knowingly engaged; or

8 (ii) the covered entity can demonstrate a compelling reason that
9 profiling is in the best interests of children;

10 (3) process any personal data that is not reasonably necessary to provide
11 an online service, product, or feature with which a child is actively and
12 knowingly engaged;

13 (4) if the end user is a child, process personal data for any reason other
14 than a reason for which that personal data was collected;

15 (5) process any precise geolocation information of children by default,
16 unless the collection of that precise geolocation information is strictly
17 necessary for the covered entity to provide the service, product, or feature
18 requested and then only for the limited time that the collection of precise
19 geolocation information is necessary to provide the service, product, or feature;

1 (6) process any precise geolocation information of a child without
2 providing a conspicuous sign to the child for the duration of that collection that
3 precise geolocation information is being collected;

4 (7) use dark patterns to cause children to provide personal data beyond
5 what is reasonably expected to provide that online service, product, or feature;
6 to forego privacy protections; or to take any action that the covered entity
7 knows, or has reason to know, is not in the best interests of children reasonably
8 likely to access the online service, product, or feature; or

9 (8) allow a child’s parent or guardian or any other consumer to monitor
10 the child’s online activity or track the child’s location, without providing a
11 conspicuous signal to the child when the child is being monitored or tracked.

12 § 2449f. DATA PRACTICES

13 (a) A data protection impact assessment collected or maintained by the
14 Attorney General pursuant to this subchapter is classified as nonpublic data or
15 private data on consumers.

16 (b) To the extent any information contained in a data protection impact
17 assessment disclosed to the Attorney General includes information subject to
18 attorney-client privilege or work product protection, disclosure pursuant to this
19 subchapter does not constitute a waiver of that privilege or protection.

1 § 2449g. ATTORNEY GENERAL ENFORCEMENT

2 (a) The Attorney General may seek the imposition of an injunction and a
3 civil penalty of not more than \$2,500.00 per affected child for each negligent
4 violation of this subchapter or not more than \$7,500.00 per affected child for
5 each intentional violation of this subchapter, plus costs and reasonable
6 attorney’s fees for each violation.

7 (b) Any penalties, fees, and expenses recovered in an action brought under
8 this subchapter must be deposited in an account in the special revenue fund and
9 are appropriated to the Attorney General to offset costs incurred by the
10 Attorney General in connection with enforcement of this subchapter.

11 (c) If a covered entity is in substantial compliance with the requirements of
12 this subchapter, the Attorney General must, before initiating a civil action
13 under this section, provide written notice to the covered entity identifying the
14 specific provisions of this subchapter that the Attorney General alleges have
15 been or are being violated. If, for a covered entity that satisfied the terms
16 pursuant to section 2449d of this chapter before offering any new online
17 product, service, or feature reasonably likely to be accessed by children to the
18 public, within 90 days following the notice required by this section, the
19 covered entity cures any noticed violation and provides the Attorney General a
20 written statement that the alleged violations have been cured, and sufficient

1 measures have been taken to prevent future violations, the covered entity is not
2 liable for a civil penalty for any violation cured pursuant to this section.

3 (d) No individual entitlement or private right of action is created by this
4 subchapter.

5 § 2449h. LIMITATIONS

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

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

8 § 230;

9 (2) prevent or preclude any child from deliberately or independently
10 searching for, or specifically requesting, content; or

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

13 § 2449i. APPLICATION

14 (a) A covered entity must complete a data protection impact assessment for
15 any new online service, product, or feature reasonably likely to be accessed by
16 children offered to the public after July 1, 2024 unless that online service,
17 product, or feature is exempt pursuant to subsection (b) of this section.

18 (b) This act does not apply to an online service, product, or feature that is
19 not offered to the public on or after July 1, 2024.

20 § 2449j. RIGHTS AND FREEDOMS OF CHILDREN

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

5 § 2449k. RULES

6 (a) The Attorney General may adopt by rule any standards or procedures
7 the Attorney General deems necessary to implement the purpose and policies
8 of this subchapter.

9 (b) The rules, as well as any finding of unlawful conduct under this
10 subchapter, shall be consistent with the rules, regulations, and decisions of the
11 Federal Trade Commission and the Federal Communications Commission and
12 with federal court interpretations of the Federal Trade Commission Act, as
13 amended, and the Communications Act of 1934, as amended.

14 Sec. 2. EFFECTIVE DATE

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

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19 (Committee vote: _____)

20

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Senator _____

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FOR THE COMMITTEE