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1ST SESSION

S. 3330

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

IN THE SENATE OF THE UNITED STATES

DECEMBER 7, 2021

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 consumer welfare 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:

8 (1) **BEHAVIORAL OR PSYCHOLOGICAL EXPERI-**
9 **MENT OR RESEARCH.**—The term “behavioral or psy-

1 chological experiment or research” means the study,
2 including through human experimentation, of overt
3 or observable actions or mental phenomena inferred
4 from behavior, including interactions between and
5 among individuals and the activities of social groups.

6 (2) CHILD.—The term “child” has the meaning
7 given such term in section 1302 of the Children’s
8 Online Privacy Protection Act of 1998 (15 U.S.C.
9 6501).

10 (3) COMMISSION.—The term “Commission”
11 means the Federal Trade Commission.

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

18 (5) INDEPENDENT REVIEW BOARD.—The term
19 “independent review board” means a board, com-
20 mittee, or other group that serves to protect the wel-
21 fare and privacy of users and is formally designated
22 by a large online operator to review, to approve the
23 initiation of, and to conduct periodic review of, any
24 research by, or at the direction or discretion of, a
25 large online operator, involving human subjects.

1 (6) INFORMED CONSENT.—The term “informed
2 consent”—

3 (A) means the express, affirmative consent
4 freely given by a user, in which such user is
5 provided a clear and conspicuous description—

6 (i) of a process by which a user is
7 provided adequate information prior to
8 being included in any behavioral or psycho-
9 logical experiment or research in order to
10 allow for an informed decision about vol-
11 untary participation in such behavioral or
12 psychological research experiment or re-
13 search; and

14 (ii) ensuring the understanding by
15 such user of the furnished information and
16 any associated benefits, risks, or con-
17 sequences of participation prior to obtain-
18 ing the voluntary agreement to participate
19 by the user; and

20 (B) does not include—

21 (i) the consent of a child; or

22 (ii) the consent to a provision con-
23 tained in a general contract or service
24 agreement.

1 (7) LARGE ONLINE OPERATOR.—The term
2 “large online operator” means any person that—

3 (A) provides an online service;

4 (B) has more than 100,000,000 authenti-
5 cated users of an online service in any 30-day
6 period; and

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

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

15 (9) USER.—The term “user” means any indi-
16 vidual who engages with an online service.

17 (10) USER DATA.—The term “user data”
18 means any information relating to an identified or
19 identifiable individual user, whether directly sub-
20 mitted to the large online operator by the user or de-
21 rived from the observed activity of the user by the
22 large online operator.

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 with the purpose or substantial effect of
8 obscuring, subverting, or impairing user autonomy,
9 decision-making, or choice to obtain consent or user
10 data;

11 (2) to subdivide or segment consumers of online
12 services into groups for the purposes of behavioral or
13 psychological experiment or research of users of an
14 online service, except with the informed consent of
15 each user involved; or

16 (3) to design, modify, or manipulate a user
17 interface on a website or online service, or portion
18 thereof, that is directed to a child, with the purpose
19 or substantial effect of causing, increasing, or en-
20 couraging compulsive usage, inclusive of video auto-
21 play functions initiated without the consent of a
22 user.

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

1 (1) The large online operator shall disclose to
2 its users on a routine basis, but not less than once
3 each 90 days, the general purpose of any such be-
4 havioral or psychological experiment or research, to
5 each user whose user data is or was during the pre-
6 vious 90-day period subject to or included in any be-
7 havioral or psychological experiment or research.

8 (2) The large online operator shall disclose to
9 the public on a routine basis, but not less than once
10 each 90 days, any experiments or studies with the
11 purposes of promoting engagement or product con-
12 version being currently undertaken, or concluded
13 since the prior disclosure.

14 (3) The large online operator shall present the
15 disclosures described in paragraphs (1) and (2) in a
16 manner that—

17 (A) is clear, conspicuous, context-appro-
18 priate, and easily accessible; and

19 (B) is not deceptively obscured.

20 (4)(A) Subject to subparagraph (B), the large
21 online operator shall remove and delete all data ob-
22 tained from affected users in the course of behav-
23 ioral or psychological experiment or research if the
24 large online operator—

1 (i) determines (or determines that it has
2 reason to believe) that the informed consent for
3 the processing of user data for such behavioral
4 or psychological experiment or research was in-
5 appropriately acquired from such users; and

6 (ii) is unable to obtain within 2 business
7 days of such determination the appropriate in-
8 formed consent.

9 (B) If the large online operator is unable to re-
10 move and delete user data pursuant to subparagraph
11 (A), the large online operator shall discontinue the
12 related behavioral or psychological experiment or re-
13 search.

14 (5) The large online operator shall establish an
15 Independent Review Board for any behavioral or
16 psychological experiment or research, of any pur-
17 pose, conducted on users or on the basis of user ac-
18 tivity or data, which shall review and have authority
19 to approve, require modification in, or disapprove all
20 behavioral or psychological experiment or research.

21 (6) The large online operator shall ensure that
22 any Independent Review Board established under
23 paragraph (5) shall register with the Commission,
24 including providing to the Commission—

1 (A) the names and resumes of every Board
2 member;

3 (B) the composition and reporting struc-
4 ture of the Board to the management of the op-
5 erator;

6 (C) the process by which the Board is to
7 be notified of proposed studies or modifications
8 along with the processes by which the board is
9 capable of vetoing or amending such proposals;

10 (D) any compensation provided to board
11 members; and

12 (E) any conflict of interest that might
13 exist concerning a board member's participation
14 in the Board.

15 (c) REGISTERED PROFESSIONAL STANDARDS
16 BODY.—

17 (1) IN GENERAL.—An association of large on-
18 line operators may register as a professional stand-
19 ards body by filing with the Commission an applica-
20 tion for registration in such form as the Commis-
21 sion, by rule, may prescribe containing the rules of
22 the association and such other information and doc-
23 uments as the Commission, by rule, may prescribe
24 as necessary or appropriate in the public interest or

1 for protecting the welfare of users of large online op-
2 erators.

3 (2) PROFESSIONAL STANDARDS BODY.—An as-
4 sociation of large online operators may not register
5 as a professional standards body unless the Commis-
6 sion determines that—

7 (A) the association is so organized and has
8 the capacity to enforce compliance by its mem-
9 bers and persons associated with its members,
10 with the provisions of this Act;

11 (B) the rules of the association provide
12 that any large online operator may become a
13 member of such association;

14 (C) the rules of the association ensure a
15 fair representation of its members in the selec-
16 tion of its directors and administration of its
17 affairs and provide that one or more directors
18 shall be representative of users and not be asso-
19 ciated with, or receive any direct or indirect
20 funding from, a member of the association or
21 any large online operator;

22 (D) the rules of the association are de-
23 signed to prevent exploitative and manipulative
24 acts or practices, to promote transparent and
25 fair principles of technology development and

1 design, to promote research in keeping with
2 best practices of study design and informed
3 consent, and to continually evaluate industry
4 practices and issue contractually binding guid-
5 ance consistent with the objectives of this Act;

6 (E) the rules of the association provide
7 that its members and persons associated with
8 its members shall be appropriately disciplined
9 for violation of any provision of this Act, the
10 rules or regulations thereunder, or the rules of
11 the association, by expulsion, suspension, limi-
12 tation of activities, functions, fine, censure,
13 being suspended or barred from being associ-
14 ated with a member, or any other appropriate
15 sanction; and

16 (F) the rules of the association are in ac-
17 cordance with the provisions of this Act, and, in
18 general, provide a fair procedure for the dis-
19 ciplining of members and persons associated
20 with members, the denial of membership to any
21 person seeking membership therein, the barring
22 of any person from becoming associated with a
23 member thereof, and the prohibition or limita-
24 tion by the association of any person with re-

1 spect to access to services offered by the asso-
2 ciation or a member thereof.

3 (3) RESPONSIBILITIES AND ACTIVITIES.—

4 (A) BRIGHT-LINE RULES.—An association
5 shall—

6 (i) develop, on a continuing basis,
7 guidance and bright-line rules for the de-
8 velopment and design of technology prod-
9 ucts of large online operators consistent
10 with subparagraph (B); and

11 (ii) notify the Commission of such
12 guidance and bright-line rules.

13 (B) SAFE HARBORS.—In formulating guid-
14 ance under subparagraph (A), the association
15 shall define conduct that does not have the pur-
16 pose or substantial effect of subverting or im-
17 pairing user autonomy, decision-making, or
18 choice, or of cultivating compulsive usage for a
19 child, such as—

20 (i) de minimis user interface changes
21 derived from testing consumer preferences,
22 including different styles, layouts, or text,
23 where such changes are not done with the
24 purpose of obtaining user consent or user
25 data;

1 (ii) algorithms or data outputs outside
 2 the control of a large online operator or its
 3 affiliates; and

4 (iii) establishing default settings that
 5 provide enhanced privacy protection to
 6 users or otherwise enhance their autonomy
 7 and decision-making ability.

8 (d) ENFORCEMENT BY THE COMMISSION.—

9 (1) UNFAIR OR DECEPTIVE ACTS OR PRAC-
 10 TICES.—

11 (A) IN GENERAL.—A violation of sub-
 12 section (a) or (b) shall be treated as a violation
 13 of a rule defining an unfair or deceptive act or
 14 practice under section 18(a)(1)(B) of the Fed-
 15 eral Trade Commission Act (15 U.S.C.
 16 57a(a)(1)(B)).

17 (B) DETERMINATION.—For purposes of
 18 enforcement of this Act, the Commission shall
 19 determine an act or practice is unfair or decep-
 20 tive if the act or practice—

21 (i) has the purpose, or substantial ef-
 22 fect, of subverting or impairing user auton-
 23 omy, decision-making, or choice to obtain
 24 consent or user data; or

1 (ii) has the purpose, or substantial ef-
2 fect, of cultivating compulsive usage by a
3 child.

4 (2) POWERS OF THE COMMISSION.—

5 (A) IN GENERAL.—The Commission shall
6 enforce this Act and the regulations promul-
7 gated under this Act in the same manner, by
8 the same means, and with the same jurisdic-
9 tion, powers, and duties as though all applicable
10 terms and provisions of the Federal Trade
11 Commission Act (15 U.S.C. 41 et seq.) were in-
12 corporated into and made a part of this Act.

13 (B) PRIVILEGES AND IMMUNITIES.—Any
14 person who violates this Act or a regulation
15 promulgated under this Act shall be subject to
16 the penalties and entitled to the privileges and
17 immunities provided in the Federal Trade Com-
18 mission Act (15 U.S.C. 41 et seq.).

19 (C) AUTHORITY PRESERVED.—Nothing in
20 this Act shall be construed to limit the author-
21 ity of the Commission under any other provi-
22 sion of law.

23 (D) REGULATIONS.—Not later than 1 year
24 after the date of enactment of this Act, the
25 Commission shall promulgate regulations under

1 section 553 of title 5, United States Code,
2 that—

3 (i) establish rules and procedures for
4 obtaining the informed consent of users;

5 (ii) establish rules for the registration,
6 formation, oversight, and management of
7 the independent review boards, including
8 standards that ensure effective independ-
9 ence of such entities from improper or
10 undue influence by a large online operator;

11 (iii) establish rules for the registra-
12 tion, formation, oversight, and manage-
13 ment of professional standards bodies, in-
14 cluding procedures for the regular over-
15 sight of such bodies and revocation of their
16 designation;

17 (iv) in consultation with a professional
18 standards body established under sub-
19 section (c), define conduct that does not
20 have the purpose or substantial effect of
21 subverting or impairing user autonomy, de-
22 cision-making, or choice, or of cultivating
23 compulsive usage for a child, such as—

24 (I) de minimis user interface
25 changes derived from testing con-

1 sumer preferences, including different
2 styles, layouts, or text, where such
3 changes are not done with the purpose
4 of obtaining user consent or user
5 data;

6 (II) algorithms or data outputs
7 outside the control of a large online
8 operator or its affiliates; and

9 (III) establishing default settings
10 that provide enhanced privacy protec-
11 tion to users or otherwise enhance
12 their autonomy and decision-making
13 ability.

14 (3) SAFE HARBOR.—The Commission may not
15 bring an enforcement action under this Act against
16 any large online operator that relied in good faith on
17 the guidance of a professional standards body.

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