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1ST SESSION

S. 2708

To prohibit the use of exploitative and deceptive practices by large online operators and to promote transparency and consumer choice in the use of behavioral research by such providers.

IN THE SENATE OF THE UNITED STATES

JULY 27, 2023

Mr. WARNER (for himself, Mrs. FISCHER, Ms. KLOBUCHAR, and Mr. THUNE) introduced the following bill; which was read twice and referred to the Committee on Commerce, Science, and Transportation

A BILL

To prohibit the use of exploitative and deceptive practices by large online operators and to promote transparency and consumer choice in the use of behavioral research by such providers.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Deceptive Experiences
5 To Online Users Reduction Act” or the “DETOUR Act”.

6 **SEC. 2. DEFINITIONS.**

7 In this Act:

1 (1) AFFIRMATIVE EXPRESS CONSENT.—The
2 term “affirmative express consent”—

3 (A) means an affirmative act by a user
4 that—

5 (i) clearly communicates the user’s
6 authorization for a specific act or practice
7 for which the user’s consent is sought to
8 proceed;

9 (ii) is freely taken by the user; and

10 (iii) is taken after the user is in-
11 formed about the act or practice for which
12 consent is sought, including through the
13 presentation to the user of a clear and con-
14 spicuous description of the act or practice;
15 and

16 (B) does not include—

17 (i) the consent of a child or teen; or

18 (ii) the consent to a provision con-
19 tained in a general contract or service
20 agreement.

21 (2) AGGREGATED DATA.—The term “aggre-
22 gated data” means data that have been combined or
23 collected together in summary or other form such
24 that the data is not linked or reasonably linkable to
25 any individual.

1 (3) AUTO-PLAY.—The term “auto-play” means
2 the automatic playing of content selected by a per-
3 sonalized recommendation system for a user.

4 (4) CHILD.—The term “child” has the meaning
5 given such term in section 1302 of the Children’s
6 Online Privacy Protection Act of 1998 (15 U.S.C.
7 6501).

8 (5) COMMISSION.—The term “Commission”
9 means the Federal Trade Commission.

10 (6) COMPULSIVE USAGE.—The term “compul-
11 sive usage” means any response stimulated by exter-
12 nal factors that causes an individual to engage in re-
13 petitive behavior causing psychological distress, loss
14 of control, anxiety, depression, or harmful stress re-
15 sponses.

16 (7) COVERED RESEARCH.—The term “covered
17 research” means behavioral or psychological experi-
18 mentation or research, including through human ex-
19 perimentation, of overt or observable user actions on
20 online platforms, including interactions between and
21 among individuals and the activities of social groups,
22 that involves interventions that are designed by the
23 experimenter or researcher to alter or manipulate
24 the emotions of users.

1 (8) DE-IDENTIFIED DATA.—The term “de-iden-
2 tified data” means information that—

3 (A) does not identify and is not linked or
4 reasonably linkable to a distinct individual or a
5 device, regardless of whether the information is
6 aggregated; and

7 (B) does not contain any persistent identi-
8 fier or other information that could readily be
9 used to reidentify, or link the information to,
10 the individual to whom, or the device to which,
11 the identifier or information pertains.

12 (9) INDEPENDENT REVIEW BOARD.—The term
13 “independent review board” means a board, com-
14 mittee, or other group that—

15 (A) serves to—

16 (i) protect the autonomy and privacy
17 of users;

18 (ii) prevent exploitative and manipula-
19 tive acts or practices;

20 (iii) promote transparent principles of
21 user interface and user experience design;

22 (iv) promote research in keeping with
23 best practices of covered research; and

1 (v) continually evaluate industry prac-
2 tices and issue guidance consistent with
3 the objectives of this Act; and

4 (B) is formally designated by a large on-
5 line operator to review, to approve the initiation
6 of, and to conduct ongoing periodic reviews of,
7 any covered research by, or at the direction or
8 discretion of, a large online operator, involving
9 human subjects.

10 (10) LARGE ONLINE OPERATOR.—The term
11 “large online operator” means any person that—

12 (A) provides an online service that has
13 more than 100,000,000 authenticated users of
14 an online service in any 30-day period; and

15 (B) is subject to the jurisdiction of the
16 Commission under the Federal Trade Commis-
17 sion Act (15 U.S.C. 41 et seq.).

18 (11) ONLINE SERVICE.—The term “online serv-
19 ice” means a website or a service, other than an
20 internet access service, that is made available to the
21 public over the internet, including a social network,
22 a search engine, or an email service.

23 (12) PUBLICLY AVAILABLE INFORMATION.—
24 The term “publicly available information” means
25 any information that a large online operator has a

1 reasonable basis to believe has been lawfully made
2 available to the general public from—

3 (A) Federal, State, or local government
4 records;

5 (B) widely distributed media, including—

6 (i) information from a telephone book
7 or online directory;

8 (ii) television, internet, or radio con-
9 tent or programming; or

10 (iii) a website or online service made
11 available to all members of the public, for
12 free or for a fee, including where all mem-
13 bers of the public, for free or for a fee, can
14 log in to the website or online service;

15 (C) a disclosure to the general public that
16 is required to be made by Federal, State, or
17 local law; or

18 (D) the visual observation of the physical
19 presence of an individual or a device in a public
20 place, not including data collected by a device
21 in the possession of the individual.

22 (13) TEEN.—The term “teen” means an indi-
23 vidual over the age of 12 and under the age of 17.

24 (14) USER.—The term “user” means any indi-
25 vidual who engages with an online service.

1 (15) USER AUTONOMY.—The term “user auton-
2 omy” means the technical ability of a user to inter-
3 act with a user interface of an online service in a
4 manner that aligns with personal intent.

5 (16) USER DATA.—The term “user data”—

6 (A) means any information that identifies
7 or is linked or reasonably linkable to an indi-
8 vidual or a device that is linked or reasonably
9 linkable to an individual, whether directly sub-
10 mitted to the large online operator by the user
11 or derived from the observed activity of the user
12 by the large online operator; and

13 (B) does not include—

14 (i) aggregated data;

15 (ii) de-identified data; or

16 (iii) publicly available information, or
17 inferences derived solely based on publicly
18 available information.

19 (17) USER EXPERIENCE.—The term “user ex-
20 perience” means how a user interacts with an online
21 service.

22 (18) USER INTERFACE.—The term “user inter-
23 face” means the point at which a user interacts with
24 a system, device, or process of an online service.

1 **SEC. 3. UNFAIR AND DECEPTIVE ACTS AND PRACTICES RE-**
2 **LATING TO THE MANIPULATION OF USER**
3 **INTERFACES.**

4 (a) CONDUCT PROHIBITED.—It shall be unlawful for
5 any large online operator—

6 (1) to design, modify, or manipulate a user
7 interface on an online service with the purpose or
8 substantial effect of obscuring, subverting, or im-
9 pairing user autonomy, decision making, or choice to
10 obtain consent or user data;

11 (2) to subdivide or segment consumers of online
12 services into groups for the purposes of covered re-
13 search, except with the affirmative express consent
14 of each user involved; or

15 (3) to design, modify, or manipulate a user
16 interface on an online service, or portion of a user
17 interface or online service, that is directed to a child
18 or teen with the purpose or substantial effect of
19 causing, increasing, or encouraging compulsive
20 usage, including using video auto-play functions ini-
21 tiated without the consent of a user.

22 (b) DUTIES OF LARGE ONLINE OPERATORS.—Any
23 large online operator that engages in any form of covered
24 research based on the activity or data of the users of the
25 large online operator shall do each of the following:

1 (1) Disclose to its users on a routine basis, but
2 not less than once each 90 days, the general purpose
3 of any such covered research to each user whose
4 user data is or was subject to or included in any cov-
5 ered research during the previous 90-day period.

6 (2) Disclose to the public on a routine basis,
7 but not less than once each 90 days, any covered re-
8 search with the purposes of promoting engagement
9 or product conversion being currently undertaken, or
10 concluded since the prior disclosure.

11 (3) Present the disclosures described in para-
12 graphs (1) and (2) in a manner that is—

13 (A) clear, conspicuous, context-appropriate,
14 and easily accessible; and

15 (B) not deceptively obscured.

16 (4)(A) Subject to subparagraph (B), remove
17 and delete all user data obtained from affected users
18 in the course of covered research if the large online
19 operator—

20 (i) determines (or determines that it has
21 reason to believe) that the affirmative express
22 consent required under this section from such
23 users was not acquired; and

1 (ii) is unable to obtain within 2 business
2 days of such determination the affirmative ex-
3 press consent required under this section.

4 (B) If unable to remove and delete user data
5 pursuant to subparagraph (A), discontinue the cov-
6 ered research.

7 (5)(A) Establish a process by which a user may
8 choose to opt out of covered research at a later date
9 from when the user previously provided affirmative
10 express consent for such research.

11 (B) Subject to subparagraph (A), following the
12 decision of a user to opt out, stop collecting, proc-
13 essing, or transferring any data from such user for
14 the purposes of the covered research.

15 (6) Establish an independent review board that
16 shall—

17 (A) develop, on a continuing basis and
18 using the resources developed under section 4,
19 guidance and rules for the development of user
20 interface and user experience design of the
21 large online operator that are consistent with
22 the requirements of subsection (a) of this sec-
23 tion; and

24 (B) review and have authority to approve,
25 require modification in, or disapprove all cov-

1 ered research conducted on users or on the
2 basis of user activity or data consistent with
3 subsection (a)(2).

4 (7) Ensure that any independent review board
5 established under paragraph (6) registers with the
6 Commission, including providing to the Commis-
7 sion—

8 (A) the names and resumes of every mem-
9 ber of the independent review board;

10 (B) the composition and reporting struc-
11 ture of the independent review board to the
12 management of the large online operator;

13 (C) the process by which the independent
14 review board is to be notified of covered re-
15 search or modifications of covered research,
16 along with the processes by which the inde-
17 pendent review board is capable of vetoing or
18 amending such research;

19 (D) any compensation provided to mem-
20 bers of the independent review board; and

21 (E) any conflict of interest that might
22 exist concerning the participation of an indi-
23 vidual on the independent review board.

1 **SEC. 4. NATIONAL INSTITUTE OF STANDARDS AND TECH-**
2 **NOLOGY RESOURCES.**

3 (a) IN GENERAL.—Not later than 540 days after the
4 date of the enactment of this Act, the Director of the Na-
5 tional Institute of Standards and Technology shall, acting
6 through the Information Technology Laboratory of the
7 National Institute of Standards and Technology, conduct
8 research to develop and disseminate consensus-based re-
9 sources consistent with subsection (b) that provide rec-
10 ommendations for user interface and user experience de-
11 sign that support user autonomy, choice, and decision
12 making in providing user consent for online services.

13 (b) CONTENT OF RESOURCES.—The resources devel-
14 oped under subsection (a) shall—

15 (1) involve methodology for usability testing to
16 identify usability problems by collecting quantitative
17 and qualitative data to determine the ability of users
18 to navigate options to achieve the specified goals of
19 user autonomy, choice, and decision making in user
20 interface and user experience design;

21 (2) include examples or demonstrations of user
22 interface design that may restrict the user auton-
23 omy, choice, or decision making of a user; and

24 (3) include methodology to evaluate the ability
25 to identify default settings that impair user auton-
26 omy.

1 **SEC. 5. ENFORCEMENT BY THE COMMISSION.**

2 (a) UNFAIR OR DECEPTIVE ACTS OR PRACTICES.—

3 A violation of section 3 or a regulation promulgated under
4 this Act shall be treated as a violation of a rule defining
5 an unfair or deceptive act or practice under section
6 18(a)(1)(B) of the Federal Trade Commission Act (15
7 U.S.C. 57a(a)(1)(B)).

8 (b) POWERS OF THE COMMISSION.—

9 (1) IN GENERAL.—The Commission shall en-
10 force section 3 and the regulations promulgated
11 under this Act in the same manner, by the same
12 means, and with the same jurisdiction, powers, and
13 duties as though all applicable terms and provisions
14 of the Federal Trade Commission Act (15 U.S.C. 41
15 et seq.) were incorporated into and made a part of
16 this Act.

17 (2) PRIVILEGES AND IMMUNITIES.—Any person
18 who violates section 3 or a regulation promulgated
19 under this Act shall be subject to the penalties and
20 entitled to the privileges and immunities provided in
21 the Federal Trade Commission Act (15 U.S.C. 41 et
22 seq.).

23 (3) AUTHORITY PRESERVED.—Nothing in this
24 Act shall be construed to limit or expand the author-
25 ity of the Commission under any other provision of
26 law.

1 (4) REGULATIONS.—Not later than 2 years
2 after the date of enactment of this Act, the Commis-
3 sion shall promulgate regulations under section 553
4 of title 5, United States Code, that—

5 (A) establish rules for the registration, for-
6 mation, and oversight of independent review
7 boards, including standards that ensure effec-
8 tive independence of such boards from improper
9 or undue influence by a large online operator;
10 and

11 (B) using the resources produced by the
12 Director of the National Institute of Standards
13 and Technology under section 4 as guidance,
14 define conduct that does not have the purpose
15 or substantial effect of—

16 (i) obscuring, subverting, or impairing
17 user autonomy, decision making, or choice;
18 or

19 (ii) causing, increasing, or encour-
20 aging compulsive usage for a child or teen,
21 such as—

22 (I) de minimis user interface
23 changes derived from testing con-
24 sumer preferences where such changes
25 of design elements are not done solely

1 to obtain affirmative express consent
2 or user data;

3 (II) algorithms or data outputs
4 outside the control of a large online
5 operator or the affiliates of such oper-
6 ator; and

7 (III) establishing default settings
8 that provide enhanced privacy protec-
9 tion to users or otherwise enhance the
10 autonomy and decision-making ability
11 of such users.

12 (5) SAFE HARBOR.—The Commission may not
13 bring an enforcement action under this Act against
14 any large online operator that relied in good faith on
15 the definitions developed under paragraph (4)(B).

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