

**LFC Requester:**

**Eric Chenier**

**AGENCY BILL ANALYSIS  
2024 REGULAR SESSION**

**SECTION I: GENERAL INFORMATION**

*{Indicate if analysis is on an original bill, amendment, substitute or a correction of a previous bill}*

*Check all that apply:*

**Original**      x      **Amendment**                
**Correction**                  **Substitute**              

**Date Prepared:**    January 19, 2024

**Bill No:**    SB68

**Sponsor:**    Sen. G. Muñoz  
                  Rep. P. Herndon

**Short Title:**    Age Appropriate Design  
                  Code Act

**Agency Name and Code Number:**    305 – New Mexico  
  Department of Justice  
**Person Writing Analysis:**    Serena R. Wheaton,  
  AAG  
**Phone:**    505-537-7676  
**Email:**    legisfir@nmag.gov

**SECTION II: FISCAL IMPACT**

**APPROPRIATION (dollars in thousands)**

Appropriation		Recurring or Nonrecurring	Fund Affected
FY24	FY25		

(Parenthesis ( ) Indicate Expenditure Decreases)

**REVENUE (dollars in thousands)**

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY24	FY25	FY26		
0	0	0		

(Parenthesis ( ) Indicate Expenditure Decreases)

**ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)**

	FY24	FY25	FY26	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
<b>Total</b>	0	450	450	900	Recurring	NMAG Operating budget

(Parenthesis ( ) Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to:  
 Duplicates/Relates to Appropriation in the General Appropriation Act

**SECTION III: NARRATIVE**

*This analysis is neither a formal Opinion nor an Advisory Letter issued by the New Mexico Department of Justice. This is a staff analysis in response to a committee or legislator’s request. The analysis does not represent any official policy or legal position of the NM Department of Justice.*

**BILL SUMMARY**

Synopsis:

SB 68 would establish a new consumer protection action for New Mexico. This new statutory section, the Age Appropriate Design Code Act (“Act”), would require that covered entities under the Act (generally businesses) which create or offer online goods, services, or product features (“online services”) as defined by the Act and which are likely to be accessed by children under 18 years of age to comply with specific standards meant to achieve what the Act defines as “the best interests of the children.”

Specifically the bill would:

1. Create a legal duty for covered entities requiring they act in the best interest of children through the application of “data protection impact assessments” (“DPIA”) meant to assess:
  - a. the purpose of the online service;
  - b. whether the online service is offered in an age-appropriate manner;
  - c. whether the design of the online service could be harmful to children;
  - d. whether the design of the online service could cause children to be exposed to online conduct against their best interest;
  - e. whether the design of the online service would cause a child to be party to or exploited by a contract;
  - f. whether the design of the online contract uses harmful algorithms, targeted advertising, or addicting features against children’s best interests; and
  - g. whether online products collect or process children’s personal data.
2. The DPIA’s are further meant to include assessments and plans to ensure that any online service is consistent with the best interest standard of the Act and that all covered entities conduct a DPIA prior to July 1, 2025.
3. The new Act further charges the New Mexico Attorney General with enforcement responsibility. Under the Act the Attorney General can send written notice to a covered entity to provide the appropriate DPIA, which are explicitly excluded from IPRA. The Act prohibits covered entities from conducting the following practices:

- a. processing the personal data of a child in contradiction to the best interest standard of the Act;
  - b. profiling a child except in explicit circumstances;
  - c. processing personal data that is not necessary to provide the online service or for any reason other than the reason the data was collected;
  - d. processing any precise geolocation information of children by default or without notification to the child;
  - e. using dark patterns as defined by the Act to provide personal data;
  - f. processing personal data which is not necessary to reasonably estimate the age of the child;
  - g. allowing a child's parent, guardian, or any other consumer to monitor the child's online activity or track the child's location without notification to the child.
4. Violation of the Act could result in injunctive relief or civil penalty amounts of \$2,500 (for negligent violation) and \$7,500 (for intentional violation). Only the Attorney General may bring actions under this Act. Written notice must be provided to the covered entity by the Attorney General prior to the initiation of a lawsuit.

## **FISCAL IMPLICATIONS**

Note: major assumptions underlying fiscal impact should be documented.

Note: if additional operating budget impact is estimated, assumptions and calculations should be reported in this section.

The New Mexico Department of Justice may have fiscal implications from additional resources needed to fulfill obligations under the proposed Act.

At minimum, this act would involve at least one specialized investigator and one specialized attorney, with experience and training in this sector and consumer protection. Based on SPO Salary Schedule for an Attorney FTE, approximately \$115,000, and an Investigator FTE at \$94,000. Additionally, a support law clerk would help monitor compliance and administrative duties, at a Law Clerk FTE \$80,000. Additionally, benefits costs for all the above.

## **SIGNIFICANT ISSUES**

1. **First Amendment:** There is a federal lawsuit out of California addressing California's similarly worded law. In that lawsuit, industry companies (Amazon, AOL, Google, Meta, and TikTok) are challenging the enacted statute under the First Amendment. New Mexico has joined an amicus brief in that lawsuit detailing how it does not believe that there is a First Amendment violation. Additionally, in comparison to the California act, SB 68 seems to specific changes to the language to address the arguments raised in the California lawsuit.

## **PERFORMANCE IMPLICATIONS**

None.

## **ADMINISTRATIVE IMPLICATIONS**

The Act requires that the Attorney General be charged with enforcement jurisdiction of

the Act in what is essentially a new consumer protection action. This could require the need for additional attorney and staff resources in what would be a new statutory responsibility.

## **CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP**

None.

## **TECHNICAL ISSUES**

- Globally, suggest adding Oxford comma to phrase “online product, service, or feature” as used throughout the Act.
- For clarity, suggest defining the following terms:
  - Pg 2:19 “highly offensive”
  - Pg. 5:2 “device”
  - Pg 7:1 “valuable consideration”
  - Pg. 9:1 “material”

## **OTHER SUBSTANTIVE ISSUES**

1. **Knowledge.** Noting that Sections 5(C) and 5(H) attribute an element of knowledge to the child, but child is defined by the Act as all minors under 18—therefore these section attribute a knowledge element to potentially very young children.

## **ALTERNATIVES**

None.

## **WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL**

Status quo.

## **AMENDMENTS**