



March 22, 2023

Senate Business, Labor, and Economic Affairs
Attn: Erin Sullivan, Committee Staff
State Capitol
1301 East 6th Avenue
Room 422
Helena, MT 59601

Re: HB 349 - Establish obscenity filter requirements for electronic devices (Oppose)

Dear Chair Small, Vice-Chair Curdy, Vice-Chair Nolan and Members of the Senate Business, Labor, and Economic Affairs Committee:

On behalf of the Computer & Communications Industry Association (CCIA), I write to respectfully oppose HB 349.

CCIA is an international, not-for-profit trade association representing a broad cross-section of communications and technology firms.¹ Proposed regulations on the interstate provision of digital services therefore can have a significant impact on CCIA members. Recent sessions have seen an increasing volume of state legislation related to the regulation of what digital services host and how they host it. While recognizing that policymakers are appropriately interested in the digital services that make a growing contribution to the U.S. economy, these bills require study, as they may raise constitutional concerns,² conflict with federal law, and risk impeding digital services in their efforts to appropriately manage content.

CCIA strongly believes children deserve an enhanced level of security and privacy online. Currently, there are a number of efforts among our members to incorporate protective design features into their websites and platforms.³ CCIA's members have been leading the effort in raising the standard for children's safety and privacy across our industry by creating new features, settings, parental tools, and protections that are age-appropriate and tailored to the differing developmental needs of young people.

However, requiring a state-specific default filter would present significant technical difficulties for businesses. Typically, internet service providers (ISPs) govern which websites users can access. For example, known pirating sites are blocked by ISPs, not the manufacturer who produces the devices. It is also important to consider how the bill's provisions would apply to devices that do not have precise location-tracking technology or only connect via WiFi. Similarly, the bill raises questions surrounding how to account for devices purchased online from an out-of-state location, or for devices purchased on the secondary market. While it is easier to determine whether a device is activated in the state based on point of sale, the myriad options available to consumers to purchase devices from outside the state raise significant questions about how the

¹ For 50 years, CCIA has promoted open markets, open systems, and open networks. CCIA members employ more than 1.6 million workers, invest more than \$100 billion in research and development, and contribute trillions of dollars in productivity to the global economy. A list of CCIA members is available at <https://www.ccianet.org/members>.

² Eric Goldman, The Constitutionality of Mandating Editorial Transparency, 73 *Hastings L. J.* 1203 (2022), https://repository.uchastings.edu/cgi/viewcontent.cgi?article=3985&context=hastings_law_journal

³ Jordan Rodell, *Why Implementing Education is a Logical Starting Point for Children's Safety Online*, Disruptive Competition Project (Feb. 7, 2023), <https://www.project-disco.org/privacy/020723-why-implementing-education-is-a-logical-starting-point-for-childrens-safety-online/>.



bill's provisions would apply.

We appreciate the opportunity to further expand on our concerns with the proposed legislation.

1. A mandatory device filter would remove a user's individual ability to tailor preferences regarding content and services.

Mandating that a device activate an “obscenity filter” intended to prevent younger users from accessing certain content ignores the fact that adults, by and large, are the primary users of the cellular phone and tablet devices that the bill explicitly seeks to regulate. In the global economy, there are many products and services that we use that are not, by default, designed for younger users. For example, automobiles are designed with seats and seatbelts for adult consumers. However, car seats designed specifically for children's safety are available and recommended for use to ensure that children are as safe as possible when riding in an automobile. In a similar vein, many devices and services have content filtering technologies that allow parents to individually tailor settings and preferences to enable both adults and children to make appropriate choices about the type of content and services they are able to see and use. These types of filters and settings, however, are not activated by default. HB 349 could invite significant consumer confusion for adults who are not aware such filters aimed for children are set by default. CCIA would recommend that the use of such filters continue to be voluntary and an opt-in feature for the specific consumers who wish to utilize them.

2. Businesses operating online depend on clear regulatory certainty across jurisdictions nationwide.

Ambiguous and inconsistent regulation at the state or local levels would undermine business certainty, creating significant confusion surrounding compliance. This type of regulatory patchwork may deter new entrants, harming competition, innovation, and consumers. Devices sold into a national market are not and cannot be designed for functionality to trigger by the mere fact that they have moved within a state's borders.

Further, HB 349 creates significant liability concerns due to the subjective nature of what may be considered “obscenity”. Standards for what is deemed to be art versus potentially “obscene” are tied to different community and cultural norms that can vary considerably across small geographic areas. The notion that a device could accurately adapt to these dynamic and subjective norms as it is moved about is implausible and certain to result in over-filtering. This subjectivity especially raises concerns for businesses particularly with the threat of lawsuits under the bill's private right of action, as further detailed below.

4. Investing sole enforcement authority with the state attorney general and providing a cure period would be beneficial to consumers and businesses alike.

HB 349 permits consumers to bring legal action against businesses that have been accused of violating new regulations. By creating a new private right of action, the measure would open the doors of Montana's courthouses to plaintiffs advancing frivolous claims with little evidence of actual injury. Lawsuits also prove extremely costly and time-intensive – it is foreseeable that these costs would be passed on to individual consumers in Montana, disproportionately impacting smaller businesses and startups across the state. Further, investing sole enforcement authority with the state attorney general allows for the leveraging of technical expertise concerning enforcement authority, placing public interest at the forefront.



CCIA recommends that the legislation include a cure period of at least 30 days. This would allow for actors operating in good faith to correct an unknowing or technical violation, reserving formal lawsuits and violation penalties for the bad actors that the bill intends to address. This would also focus the government's limited resources on enforcing the law's provisions for those that persist in violations despite being made aware of such alleged violations. Such notice allows consumers to receive injunctive relief, but without the time and expense of bringing a formal suit.

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We appreciate your consideration of these comments and stand ready to provide additional information as the legislature considers proposals related to technology policy.

Sincerely,

Khara Boender
State Policy Director
Computer & Communications Industry Association