

COMMENTS OF THE ELECTRONIC PRIVACY INFORMATION CENTER

to the

VERMONT ATTORNEY GENERAL'S OFFICE

Re: Proposed Vermont Age-Appropriate Design Code Rules for

Sections 2449g of Act 63

October 2, 2026

The Electronic Privacy Information Center (EPIC) submits these comments in response to the Vermont Attorney General's Office's ("AGO") proposed Age Assurance Privacy Rule ("Proposed Rule") for the Vermont Age-Appropriate Design Code ("AADC"), to be codified in Sections 2449g.¹

EPIC is an independent, nonpartisan public interest research center in Washington, D.C., established in 1994 to protect privacy, freedom of expression, and democratic values in the information age. For decades, EPIC has worked under different administrations to safeguard individuals' personal data and to protect consumer privacy. Recently, EPIC has been a leading voice on platform governance issues, advocating for meaningful regulation and oversight of platform companies that respects the privacy, speech rights, and associational rights of platform users.

EPIC offers the following principles to ensure age assurance is implemented in a way that minimizes speech and privacy concerns:

¹ Vermont Attorney General's Office, *Age Vermont Age-Appropriate Design Code Rulemaking* (July 8, 2026), <https://ago.vermont.gov/vermont-age-appropriate-design-code-rulemaking>.

- Tailor age assurance to the harm by age gating harmful data and design practices, not entire online services and products.
- Make age assurance proportionate to the harm and sensitive to impacts on accessibility and usability.
- Minimize data collection by requiring operators to use information they currently possess before requesting additional personal data.
- Include strong privacy protections for any personal data collected for age assurance.
- Provide consumers with choice of age assurance methods.
- Provide an effective and responsive appeals process.
- Provide the public with transparency about age determination practices.

To that end, EPIC recommends that the AGO:

- Remove the proportionality framework and instead make relevant determinations about proportionality.
- Remove language that would require all covered businesses to assess every consumer's age.
- Revise the graduated escalation framework to accurately capture privacy interests.
- Ensure all consumers, and all personal data, receive protections under the Rule, not just covered minors.
- Determine which businesses can provide consumers with multiple options for age assurance within commercial reasonability.
- Clarify the appeals process.
- Require public transparency into age assurance systems.

I. The applicability of the Proposed Rule should be based on whether a covered business engages in regulated practices and should not require all covered businesses to determine every consumer’s age.

Age assurance requirements, when implemented correctly, can help ensure that businesses do not subject minors to harmful data and design practices. But age assurance must be implemented in way that is proportionate to the harm of the regulated practice, the protections provided by the statute, and the impact on privacy and accessibility. These proportionality decisions must not be left to the covered businesses to make—the AGO must make these decisions for the businesses.

The VTAADC classifies regulated practices into a risk framework, and the AGO should use this risk framework to define a proportionate age assurance framework. Practices that are prohibited for covered minors—ones that are listed in the high-risk practices section, prohibited by the duty of care, or described by the AGO’s proposed rules on prohibited data and design practices—represent the highest risk category and covered businesses should not be able to subject consumers to those practices without first determining that they are not covered minors. The default settings requirements identify lower risk practices that minors can turn on and off. The AGO should not require covered businesses to collect additional data from consumers to determine whether they are covered minors to comply with these requirements.

EPIC thus recommends that the AGO:

A. Remove all references to proportionate age assurance.

The AGO should not allow covered businesses to decide what age assurance is proportionate. The VTAADC has already made many of these decisions, and the AGO should make the rest. Leaving these decisions to covered businesses will result in disjointed and confused compliance, including businesses that over-comply by age gating their entire services,

and businesses that under-comply by failing to use appropriate means to determine that a consumer is not a minor before subjecting them to harmful data and design practices.

The framework that the AGO outlines in the Age Assurance Selection section is an appropriate framework for the AGO to use to determine the rules regarding age assurance, but the AGO should not give covered businesses discretion to make these determinations. EPIC illustrates below how the AGO should use this framework to announce a more concrete Rule:

Foreseeability of harm. The VTAADC has already determined the foreseeability of harm for regulated practices. The VTAADC provides two categories of protections: It prohibits certain practices because they carry a high risk of harm and it sets default settings covered minors can change when there is a lower risk of harm and/or countervailing benefits of a practice. No consumer should be subjected to the data and design practices prohibited by the VTAADC unless the covered business first determines the consumer's age range under the Proposed Rule. A lower standard of age assurance would be appropriate for the default privacy settings provisions if additional factors, like privacy and accessibility, would be negatively impacted by using the same standard as the prohibited practices.

Accessibility and functionality. Age assurance should not be a barrier to accessing an entire online product or service. The VTAADC prohibits data and design practices that are simply not necessary for the functionality of any online product or service and thus could be turned off by default—or eliminated entirely—for all consumers. To preserve user accessibility and functionality, any covered business that wishes to offer any prohibited practice or feature should **only age gate the prohibited practice or feature** and not their entire product or service. Most of the default privacy settings and tools could also be implemented as defaults for all to ensure that age assurance does not become a barrier to accessing entire online products or

services. The one exception is the set of settings concerning features that connect covered minors and known adult users, as a covered business would need to know which group a consumer belonged to prior to providing online products and services that facilitate communication between users. To prevent the minor-adult default settings from being a barrier to accessing entire communications products and services, the AGO should allow covered businesses to rely on data they have previously collected about a user to determine whether they are a covered minor for the purposes of complying with the default privacy settings and tools provisions.

Privacy. Covered businesses should be encouraged to use information they already have to assess age, subject to certain conditions, before requesting additional data from consumers. If a covered business must collect additional data, the business should be required to use privacy-preserving technology, like zero-knowledge proofs and on-device processing, when technically feasible. The AGO’s proposed Graduated Escalation provision can be modified to capture these requirements.

Accuracy. All covered businesses that subject consumers to prohibited practices should adhere to the same accuracy standards, and the AGO should announce these standards in the final Rule.

B. Make the rule apply to any covered business that engages in regulated practices.

In the Applicability section, provision (b) states that “This Rule applies where a covered business knows or reasonably should know that a user is a covered minor.” But all covered businesses should be subject to the rule if they engage in any practice regulated by the VTAADC. The AGO should strike (b) and replace with “This Rule applies to any covered business that has obligations under 9 V.S.A §§ 2449c, 2449d, 2449f, or 2449g.”

C. Do not require all covered businesses to determine whether a consumer is a covered minor.

In the Applicability section, provisions (c) and (d) state:

(c) A covered business shall implement proportionate age assurance measures for any online service, product, or feature reasonably likely to be accessed by covered minors.

(d) A covered business shall determine whether a user is a covered minor using a proportionate age assurance method.

The AGO should strike these two provisions. These provisions seem to require that all covered businesses determine the age of every consumer who accesses their online product or service. Such an expansive age determination mandate is neither necessary nor proportional to the risk of harm. Not all covered businesses engage in practices regulated by the VTAADC. Those businesses should not be required to assess any consumer's age. As for covered businesses that do engage in regulated practices, age assurance should **only be performed prior to subjecting a consumer to a feature or practice that is prohibited for covered minors and should never be mandatory**—all consumers must be able to default into the protections afforded by the VTAADC instead of having their age range determined.

D. Require covered businesses assure age only when a consumer requests a high-risk practice.

To clarify the scope of the Proposed Rule along the lines suggested above, the AGO should add the following provision to the Applicability section:

(c) A covered business shall determine whether a consumer is a covered minor according to this Rule when a consumer requests a practice prohibited for covered minors under 9 V.S.A §§ 2449c or 2449f, including any applicable rules.

E. To comply with the default privacy settings requirements, covered businesses should be required to use existing data on consumers, not collect additional data.

To prevent age assurance from acting as a barrier to accessing entire online products and services, and taking into consideration the lower risks and protections encompassed in the default privacy settings and tools provisions, the AGO should add the following provision to the Applicability section:

(d) A covered business shall determine whether a consumer is a covered minor according to this Rule if it has obligations under 9 V.S.A § 2449d, including any applicable rules, but shall not be required to collect any personal data to determine age range for the sole purpose of complying with the section.

II. The graduated escalation framework should be modified to accurately reflect data minimization principles.

The Graduated Escalation section of the Proposed Rule could be a useful framework for covered businesses to use to design their age assurance systems, but the Proposed Rule does not accurately capture the relative invasiveness of various age assurance methods.

The privacy implications of an age assurance method depend on the extent to which the method:

- Requires a covered business or processor to collect or process any personal information beyond what the covered business already collects or processes;
- Requires a covered business or processor to collect or process sensitive personal information, such as biometric data or government identification documents;
- Creates a risk of linkability between a consumer's identity and their online activities;

- Presents a risk of contributing to or entrenching commercial surveillance through secondary use, such as through data sale or use for targeting advertising; and
- Increases the risk that personal data is exposed through a data breach.

The VTAADC's primary method of mitigating privacy concerns is through its statutory privacy protections, along with the additional privacy protections contained in the Proposed Rules. By choosing an age assurance method that meets these privacy requirements, a covered business will minimize data collection and processing as well as linkability, secondary use, and data security risks.

When it comes to choice of age assurance method, the relative privacy invasiveness is not as simple as whether the method involves collecting or processing a particular age signal. For example, a credential-based method could be more privacy protective than a method that analyzes a consumer's behavior on a platform if the credential-based method processes all personal data on the consumer's device and transmits an age signal using a zero-knowledge proof. That is because, with on-device processing, the covered business never collects the consumer's personal data, and with the zero-knowledge proof, the covered business does not learn the consumer's identity, and the processor does not learn anything about the consumer's online activity. An age assurance method that relies on behavioral profiling could potentially involve the covered business processing large amounts of personal data and even collecting behavioral data that is otherwise not necessary to provide the online service, product, or feature to the consumer. There is, however, a reason to prohibit covered businesses from *solely* determining age based on credential-based age assurance: not every consumer has the required credentials to prove age. Thus, the AGO should require that covered businesses that use credential-based age assurance offer some alternative means of assessing age.

The AGO should modify the Graduated Escalation provision to accurately capture data minimization principles by directing covered businesses to first use data they may currently possess that is highly likely to be correlated with age.² The rule should be specific as to which signals are acceptable and when they are sufficient to satisfy the age determination requirement. For instance, self declaration that a consumer is a minor is highly likely to mean that the consumer is a minor, as users only have an incentive to falsely declare that they are adults to avoid platform access controls. Meanwhile, the AGO could declare that a consumer who created their account over ten years ago is sufficiently likely to be over the age of 18 that the consumer need not undergo any additional age assurance.

Once covered businesses have exhausted their existing age signal data, they should then be directed to use privacy-preserving means of processing and transmitting age signals to the extent that such privacy-preserving technology is commercially reasonable and technically feasible. Under the VTAADC, the AGO must be the one to determine that a privacy-preserving technology meets this standard, either by declaring that the technology is commercially reasonable and technically feasible, or by defining a clear market condition that, when met, would mean that the technology must be adopted.³

EPIC suggests the following language to replace provisions (a) and (b) in the Graduated Escalation section of the Proposed Rule:

(a) To minimize the collection and processing of personal data for age assurance, a covered business shall first use age signals currently in its possession to

² 9 V.S.A § 2449g(b)(2)(B)(v)(I) (directing the AGO to consider “the efficacy of requiring covered businesses and process to use previously collected data to determine user age.”)

³ 9 V.S.A § 2449g(b)(1) (the AGO “shall . . . adopt rules identifying commercially reasonable and technically feasible methods for covered businesses and processors to determine if a user is a covered minor . . .”)

determine age range, if possible, and then use minimally invasive methods that employ privacy-preserving technology. This shall include:

- 1. Self Declaration. Self declaration that a consumer is a minor shall constitute actual knowledge that the consumer is a covered minor. Self declaration that a consumer is not a minor shall not be sufficient to support a determination that a consumer is not a covered minor.*
- 2. Account Age. Any consumer that opened their account over 10 years prior to the date of assessment shall not be considered a covered minor.*
- 3. Existing age determinations or inferences. The covered business shall use any determinations or inferences of the consumer's age or age range, or any inferences correlated with age or age range, that the covered business has associated with the consumer, including any inferences the business has used to target advertisements to the consumer, to assign a consumer an age range.*
- 4. Privacy-preserving technology. If a covered business must collect additional data from a consumer to determine their age range, the business shall use privacy-protective techniques, such as zero-knowledge proofs and on-device processing of personal data, [as far as the AGO has determined is commercially reasonable and technically feasible.]*

(b) If a covered business is not able to determine a consumer's age range using one of the methods described in (a), the business may use other methods of determining whether a consumer is or is not a covered minor that conform to the standards established in 9 V.S.A § 2449g and this Rule, provided that:

1. *If the covered business intends to process personal data it has previously collected about a consumer to determine age range, other than through the methods described in (a), the business must first request the consumer's separate and affirmative consent for the processing and provide the consumer a prominent and accessible means to opt out of the processing on an ongoing basis following consent.*
2. *A covered business shall not solely offer consumers the option of credential-based age assurance.*

EPIC also suggests the following change to provision (d) to conform to the above changes:

- (d) Prior to selecting ~~an moderate-intrusion or higher-intrusion~~ age assurance process or technique, a covered business shall:*
- 1. Evaluate ~~at least one lower-intrusion alternative~~ **all methods described in (a);***
 - 2. Document ~~why such alternative is not reasonably available or sufficient to achieve the reasonably necessary level of accuracy or confidence~~ **whether and to what extent such methods could be used to determine consumers' age ranges, including the percentage of consumers whose age ranges could be determined using each method; and***
 - 3. Document the basis for selecting ~~the~~ **each** age assurance process or technique used.*

III. Protections should apply to all consumers, not just covered minors, and should clearly protect all personal data.

Several sections of the Proposed Rule describe privacy and accessibility protections but only afford those protections to “covered minors.” All of the provisions in these sections should

replace “covered minor” with “consumer” where appropriate to ensure that all consumers are afforded the same rights:

- Frequency and Reassessment
- Data Minimization in Age Assurance
- Linkability and System Design
- Prohibited Uses, Retention, and Disclosure of Age Assurance Data
- Fallback and Accessibility
- Appeals Process

The Proposed Rule also uses imprecise language in numerous places to describe personal data. All instances of “age assurance data” should be revised to “personal data collected for age assurance purposes.” Wherever the rule mentions “raw personal data”, the term “raw” should be struck.

IV. Assess the commercial reasonability of large businesses providing consumers with multiple options for assessing age.

The AGO should determine whether it is commercially reasonable for the Rule to require covered businesses with a certain amount of annual revenue provide consumers with multiple age assurance options.⁴ User choice will aid consumer adoption of age assurance methods. Not all consumers will be comfortable with the same age determination methods. Some consumers may be comfortable submitting to a face scan, while others may not. Real or perceived biases in age determination methods may also influence which methods consumers are willing to use and which ones are likely to give the consumer an accurate determination. The largest covered

⁴ 9 V.S.A § 2449g(b)(2)(B)(v)(III) (directing the AGO to determine “the efficacy of requiring covered businesses and processors to provide users with multiple options for age assurance.”)

businesses are likely to be able to provide consumers with multiple options for age assurance method and the AGO should require them to do so.

V. Prohibit covered businesses from limiting their appeals processes to a show of ID and clarify other aspects of the appeals process.

The AGO should add one condition and two clarifications to the Appeals Process section. First, covered businesses' appeals processes should not be based solely on credential-based age assurance for the same reason that their primary age assurance system should not rely solely on credentials: not all consumers have the appropriate documents to demonstrate age. Second, the Rule should make clear that the appeals process must adhere to all of the requirements in the Rule for age assurance generally as well as the VTAADC's statutory requirements. Finally, EPIC recommends that the AGO set a timeline for when covered businesses must respond to appeals, otherwise businesses may not properly staff the appeals process and consumers may experience extensive delays.

VI. Require covered businesses to make publicly available reports on their age assurance systems.

EPIC lauds the AGO for including strong assessment and documentation requirements in the Proposed Rule. Covered businesses should, however, be required to make a report based on this documentation publicly available on an annual basis. A public report will aid researchers in assessing covered business's age assurance systems, resulting in information that will help the AGO refine this Rule in the future. A public report will also provide consumers with much-needed transparency into how their data is collected, processed, and secured for age assurance purposes.⁵ A covered business should be required to publish this report in a prominent and

⁵ 9 V.S.A § 2449g(b)(2)(B)(iv) (directing the AGO to consider "whether and to what extent transparency measures would increase consumer trust in an age assurance method.")

accessible location on its website and also link to the report whenever it requests that a consumer undergo an age assurance process.

VII. Conclusion

EPIC commends the AGO on the Proposed Rules and is eager to engage with the AGO further regarding this rulemaking. Please contact the Director of EPIC's Platform Governance and Accountability program, Megan Iorio, at iorio@epic.org with any questions.

Sincerely,

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