DATE: March 16, 2023
TO: Chair Jamie Becker-Finn, Vice-Chair Cedrick Frazier, and Members of the House Judiciary Finance and Civil Law Committee
FROM: Andrew O'Connor
RE: HF 2257 – Oppose

The Entertainment Software Association (ESA), the trade association representing video game publishers and console makers, respectfully opposes House File 2257, the Minnesota Age Appropriate Design Code Act.

The video game industry has long supported efforts and complied with laws to keep all gamers—specifically, with respect to children and teens—safe online. ESA and its members have been at the forefront of promoting privacy and safety of consumers, including minors, for nearly three decades. For nearly 30 years, the Entertainment Software Rating Board (ESRB), a non-profit founded by ESA has independently assigned age ratings for video games and mobile apps; educated parents about age ratings, parental controls, and privacy-related topics; enforced industry-adopted ad guidelines; and worked with major retailers to help children access appropriate content. In addition, each video game console produced by our members has robust parental controls to empower parents (and all players) to create the online experience most suitable for their child. These controls include choices to limit screen time, spending, and communication features, among others. These member companies also provide mobile apps and other educational resources to make it easy for parents to learn about and set controls.

HF 2257 is not the proper vehicle for creating safe, productive online environments for the following reasons: 1) the bill's core components mirrors a California law that is currently being challenged as unconstitutional in federal court; 2) portions of the bill set forth unclear, unworkable legal standards for which it will be difficult for companies to comply; and 3) both this bill and the California law trace back to the UK AADC, and there are challenges with porting over that framework into U.S. law.

1. ***The pending litigation***

HF 2257 roughly aligns with California's recently enacted Age Appropriate Design Code law (CA AADC), which is the subject of ongoing federal litigation – *NetChoice LLC v. Bonta*. Accordingly, we oppose any "age appropriate design" bills until the constitutional arguments are resolved in court. Those challenging the California law have cited First Amendment and other constitutional defects. In *NetChoice*, the plaintiffs allege, among other points, that the requirement to perform Data Protection Impact Assessments, also included in HF 2257, would chill protected speech by requiring businesses to identify and eliminate potentially harmful content before product launch. The complaint alleges that these requirements, coupled with other mandates in the bill, amount to a prior restraint of speech for several reasons, including that: (i) it requires businesses to promote users' well-being as decided by the State; (ii) it requires states to enforce their moderation policies to the State's satisfaction; and (iii) it restrains providers from serving content to users unless the provider has verified the age of each user or tailored that content to an age-appropriate level.[1]

2. ***Unclear Legal Standards***

HF 2257 diverges from widely adopted privacy concepts and norms in its operative provisions and definitions. The definitions section is key for determining which entities and segments of data are within scope. Unfortunately,

[1] *NetChoice LLC v. Bonta*, Case No. 5:22-cv-08861-BLF, (N.D. Cal.), motion for prelim. inj. filed Feb. 17, 2023.

multiple definitions set forth broad standards which fail to provide businesses clarity on their compliance obligations.

For example, the bill would include personal information if "capable of being associated with" a household. Yet, the "household data" concept has not been widely adopted in the data privacy context because privacy protections are designed to be applied to information only when it is linked to a specific individual. Under the Child Online Privacy Protection Act, the federal children's privacy law, a business is required to provide heightened privacy protections if it has "actual knowledge" the individual is a child. It is impractical to adopt a "household data" standard because a business cannot determine which individual is under 18. Further, the protections contemplated in HF 2257 should only apply to children under 18 years old as set forth in this bill, not adults. By applying a household data concept, businesses will be forced to adopt one of two approaches to minimize risk of noncompliance. Businesses may apply the most restrictive protections to a broader audience (which is not the intent of this bill); or alternatively, businesses would need to collect additional information from consumers to determine to whom additional protections should apply. Privacy regulations should not adopt a standard that would require businesses to collect additional information from consumers to determine whether additional protections apply.

3. ***There are key process differences with absorbing aspects of the UK AADC into U.S. law***

Both the California law and the HF 2257 track key features of the UK AADC. That statutory code is intended to apply principles of the UK GDPR to children/teen data and is enforced by the Information Commissioner's Office (ICO), to date mostly through audits and largely in the capacity of a regulator. In contrast, here, both HF 2257 and the California law would be enforced by the states' respective AGs. Passing a law to be enforced by an AG, which is law enforcement authority, is a different undertaking with different incentives and purposes.

For these reasons, ESA respectfully opposes HF 2257. We appreciate the opportunity to provide testimony and would be happy to follow-up with any additional information as needed.

Sincerely,

Andrew O'Connor
Director, State Government Affairs
Entertainment Software Association