Date of Hearing: June 28, 2022

ASSEMBLY COMMITTEE ON JUDICIARY
Mark Stone, Chair
SB 1018 (Pan) – As Amended June 23, 2022

As Proposed to be Amended

SENATE VOTE: 30-9

SUBJECT: PLATFORM ACCOUNTABILITY AND TRANSPARENCY ACT

KEY ISSUES:

1) SHOULD SOCIAL MEDIA PLATFORMS, AS DEFINED, BE REQUIRED TO MAKE ANNUAL DISCLOSURES REGARDING THE EXTENT TO WHICH CONTENT IDENTIFIED AS VIOLATING THE PLATFORM'S POLICIES WAS AMPLIFIED TO ITS USERS?

2) SHOULD THE ATTORNEY GENERAL OR A LOCAL GOVERNMENT ATTORNEY BE AUTHORIZED TO BRING A CIVIL ACTION FOR PENALTIES, TO ENFORCE THE DISCLOSURE REQUIREMENTS?

SYNOPSIS

While the internet was developed over 20 years ago, social media is a relatively recent development. For the last decade, social media companies have grown into the digital town square, allowing individuals to build community, stay up to date on current events, and engage in dialogue with other users they may otherwise never interact with. These platforms arguably provide valuable tools for community building, innovation, and information sharing. However, because the concept of social media platforms has evolved rapidly, our collective knowledge regarding the companies' algorithms and the ways in which they promote content remains a mystery. This bill intends to address this lack of knowledge by compelling specified disclosures from qualifying social media platforms.

The bill would require social media platforms to publicly disclose statistics regarding the extent to which content posted to their platforms that had been identified as violating the platform's policies were recommended or amplified by the platform's algorithms. The report would require the platform to specify how extensively the post was amplified or shared both prior to and after being identified as violating their policies. In the event of a platform's failure to comply with the disclosure requirement, the bill would authorize a civil penalty of $100,000 per violation, available to be recovered by public prosecutors.

This bill is sponsored by Protect US, supported by Oakland Privacy, and opposed by Stand Up Sacramento County. The bill was previously heard by the Assembly Committee on Privacy and Consumer Protection and was passed on a vote of 9-2.

SUMMARY: Requires social media platforms to make annual disclosures regarding the extent to which content identified as violating the platform's policies were amplified or suggested to the platform's users. Specifically, **this bill**:

1) Establishes the Platform Accountability and Transparency Act.

2) Provides the following definitions:

   a) "Social media platform" means a public or semipublic internet service or application that meets the following criteria:

      i) The service or application has users in California;

      ii) A substantial function of the service or application is to connect users in order to allow users to interact socially with each other within the service or application;

      iii) A service or application that provides email or direct messaging services shall not be considered to meet this criterion on the basis of that function alone.

      iv) The service or application allows users to do all of the following:

         (1) Construct a public or semipublic profile for purposes of signing into and using the service or application;

         (2) Populate a list of other users with whom an individual shares a social connection within the system;

         (3) Create or post content viewable by other users, including, but not limited to, on message boards, in chat rooms, or through a landing page or main feed that presents the user with content generated by other users.

   b) "Public or semipublic internet-based service or application" excludes a service or application used to facilitate communication within a business or enterprise among employees or affiliates of the business or enterprise, provided that access to the service or application is restricted to employees or affiliates of the business or enterprise using the service or application.

   c) "User" means a person with an account on a social media platform.

   d) "Content" means statements or comments made by users and media that are created, posted, shared, or otherwise interacted with by users on an internet-based service or application. "Content" does not include media put online exclusively for the purpose of cloud storage, transmitting documents, or file collaboration.

3) Requires a platform to disclose to the public, on or before July 1, 2023, and annually thereafter, statistics regarding the extent to which, in the preceding 12-month period, items of content that the platform determined violated its policies were recommended or otherwise amplified by platform algorithms before and after those items were identified as in violation of the platform's policies, disaggregated by category of policy violated.

4) Clarifies that the disclosure requirements in 3) do not require the dissemination of confidential business information or trade secrets.

5) Provides that a violation of the requirements of this bill is punishable by a civil penalty of up to $100,000 for each violation recoverable in a civil action brought by the Attorney General,

by any district attorney, by any city attorney of a city having a population in excess of 750,000, or by a county counsel of any county within which a city has a population in excess of 750,000, by any city attorney of any city and county, or, with the consent of the district attorney, by a city prosecutor in any city having a full-time city prosecutor, in any court of competent jurisdiction.

EXISTING LAW:

1) Prohibits, through the United States Constitution, the enactment of any law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances. (United States Constitution, First Amendment.)

2) Provides, through the California Constitution, the right of every person to freely speak, write, and publish their sentiments on all subjects, being responsible for the abuse of this right. Further provides that a law may not restrain or abridge liberty of speech or press. (California Constitution, Article I, Section 2 (a).)

3) Provides, in federal law, that a provider or user of an interactive computer service shall not be treated as the publisher or speaker of any information provided by another information content provider. (47 U.S.C. Section 230 (c)(2).)

4) Provides that a provider or user of an interactive computer service shall not be held liable on account of:

    a) Any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

    b) Any action taken to enable or make available to information content providers or others the technical means to restrict access to such material. (47 U.S.C. Section 230 (c)(2).)

5) Defines "interactive computer service" as any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions. (47 U.S.C. Section 230 (f)(2).)

6) Requires an operator of a commercial website or online service that collects personally identifiable information about consumers to conspicuously post its privacy policy on its website and include specified disclosures. (Business & Professions Code Section 22575.)

7) Requires, pursuant to the California Consumer Protection Act of 2018 (CCPA), businesses, as defined, to include specified information in their privacy policies, such as a description of consumer rights, the categories of personal information the business collects about consumers, and a list of the categories it has sold about consumers in the preceding 12 months. (Civil Code Section 1798.130.)

8) Requires, pursuant to the CCPA, businesses, as defined, to provide a clear and conspicuous link on the business's internet homepage, titled "Do Not Sell My Personal Information" that enables a consumer to opt-out of the sale of the consumer's personal information. (Civil Code Section 1798.135.)

FISCAL EFFECT: As currently in print this bill is keyed fiscal.

COMMENTS: While the internet was developed over 20 years ago, social media is a relatively recent development. For the last decade, social media companies have grown into the digital town square, allowing individuals to build community, stay up to date on current events, and engage in dialogue with other users they may otherwise never interact with. These platforms arguably provide valuable tools for community building, innovation, and information sharing. However, because the concept of social media platforms has evolved rapidly, our collective knowledge regarding the companies' algorithms and the ways in which they promote content remains mysterious.

Since the onset of the coronavirus pandemic, false information regarding the virus, vaccines, and protective measures has been widespread. Social media has been a key player in the spread of both misinformation and disinformation – the former referring to incorrect assertions with no intent to cause harm and the latter capturing incorrect information disseminated with the intent to cause harm. A focus on the proportion of COVID-19 misinformation on social media in 2021 revealed that up to 28 percent of COVID-19 related content on social media was misinformation. (Gabarron, Oyeyemi and Wynn, *COVID-19 related misinformation on social media: a systematic review*, Bulletin of the World Health Organization (June 1, 2021), *available at* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8164188/.) As with all content shared to social media, the platforms' internal algorithms may have subsequently amplified some misinformation, although the degree to which they did so is unclear. This bill makes efforts to provide insight into these practices. According to the author:

> The public should not need to wait for a whistleblower to discover what steps companies are taking to ensure consumer safety. Addressing the many public policy concerns regarding social media begins with more transparency. SB 1018 would require social media platforms to disclose information about the content moderation efforts.

This bill would require a social media platform to publicly disclose statistics regarding the extent to which content posted to their platform that had been identified as violating the platform's policies were recommended or amplified by the platform's algorithms. The report would require the platform to specify how the post was amplified or shared both prior to and after being identified as violating their policies. The bill would require these reports to be made annually, beginning on or before July 1, 2023.

Compelled speech under the First Amendment. Whenever government requires a business to make disclosures, the requirement raises *potential* First Amendment concerns as a form of "compelled speech." The First Amendment prevents the government from compelling speech just as certainly as it prevents the government from restraining speech. However, several state and federal statutes require the disclosure of information that is useful to the consumer, such as food labeling requirements or prescription drug warnings. Courts hold regulations of this kind of "commercial speech" to a much less exacting standard than efforts to regulate more traditional political or expressive speech. Indeed, California has numerous statutes that require businesses to disclose information useful to consumers or to the public generally on their websites and

elsewhere. For example, existing law requires websites to post their privacy policies, and no court has held that this requirement constitutes compelled speech. The line of compelled speech cases generally have struck down only those disclosure requirements which force a person or entity to directly or indirectly endorse positions or ideas to which the person or business objects; create a false or unwanted association with a group, movement, or set of ideas; or force the person or entity to support a group or position with which it disagrees. (*See West Virginia Board of Education v. Barnette* (1943) 319 U.S. 624; *Woolley v Maryland* (1977) 430 U.S. 795; *United States v. United Foods* (2001); *Boy Scouts of American v Dale* (2000) 530 U.S. 533; and *National Institute of Family and Life Advocates v Becerra* (2018) 138 S. Ct. 2361. *See also* Larry Alexander, *Compelled Speech*, 23 Constitutional Commentary 147 (2006), and Erwin Chemerinsky, Constitutional Law 3d Ed. (2006) 972-973.)

Existing case law suggests that the disclosures required by this bill would not violate the compelled speech doctrine. There is a viable argument that the information required to be disclosed under the provisions of this bill, regarding the social media platform's policy for content moderation and content that violates the platform's policies, are useful to current and prospective consumers. Additionally, requiring social media companies to disclose the extent to which certain content was amplified, both before and after being identified as in violation of its internal policies, is unlikely to be considered to be forcing the platform to assume a certain position or idea, whether advertently or inadvertently. While the disclosure may demonstrate that the company's internal policies or algorithms favored one type of content over another, it would not then compel the company to modify their policies to adopt a distinct view or otherwise penalize them for the apparent position reflected through their policies. Rather, the required disclosures would merely document existing policies and moderation strategies. The disclosures considered by this bill therefore very likely pose no constitutional concerns.

Enforcement. One option for regulations on businesses is enforcement under the Unfair Competition Law (UCL). The UCL provides a framework for enforcement of "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising[.]" (Business and Professions Code Section 17200.) Civil penalties under the UCL are generally capped at $2,500 per violation. (Business and Professions Code Section 17206.) The UCL also authorizes enforcement through civil claims brought by a variety of public prosecutors, such as the Attorney General, district attorneys, and city attorneys.

The bill as currently in print would authorize enforcement and recovery of the specified civil penalty *only* through a claim brought by the Attorney General. In order to help ensure that the bill's requirements are complied with, it is more effective to authorize additional offices to bring claims against the platforms in question. Moreover, this practice mirrors the enforcement authorized under the UCL. However, because the UCL potentially caps penalties at the much lower threshold of $2,500 per violation, the existing penalty structure under this bill is arguably a more effective deterrent for platforms who might otherwise refuse to comply with the bill's disclosure requirement. Therefore, the author proposes to amend the bill to allow enforcement by the offices included under the UCL, while maintaining the penalty structure already in print. The amendment is as follows:

> **11549.68.** A violation of this chapter shall subject the violator to a civil penalty of up to one hundred thousand dollars ($100,000) for each violation that may be recovered only in a civil action brought ***in the name of the people of the State of California*** by the Attorney General, ***by any district attorney, by any city attorney of a city having a population in excess of***

750,000, or by a county counsel of any county within which a city has a population in excess of 750,000, by any city attorney of any city and county, or, with the consent of the district attorney, by a city prosecutor in any city having a full-time city prosecutor, in any court of competent jurisdiction.

Proposed amendments to the definition of social media platform. The bill currently in print has a new definition of social media platform that has been introduced across the numerous bills touching on social media currently making their way through the legislative process. The intent of this definition is to reflect the concept of social media that each of us inherently recognizes in platforms such as Facebook, Twitter, and YouTube. The current definition, however, may inadvertently capture what is known as "business to business" platforms, or technologies that allow messaging within businesses, between coworkers, or teammates, that are primarily for business purposes and do not have any inherent social component. In order to ensure these programs are not inadvertently subject to the same requirements as social media platforms, the author proposes the following amendments:

(a) (1) "Content" means statements or comments made by users and media that are created, posted, shared, or otherwise interacted with by users on an internet-based ***service or application***.

(2) "Content" does not include media put online exclusively for the purpose of cloud storage, transmitting documents, or file collaboration.

(b) "Social media platform" means ***a public or semipublic*** internet-based service or application that has users in California and that meets all of the following criteria:

(1) (A) A substantial function of the service or application is to connect users ~~***and allow***~~ ***in order to allow*** users to interact socially with each other within the service or application.

(B) A service or application ~~***for which a substantial function is the conveyance of that***~~ ***provides*** email or direct messag***ing services*** shall not be considered to meet this criterion on the basis of that function alone.

(2) The service or application allows users to do all of the following:

(A) Construct a public or semipublic profile for purposes of signing into and using the service ***or application***.

(B) Populate a list of other users with whom an individual shares a ***social*** connection within the system.

(C) Create or post content viewable by other users, including, but not limited to, on message boards, in chat rooms, or through a landing page or main feed that presents the user with content generated by other users.

(c) "Public or semipublic internet-based service or application" excludes a service or application used to facilitate communication within a business or enterprise among employees or affiliates of the business or enterprise, provided that access to the service or application is restricted to employees or affiliates of the business or enterprise using the service or application.

These amendments strike an important balance by capturing the traditional concept of social media and excluding services with no social component, while still allowing for an expansive definition to capture newer platforms that are developing or have yet to be created.

ARGUMENTS IN SUPPORT: This bill is sponsored by Protect Us and is supported by Oakland Privacy. The sponsor writes:

> Throughout the pandemic, we have witnessed the deadly effects of rampant public health disinformation spreading across social media relatively unchecked. Following online misinformation about the use of methanol to treat COVID-19, approximately 800 people died, and over 5,800 people were hospitalized after drinking methanol to cure coronavirus. Furthermore, rampant vaccine misinformation has hindered our efforts to curb the spread of the virus, with studies showing that even brief exposure to COVID-19 vaccine misinformation makes people less likely to want to get vaccinated. With social media algorithms notoriously prioritizing content based on popularity and similarity to previously seen content, users exposed to misinformation once may end up seeing more and more of it over time, further reinforcing the user's misunderstanding. Given the deadly impacts of public health disinformation, it is imperative that we hold social media platforms accountable for prioritizing profits over people.
>
> From our support for evidence-based public health policy to our creation of Masked Up, a show dedicated to debunking health disinformation, combating online disinformation has been a top priority for our organization. SB 1018 would assist in our goal of protecting the health of our most vulnerable communities by making it easier for the public to hold social media companies accountable for their spread of disinformation. SB 1018 would give the public the necessary tools to understand social media algorithms without waiting for reports from whistleblowers, thereby hastening our ability to stop disinformation at the source.

ARGUMENTS IN OPPOSITION: The bill in its previous form was opposed by Stand Up Sacramento County. They wrote the following in opposition to the bill prior to being amended in its current form:

> [U]sers are encouraged to read the terms of engagement policies and are informed of the use of algorithms and the purposes of algorithms within these policies. Internet users then have the choice to accept or decline these terms. Some if not all web sites attempt to monitor their sites. For example, some sites monitored by use of administrators will delete or ban users from their platforms. Some sites may suspend users who do not comply with the user agreement.
>
> It should not be a government agency deciding or researching whether a user on a platform violates the platform's terms of agreement or require platform operators to relinquish data on who visits their sites and for what purpose. That is the private sector administration or platform's operator's role to monitor and report violators to the proper authorities of whom the state of California as well as the Federal government currently has.
>
> Therefore, it is the stance of Stand Up Sacramento and the citizens of Sacramento county to oppose SB 1018 on the merit of infringement to the 4th amendment of the US constitution and Article 1 Section 13 of the California Constitution.

Additionally, BSA: The Software Alliance, while not adopting a formal position on the bill, has flagged concerns that the definition of social media present in this bill prior to the amendments described above would unnecessarily capture broader media platforms and services that should not be impacted by the bill's disclosure provisions. Specifically they state:

> The obligations envisioned by the range of bills you are considering were clearly conceived with specific platforms in mind to better understand whether their algorithmic promotion mechanisms are contributing to the public spread of socially harmful content. Unfortunately, the new definition of "social media platform" captures more than the handful of companies that the Senate and Assembly bills' requirements were tailored to address. For instance, the current definition is neither limited to publicly available, consumer-facing services nor to those platforms that utilize the types of algorithmic recommendation systems that give rise to the viral amplification of content within their systems.
>
> […] For instance, although enterprise communication services are not typically considered to be social media platforms, the current definition may unintentionally include them. Unlike social media services that offer publicly accessible platforms for users to interact and share content with the world, enterprise service providers generally lack visibility into the content on their networks and have no direct relationship to the individual end-users that may post content thereon. For instance, enterprise service providers may provide corporate communications tools that enable companies to manage employee communication portals. While such a portal might meet the proposed legislative definition, the enterprise service provider would be unable to provide the type of information contemplated by the reporting requirements.
>
> […]
>
> **BSA Proposed Definition:**
>
> (*a) "Social media platform" means a publicly accessible, consumer-facing internet-based service or platform that:*
>
> 1. *Has the primary purpose of facilitating social interactions between a potentially unlimited number of users of the service or platform;*
> 2. *Uses algorithmic tools to recommend or otherwise promote content to users of the service or platform; AND*
> 3. *Allows users of the service or platform to do all of the following:*
>   - i. *Create a profile for the purposes of signing into and using the service in a personalized manner.*
>   - ii. *Post comments, information, ideas and other content that is visible to the public or to specified users, as determined by the platform users' preferences and privacy settings.*
>   - iii. *Search for, and connect with, other platform users in order to view the content the user has posted on the platform.*

iv. View and navigate a list of connections made by other users of the platform individuals within the system.

v. Visit a main feed or landing site where content from advertisers and connected users is automatically displayed.

REGISTERED SUPPORT / OPPOSITION:

Support

Protect US (sponsor)
Oakland Privacy

Opposition

Stand Up Sacramento County

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