

February 21, 2024

The Honorable Zack Stephenson  
Chair, House Commerce Finance and Policy Committee  
Minnesota House of Representatives  
100 Rev. Martin Luther King Jr. Blvd.  
St. Paul, Minnesota 55155

**RE: HF 2257 (Age-Appropriate Design Code)**

Dear Chair Stephenson, Vice-Chair Kotyza-Witthuhn, and Members of the House Commerce Finance and Policy Committee,

The Entertainment Software Association (ESA), the trade association representing video game publishers and console makers, shares your goal of protecting children and teens online and appreciates your leadership to ensure online platforms frequented by children and teens are safe. As the innovators, creators, publishers, and business leaders who are transforming the video game industry, ESA members understand that online safety is critically important. We thank you for the opportunity to provide comment on HF 2257, the Age-Appropriate Design Code Act, and encourage Minnesota legislators to consider adopting a safe harbor standard in the new legislative text that would recognize industries that have taken a proactive approach to protecting children online.

Moreover, the current form of the bill aligns with California's Age-Appropriate Design Code law (CA AADC), which has been met with controversy and is the subject of ongoing federal litigation in *NetChoice LLC v. Bonta*. ESA also has concerns with the Senate-sponsored January 11<sup>th</sup> amendment offered to the Legislative Commission on Data Practices because this may also impact the video game industry's First Amendment rights and will impose new burdensome requirements.

In today's 21<sup>st</sup> century media landscape, consumers value video games and consider them to be an important part of their entertainment. In fact, in a recent survey, more than 80 percent of Americans reported that video games bring them joy, reduce stress, and improve their cognitive skills.<sup>1</sup> Many consumers have adopted gaming as family entertainment, and 76 percent of parents reported that they play video games with their children.<sup>2</sup> Accordingly, due to the widespread use of video games across different age groups, ESA's members have made significant investments to protect all video game players online, especially children and teens.

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<sup>1</sup> See 2023 ESA Essential Facts, available at <https://www.theesa.com/2023-essential-facts/>.

<sup>2</sup> *Id.*

For nearly three decades the video game industry has invested and developed leading-edge content moderation tools, as well as parental and user controls, to successfully make games safer for kids and teens online. For example, 74 percent of parents who have children that play video games use the industry’s rating system to select age-appropriate games, which was developed, and is enforced, by the Entertainment Software Rating Board (ESRB).<sup>3</sup> In addition, ESA member companies continuously invest in the development of in-game features to empower parents and protect children, such as tools to restrict communications and block purchasing capabilities to create a safe environment for video game play.

Accordingly, to continue to encourage ESA member companies’ long track record of investment in providing a safe online environment for its users, ESA urges Minnesota legislators consider adopting a safe harbor standard, that would recognize industries that have taken a proactive approach to protecting children online. The ratings system, advertising guidelines, and other tools set forth by the ESRB are widely-adopted and effective tools that the video game industry uses to protect children. We ask that the Minnesota legislature recognize these efforts and utilize our expertise in crafting this legislation.

### **A Safe Harbor is Necessary to Protect the Video Game Industry’s First Amendment Rights**

The First Amendment has been fundamental to the growth of the video game industry. Free speech protections for video game publishers, developers, artists, and storytellers have enabled the industry’s groundbreaking experiences in interactive entertainment. In 2011, the U.S. Supreme Court confirmed that video games are expressive works protected by the First Amendment and that efforts to limit or ban video game content violates publishers’ free speech rights.<sup>4</sup> These First Amendment rights have helped enable video game companies to develop new worlds and story lines into an industry with a domestic economic impact of over \$90 billion that provides high-skilled jobs and other economic benefits across the United States.

While ESA supports the goals of HF 2257, we are concerned that the data processing and design requirements of this bill will have a chilling effect on the speech of our members. Specifically, by directing companies to operate in the “best interest of the child” without creating a workable standard and definitions, HF 2257 will expose companies to undue risk and liability. As a result, video game publishers may seek to limit user access to online content and limit data processing more than what is necessary to prevent the harm, thus chilling speech and curbing innovation and development.

### **Notice Requirements for the Video Game Industry Are Duplicative and Burdensome**

In addition, the notice requirements for companies with products or services that are deemed “reasonably likely” to be accessed by a variety of age ranges are unduly burdensome, as this bill would require companies to provide a variety of disclosures in a manner appropriate for each age

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<sup>3</sup> *Id.*

<sup>4</sup> See *Brown v. Entertainment Merchants Association & Entertainment Software Association* (2011).

range accessing the product or service. This requirement is redundant for ESA member companies, as many of them already provide such notice through their ratings system and advertising guidelines. Also, all ESA members already comply with existing federal and state privacy laws and adding these duplicative and burdensome requirements will only complicate the growing patchwork of laws and regulations. Accordingly, adopting a safe harbor framework will avoid these duplicative efforts and incentivize good actors. It would also boost the investment that many companies have already made in online safety tools to protect children and teens.

ESA and its members recognize the importance of children' online safety and want to be a resource to Minnesota legislators as you try to navigate this complicated and evolving landscape. Thank you for your consideration of including a safe harbor in HF 2257. Please reach out to the undersigned with any questions.

Sincerely,

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