

## 117TH CONGRESS 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-

- chological experiment or research" means the study, including through human experimentation, of overt or observable actions or mental phenomena inferred from behavior, including interactions between and among individuals and the activities of social groups.
  - (2) CHILD.—The term "child" has the meaning given such term in section 1302 of the Children's Online Privacy Protection Act of 1998 (15 U.S.C. 6501).
  - (3) Commission.—The term "Commission" means the Federal Trade Commission.
  - (4) Compulsive usage.—The term "compulsive usage" means any response stimulated by external factors that causes an individual to engage in repetitive behavior causing psychological distress, loss of control, anxiety, depression, or harmful stress responses.
  - (5) Independent review board" means a board, committee, or other group that serves to protect the welfare and privacy of users and is formally designated by a large online operator to review, to approve the initiation of, and to conduct periodic review of, any research by, or at the direction or discretion of, a 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 be4 havioral or psychological experiment or research, to
  5 each user whose user data is or was during the pre6 vious 90-day period subject to or included in any be7 havioral or psychological experiment or research.
  - (2) The large online operator shall disclose to the public on a routine basis, but not less than once each 90 days, any experiments or studies with the purposes of promoting engagement or product conversion being currently undertaken, or concluded since the prior disclosure.
  - (3) The large online operator shall present the disclosures described in paragraphs (1) and (2) in a manner that—
    - (A) is clear, conspicuous, context-appropriate, and easily accessible; and
      - (B) is not deceptively obscured.
  - (4)(A) Subject to subparagraph (B), the large online operator shall remove and delete all data obtained from affected users in the course of behavioral or psychological experiment or research if the large online operator—

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- 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 in5 appropriately acquired from such users; and
  6 (ii) is unable to obtain within 2 business
  - (ii) is unable to obtain within 2 business days of such determination the appropriate informed consent.
  - (B) If the large online operator is unable to remove and delete user data pursuant to subparagraph (A), the large online operator shall discontinue the related behavioral or psychological experiment or research.
  - (5) The large online operator shall establish an Independent Review Board for any behavioral or psychological experiment or research, of any purpose, conducted on users or on the basis of user activity or data, which shall review and have authority to approve, require modification in, or disapprove all behavioral or psychological experiment or research.
  - (6) The large online operator shall ensure that any Independent Review Board established under paragraph (5) shall register with the Commission, 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	Вору.—
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

- for protecting the welfare of users of large online operators.
  - (2) Professional standards body unless the Commission determines that—
    - (A) the association is so organized and has the capacity to enforce compliance by its members and persons associated with its members, with the provisions of this Act;
    - (B) the rules of the association provide that any large online operator may become a member of such association;
    - (C) the rules of the association ensure a fair representation of its members in the selection of its directors and administration of its affairs and provide that one or more directors shall be representative of users and not be associated with, or receive any direct or indirect funding from, a member of the association or any large online operator;
    - (D) the rules of the association are designed to prevent exploitative and manipulative acts or practices, to promote transparent and fair principles of technology development and

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design, to promote research in keeping with best practices of study design and informed consent, and to continually evaluate industry practices and issue contractually binding guidance consistent with the objectives of this Act;

- (E) the rules of the association provide that its members and persons associated with its members shall be appropriately disciplined for violation of any provision of this Act, the rules or regulations thereunder, or the rules of the association, by expulsion, suspension, limitation of activities, functions, fine, censure, being suspended or barred from being associated with a member, or any other appropriate sanction; and
- (F) the rules of the association are in accordance with the provisions of this Act, and, in general, provide a fair procedure for the disciplining of members and persons associated with members, the denial of membership to any person seeking membership therein, the barring of any person from becoming associated with a member thereof, and the prohibition or limitation 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 or
17	the guidance of a professional standards body.

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