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S. 1084

To prohibit the usage 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

APRIL 9, 2019

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

A BILL

To prohibit the usage 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 **MENTS OR RESEARCH.**—The term “behavioral or

1 psychological experiments or research” means the
2 study, including through human experimentation, of
3 overt or observable actions and mental phenomena
4 inferred from behavior, including interactions be-
5 tween and among individuals and the activities of so-
6 cial groups.

7 (2) COMMISSION.—The term “Commission”
8 means the Federal Trade Commission.

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

15 (4) INDEPENDENT REVIEW BOARD.—The term
16 “independent review board” means a board, com-
17 mittee, or other group formally designated by a large
18 online operator to review, to approve the initiation
19 of, and to conduct periodic review of, any research
20 by, or at the direction or discretion of a large online
21 operator, involving human subjects.

22 (5) INFORMED CONSENT.—The term “informed
23 consent”—

24 (A) means a process by which a research
25 subject is provided adequate information prior

1 to being included in any experiment or study to
2 allow for an informed decision about voluntary
3 participation in a behavioral or psychological re-
4 search experiment or study, while ensuring the
5 understanding of the potential participant of
6 the furnished information and any associated
7 benefits, risks, or consequences of participation
8 prior to obtaining the voluntary agreement to
9 participate by the participant; and

10 (B) does not include—

11 (i) the consent of an individual under
12 the age of 13; or

13 (ii) the consent to a provision con-
14 tained in a general contract or service
15 agreement.

16 (6) LARGE ONLINE OPERATOR.—The term
17 “large online operator” means any person that—

18 (A) provides an online service;

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

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

1 (7) ONLINE SERVICE.—The term “online serv-
 2 ice” means a website or a service, other than an
 3 internet access service, that is made available to the
 4 public over the internet, including a social network,
 5 a search engine, or email service.

6 (8) USER DATA.—The term “user data” means
 7 any information relating to an identified or identifi-
 8 able individual user, whether directly submitted to
 9 the large online operator by the user, or derived
 10 from the observed activity of the user by the large
 11 online operator.

12 **SEC. 3. UNFAIR AND DECEPTIVE ACTS AND PRACTICES RE-**
 13 **LATING TO THE MANIPULATION OF USER**
 14 **INTERFACES.**

15 (a) CONDUCT PROHIBITED.—

16 (1) IN GENERAL.—It shall be unlawful for any
 17 large online operator—

18 (A) to design, modify, or manipulate a user
 19 interface with the purpose or substantial effect
 20 of obscuring, subverting, or impairing user au-
 21 tonomy, decision-making, or choice to obtain
 22 consent or user data;

23 (B) to subdivide or segment consumers of
 24 online services into groups for the purposes of
 25 behavioral or psychological experiments or stud-

1 ies, except with the informed consent of each
2 user involved; or

3 (C) to design, modify, or manipulate a user
4 interface on a website or online service, or por-
5 tion thereof, that is directed to an individual
6 under the age of 13, with the purpose or sub-
7 stantial effect of cultivating compulsive usage,
8 including video auto-play functions initiated
9 without the consent of a user.

10 (b) DUTIES OF LARGE ONLINE OPERATORS.—Any
11 large online operator that engages in any form of behav-
12 ioral or psychological research based on the activity or
13 data of its users shall—

14 (1) disclose to its users on a routine basis, but
15 not less than once each 90 days, any experiments or
16 studies that user was subjected to or enrolled in with
17 the purpose of promoting engagement or product
18 conversion;

19 (2) disclose to the public on a routine basis, but
20 not less than once each 90 days, any experiments or
21 studies with the purposes of promoting engagement
22 or product conversion being currently undertaken, or
23 concluded since the prior disclosure;

24 (3) shall present the disclosures in paragraphs
25 (1) and (2) in a manner that—

1 (A) is clear, conspicuous, context-appro-
2 priate, and easily accessible; and

3 (B) is not deceptively obscured;

4 (4) establish an Independent Review Board for
5 any behavioral or psychological research, of any pur-
6 pose, conducted on users or on the basis of user ac-
7 tivity or data, which shall review and have authority
8 to approve, require modification in, or disapprove all
9 behavioral or psychological experiments or research;
10 and

11 (5) ensure that any Independent Review Board
12 established under paragraph (4) shall register with
13 the Commission, including providing to the Commis-
14 sion—

15 (A) the names and resumes of every board
16 member;

17 (B) the composition and reporting struc-
18 ture of the Board to the management of the op-
19 erator;

20 (C) the process by which the Board is to
21 be notified of proposed studies or modifications
22 along with the processes by which the board is
23 capable of vetoing or amending such proposals;

24 (D) any compensation provided to board
25 members; and

1 (E) any conflict of interest that might
2 exist concerning a board member's participation
3 in the Board.

4 (c) REGISTERED PROFESSIONAL STANDARDS
5 BODY.—

6 (1) IN GENERAL.—An association of large on-
7 line operators may register as a professional stand-
8 ards body by filing with the Commission an applica-
9 tion for registration in such form as the Commis-
10 sion, by rule, may prescribe containing the rules of
11 the association and such other information and doc-
12 uments as the Commission, by rule, may prescribe
13 as necessary or appropriate in the public interest or
14 for protecting the welfare of users of large online op-
15 erators.

16 (2) PROFESSIONAL STANDARDS BODY.—An as-
17 sociation of large online operators may not register
18 as a professional standards body unless the Commis-
19 sion determines that—

20 (A) the association is so organized and has
21 the capacity to enforce compliance by its mem-
22 bers and persons associated with its members,
23 with the provisions of this Act;

1 (B) the rules of the association provide
2 that any large online operator may become a
3 member of such association;

4 (C) the rules of the association assure a
5 fair representation of its members in the selec-
6 tion of its directors and administration of its
7 affairs and provide that one or more directors
8 shall be representative of users and not be asso-
9 ciated with, or receive any direct or indirect
10 funding from, a member of the association or
11 any large online operator;

12 (D) the rules of the association are de-
13 signed to prevent exploitative and manipulative
14 acts or practices, to promote transparent and
15 fair principles of technology development and
16 design, to promote research in keeping with
17 best practices of study design and informed
18 consent, and to continually evaluate industry
19 practices and issue binding guidance consistent
20 with the objectives of this Act;

21 (E) the rules of the association provide
22 that its members and persons associated with
23 its members shall be appropriately disciplined
24 for violation of any provision of this Act, the
25 rules or regulations thereunder, or the rules of

1 the association, by expulsion, suspension, limi-
2 tation of activities, functions, fine, censure,
3 being suspended or barred from being associ-
4 ated with a member, or any other appropriate
5 sanction; and

6 (F) the rules of the association are in ac-
7 cordance with the provisions of this Act, and, in
8 general, provide a fair procedure for the dis-
9 ciplining of members and persons associated
10 with members, the denial of membership to any
11 person seeking membership therein, the barring
12 of any person from becoming associated with a
13 member thereof, and the prohibition or limita-
14 tion by the association of any person with re-
15 spect to access to services offered by the asso-
16 ciation or a member thereof.

17 (3) RESPONSIBILITIES AND ACTIVITIES.—

18 (A) BRIGHT-LINE RULES.—An association
19 shall develop, on a continuing basis, guidance
20 and bright-line rules for the development and
21 design of technology products of large online
22 operators consistent with subparagraph (B).

23 (B) SAFE HARBORS.—In formulating guid-
24 ance under subparagraph (A), the association
25 shall define conduct that does not have the pur-

1 pose or substantial effect of subverting or im-
2 pairing user autonomy, decision-making, or
3 choice, or of cultivating compulsive usage for
4 children such as—

5 (i) de minimis user interface changes
6 derived from testing consumer preferences,
7 including different styles, layouts, or text,
8 where such changes are not done with the
9 purpose of obtaining user consent or user
10 data;

11 (ii) algorithms or data outputs outside
12 the control of a large online operator or its
13 affiliates; and

14 (iii) establishing default settings that
15 provide enhanced privacy protection to
16 users or otherwise enhance their autonomy
17 and decision-making ability.

18 (d) ENFORCEMENT BY THE COMMISSION.—

19 (1) UNFAIR OR DECEPTIVE ACTS OR PRAC-
20 TICE.—A violation of subsection (a) or (b) shall be
21 treated as a violation of a rule defining an unfair or
22 deceptive act or practice under section 18(a)(1)(B)
23 of the Federal Trade Commission Act (15 U.S.C.
24 57a(a)(1)(B)).

1 (2) DETERMINATION.—For purposes of en-
2 forcement of this Act, the Commission shall deter-
3 mine an act or practice is unfair or deceptive if the
4 act or practice—

5 (A) has the purpose, or substantial effect,
6 of subverting or impairing user autonomy, deci-
7 sion-making, or choice to obtain consent or user
8 data; or

9 (B) has the purpose, or substantial effect,
10 of cultivating compulsive usage by a child under
11 13.

12 (3) REGULATIONS.—Not later than 1 year after
13 the date of enactment of this Act, the Commission
14 shall promulgate regulations under section 553 of
15 title 5, United States Code, that—

16 (A) establish rules and procedures for ob-
17 taining the informed consent of users;

18 (B) establish rules for the registration, for-
19 mation, oversight, and management of the inde-
20 pendent review boards, including standards that
21 ensure effective independence of such entities
22 from improper or undue influence by a large
23 online operator;

24 (C) establish rules for the registration, for-
25 mation, oversight, and management of profes-

1 sional standards bodies, including procedures
2 for the regular oversight of such bodies and rev-
3 ocation of their designation; and

4 (D) in consultation with a professional
5 standards body established under subsection
6 (c), define conduct that does not have the pur-
7 pose or substantial effect of subverting or im-
8 pairing user autonomy, decision-making, or
9 choice, or of cultivating compulsive usage for
10 children such as—

11 (i) de minimis user interface changes
12 derived from testing consumer preferences,
13 including different styles, layouts, or text,
14 where such changes are not done with the
15 purpose of obtaining user consent or user
16 data;

17 (ii) algorithms or data outputs outside
18 the control of a large online operator or its
19 affiliates; and

20 (iii) establishing default settings that
21 provide enhanced privacy protection to
22 users or otherwise enhance their autonomy
23 and decision-making ability.

24 (4) SAFE HARBOR.—The Commission may not
25 bring an enforcement action under this Act against

- 1 any large online operator that relied in good faith on
- 2 the guidance of a professional standards body.

