

Date of Hearing: May 3, 2022

ASSEMBLY COMMITTEE ON PRIVACY AND CONSUMER PROTECTION

Jesse Gabriel, Chair

AB 1628 (Ramos) – As Amended April 21, 2022

SUBJECT: Online platforms: electronic content management: controlled substances

SUMMARY: This bill would require an online platform, as defined, that operates in this state to create and publicly post a policy statement including specified information pertaining to the use of the platform to illegally distribute controlled substances. Specifically, **this bill would:**

- 1) Require an online platform that operates in this state to create and publicly post on the online platform's internet website, a policy statement that includes all of the following:
 - The online platform's policy on the use of the online platform to illegally distribute a controlled substance.
 - A general description of the online platform's moderation practices that are employed to prevent users from posting or sharing electronic content pertaining to the illegal distribution of a controlled substance, excluding any information that the online platform believes might compromise operational efforts to identify prohibited content or user activity, or otherwise endanger safety.
 - A link to mental health and drug education resources for users.
 - A link to the online platform's reporting mechanism for illegal or harmful content or behavior on the online platform.
 - A link to the online platform's resources for law enforcement officials, including the mechanism for requesting legal process and making official inquiries.
- 2) Specify that the disclosures required by the bill may be posted separately or incorporated within another document or post, including, but not limited to, the terms of service or the community guidelines.
- 3) Require a person or entity operating an online platform in the state to update the policy statement created pursuant to 1), above, as necessary, and to consult with nonprofits, safety advocates, and survivors to assist in developing and supporting the policy statement created pursuant to 1), above.
- 4) Provide that the provisions of the bill shall remain in effect only until January 1, 2028, and as of that date are repealed.
- 5) Define "controlled substance" to have the same meaning as that term is defined in the Uniform Controlled Substances Act.
- 6) Define "online platform" to mean an electronic service that allows its users to post or share electronic content with other users, including, but not limited to, text, videos, still

photographs, blogs, video blogs, podcasts, instant messages, email, online accounts or profiles, or locations.

EXISTING LAW:

- 1) 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 included specified disclosures. (Bus. & Prof. Code Sec. 22575.)
- 2) 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. (Civ. Code Sec. 1798.130.)
- 3) Pursuant to the federal Communications Decency Act of 1996, provides, that “no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider,” and affords broad protection from civil liability for the good faith content moderation decisions of interactive computer services. (47 U.S.C. Sec. 230(c)(1) and (2).)
- 4) Provides that, except as otherwise provided, every person who possesses for sale or purchase for purposes of sale any specified controlled substance, as defined, shall be punished by imprisonment in a county jail for two, three, or four years pursuant to existing law pertaining to felony sentencing. (Health & Saf. Code Sec. 11351.)
- 5) Provides that, except as otherwise provided, every person who transports, imports into this state, sells, furnishes, administers, or gives away, or offers to transport, import into this state, sell, furnish, administer, or give away, or attempts to import into this state or transport, any specified controlled substance shall be punished by imprisonment in a county jail for two, three, or four years pursuant to existing law pertaining to felony sentencing. (Health & Saf. Code Sec. 11352.)
- 6) Prohibits a government entity from compelling the production of or access to electronic communication information, as defined, from a service provider, as defined, except as specified. (Pen. Code Sec. 1546.1.)
- 7) Defines “electronic communication,” for purposes of 6), above, to mean the transfer of signs, signals, writings, images, sounds, data, or intelligence of any nature in whole or in part by a wire, radio, electromagnetic, photoelectric, or photo-optical system. (Pen. Code Sec. 1546(c).)
- 8) Defines “electronic communication information,” for purposes of 6), above, to mean any information about an electronic communication or the use of an electronic communication service, including, but not limited to, the contents, sender, recipients, format, or location of the sender or recipients at any point during the communication, the time or date the communication was created, sent, or received, or any information pertaining to any individual or device participating in the communication, including, but not limited to, an IP address. (Pen. Code Sec. 1546(d).)

- 9) Defines “electronic communication service,” for purposes of 6), above, to mean a service that provides to its subscribers or users the ability to send or receive electronic communications, including any service that acts as an intermediary in the transmission of electronic communications, or stores electronic communication information. (Pen. Code Sec. 1546(e).)
- 10) Defines “service provider,” for purposes of 6), above, to mean a person or entity offering an electronic communication service.
- 11) Defines “controlled substance,” unless otherwise specified, to mean a drug, substance, or immediate precursor which is listed in any schedule pursuant to the Uniform Controlled Substances Act, as specified. (Health & Saf. Code Sec. 11007; Secs. 11054-11058.)
- 12) Defines “social media,” for purposes of laws pertaining to employer use of social media, as an electronic service or account, or electronic content, including, but not limited to, videos, still photographs, blogs, video blogs, podcasts, instant and text messages, email, online services or accounts, or internet website profiles or locations. (Lab. Code Sec. 980(a).)

FISCAL EFFECT: None. This bill has been keyed non-fiscal by the Legislative Counsel.

COMMENTS:

1) Purpose of this bill: This bill seeks to stem the rising tide of illicit drug sales perpetrated through social media and other online platforms which have in many cases led to addiction, overdose, and death, by requiring the disclosure of certain information pertaining to the moderation of illicit drug sales by the operators of online platforms.

2) Author’s statement: According to the author:

In recent years, fentanyl, a powerful, cheaply produced synthetic opioid has flooded the illicit drug market. In the most recent wave of the opioid crisis, the drug has become both a larger share of the opioid market, competing directly with heroin, and a popular adulterant for other more costly drugs. Due to the strength of fentanyl, determining dose size is notoriously difficult for users, leading to an increase in the likelihood of overdose. Furthermore, due to its use as an adulterant, there have been many notable cases of an individual purchasing a substance believing it to be cocaine, methamphetamine, or a prescription pill, only for that substance to contain a dangerous quantity of fentanyl that the user unknowingly ingests.

In testimonials from drug users and parents of people who have overdosed on fentanyl, social media has often been cited as often used platform to advertise and sell drugs, including those that may contain fentanyl. AB 1628 would confront this problem by requiring social media platforms to have policies prohibiting illegal activity and reporting processes, preventing the sale of illicit drugs on social media platforms.

3) Sale of illicit drugs on social media: The rate of drug overdose deaths has reached unprecedented levels over the past several years, with the federal Drug Enforcement Agency (DEA) reporting that overdose deaths in the U.S. topped 100,000 for the first time over a 12-

month period between spring 2020 and spring 2021.¹ In part, this stark increase in overdose deaths has resulted from increased demand for dangerous illicit substances fueled by a growing mental health and addiction crisis that has emerged over the past decade, and in part, it has resulted from an increase in the potency and accessibility of these substances. In particular, according to a 2021 public statement by the DEA, “a growing number of fake pills bought online are laced with potentially lethal amounts of the synthetic opioid fentanyl.”² According to a Washington Post article detailing the DEA statement:

The new public safety alert warns Americans that counterfeit pills, often sold on social media or e-commerce websites, increasingly contain fentanyl or sometimes methamphetamine, posing health risks beyond the dangers of buying prescription pills.

The DEA has seized 9.6 million counterfeit pills already this budget year, which is more than it seized in the previous two years combined, officials said. The number of seized counterfeit pills found to contain fentanyl has jumped 430 percent since 2019.³

Fentanyl is particularly central to discussions of rising illicit drug use and overdose due to its remarkable potency and addictive potential. Because fentanyl is relatively cheap to produce and highly potent, it can be used as an additive in other impure drugs to compensate for their decreased potency due to dilution with non-psychoactive adulterants, increasing the profit margin of selling that substance. As an educational resource provided by the California Department of Public Health (CDPH) Overdose Prevention Initiative, a project of the department’s Substance and Addiction Prevention Branch, explains:

Fentanyl is extremely potent. It is up to 50 times stronger than heroin and 100 times stronger than morphine. Illicit fentanyl can be added to other drugs to make them cheaper, more powerful, and more addictive. Illicit fentanyl has been found in many drugs, including heroin, methamphetamine, counterfeit pills, and cocaine. Fentanyl mixed in with any drug increases the likelihood of a fatal interaction. [...] Lab testing finds that 2 out of every 5 counterfeit pills with fentanyl seized by the DEA contains a potentially lethal dose of fentanyl.⁴

The resulting overdose epidemic has spread rapidly by way of the digital communications infrastructure provided by social media platforms which allow interested parties to connect with strangers or acquaintances that may market and distribute these substances, increasing the convenience of locating and purchasing illicit substances. Because the clientele of most social media outlets skew younger, this route of distribution has been especially harmful to teens and young adults. As different 2021 Washington Post article described:

¹ DEA Washington Division, “Fentanyl Deaths Climbing, DEA Washington Continues the Fight,” *DEA Public Information Office*, Feb. 16, 2022, <https://www.dea.gov/stories/2022/2022-02/2022-02-16/fentanyl-deaths-climbing-dea-washington-continues-fight> [as of May 1, 2022].

² Devlin Barrett & Elizabeth Dwoskin, “With overdose deaths soaring, DEA warns about fentanyl-, meth-laced pills,” *Washington Post*, Sep. 27, 2021, https://www.washingtonpost.com/national-security/dea-warning-counterfeit-drugs/2021/09/27/448fcb18-1f27-11ec-b3d6-8cdebe60d3e2_story.html [as of May 1, 2022].

³ *Ibid.*

⁴ Overdose Prevention Initiative, “Substance Basics: Fentanyl,” *California Department of Public Health*, updated Feb. 23, 2022, <https://www.cdph.ca.gov/Programs/CCDPHP/sapb/Pages/Fentanyl.aspx> [as of May 1, 2022].

In an interview, DEA Administrator Anne Milgram specifically called out Snapchat and TikTok, two apps that are popular with teenagers and young adults, for not doing more to combat sales, and said that the agency was going to go to social media companies with specific demands.

But it's not yet clear what those demands will be or how they might help. For years illegal drug sales have been a scourge on Facebook, Snapchat, TikTok and other social media apps. Companies have repeatedly said they're working to rid their sites of drug deals by hiring extra moderators, using artificial-intelligence algorithms to root out illegal material and limiting searches for keywords related to drugs. But prescription and other drugs can still easily be found for sale. [...]

The public health crisis is renewing calls from not just law enforcement groups but concerned parents and researchers for the social media companies to do more. They want the companies to be more transparent about what's happening on their platforms []. [...] Some researchers acknowledge the difficulty of the problem. The sheer scale of information on the platforms is hard to police, and algorithms can do only so much. Drug dealers can use strange fonts or edit photos advertising drugs in ways that can trick image-recognition algorithms, creating an arms race between drug sellers and the social media companies.

Regardless, social media platforms and other online communication platforms have failed to eradicate this dangerous practice, and public policy to more effectively assist and incentivize elimination of illicit drug sales via online platforms has not materialized. Efforts to address online content moderation at the state level have often been frustrated by issues of federal preemption. Specifically, Section 230 of the federal Communications Decency Act of 1996, which provides that an online platform generally cannot be held liable for content posted by third parties, explicitly preempts any conflicting state law. The law was designed to permit online platforms to freely moderate content in good faith without the risk of liability for content moderation decisions. But in effect, the liability shield provided by Section 230, coupled with its preemption of state law, makes it remarkably difficult to legislate at the state level with respect to content moderation, including illegal content pertaining to the trade of illicit drugs. As a result, attempts to impose specific guidelines, restrictions, or requirements on social media platforms toward this end have thus far been unsuccessful.

AB 1628 seeks to improve transparency with respect to online platforms' policies concerning their use for the illegal sale of drugs, and to facilitate access by users to mechanism for reporting such activity and for educating themselves on the associated risks.

- 4) **AB 1628 would require online platforms to post policies and resources relating to the illegal distribution of controlled substances:** The bill in print would require an online platform, as defined, to create and publicly post a policy statement that includes: the platform's policy on use of the platform to illegally distribute drugs; a general description of the platform's moderation practices that are employed to prevent users from posting or sharing electronic content pertaining to the illegal distribution of drugs; a link to mental health and drug education resources for users; a link to the platform's mechanism for reporting illegal or harmful content or behavior; and a link to the platform's resources for law enforcement officials, including the mechanism for requesting legal process and making official inquiries. The bill would permit the platform to include these disclosures either

separately or within a terms of service or community guidelines document, and would require that the policy statement be updated as necessary, and be developed in consultation with nonprofits, safety advocates, and survivors. The provisions of the bill would remain effective only until January 1, 2028, and as of that date, be repealed.

In support of this bill, the Orange County Board of Supervisors argues:

[S]ocial media platforms are increasingly becoming the setting of illegal drug transactions. Despite this concerning trend, there continues to be a need for the implementation of protocols to help hold social media companies more accountable and deter drug distribution on their platforms. AB 1628 would serve as a tool to fight against the illicit fentanyl sales by additionally compelling social media companies to post resources for mental health and drug education, resources for law enforcement officials, and a link to the platform's mechanism for reporting illegal or harmful content on the platform.

The bill does not require any particular moderation actions on the part of the platform to crack down on illicit drug trafficking, but rather requires clear statements of policy and provision of resources by the platform to ensure prospective users (or their parents) are aware of how the platform handles those activities and how they can best be addressed if a user encounters them. Accordingly, the bill does not appear to face significant risk of federal preemption pursuant to Section 230 liability protections, which apply to a platform's moderation practices themselves.

That said, it is not clear how effective this mechanism would be for curbing the catastrophic harms of drug overdose and addiction, and the role of online social media in exposing users to those harms. Notably, most major social media platforms already publish policies pertaining to their use toward illicit ends, and yet problems with drug distribution still persist. Though a better understanding of a platform's policies may help users make decisions as to which platforms with which to engage and greater clarity on how to report illegal content may be helpful to users when such content is encountered, resources included in terms of service or community guidelines documents are unlikely to be particularly salient to the user, and, after initial registration for the platform, may seldom be viewed at all. Generally, by the time a user is confronted with illicit activity on a platform, they will not be regularly viewing terms of service or other policy documents pertaining to the platform, and educational resources therein may thus be of little use.

Still, consolidating all of these resources in a single, easily accessible location on the platform such as a terms of service or community guidelines document could make it easier to find all relevant policies and resources provided by a platform should a user be inclined to do so. Because the burden of complying with the provisions of the bill is relatively minimal, the possibility that some users could gain insight or utility from the provided information arguably justifies its publication.

- 5) **Definition of “online platform” in the bill in print is extremely broad:** The bill in print defines “online platform” to mean “an electronic service that allows its users to post or share electronic content with other users, including, but not limited to, texts, videos, still photographs, blogs, video blogs, podcasts, instant messages, email, online accounts or profiles, or locations.” This definition seems incredibly broad, and would likely be interpreted to include many online platforms for which this type of information would

arguably be irrelevant. For example, the definition would include comment sections on news websites, connected exercise devices and applications that allow users to share their run times, and platforms allowing customers to review their experiences with providers of elder care. In these cases, rather than informing users, this information may instead confuse users or distract from more pertinent information in terms of service documents. Additionally, the definition does not place a threshold on the size of a platform to be subject to the requirements of the bill. While its requirements seem minimally burdensome to major social media outlets such as Facebook and Snapchat with legal teams dedicated to maintaining compliance with applicable laws, it may impose a more significant burden on an individual hosting a website to display their artwork as a hobby.

Because illicit drug trade, especially among individuals who are not already personally acquainted, requires a critical mass of users and certain social networking or communication infrastructure to be lucrative, it is unlikely that these smaller platforms necessitate the provision of this information.

In an attempt to limit the provisions of the bill to only those platforms where the utility of the required disclosures outweighs their burden, the author has offered the following amendment to constrain both the definition of “online platform” and the general applicability of the bill’s provisions. The amendment would exclude from the bill businesses that generated less than \$100,00,000 in gross revenue in the preceding calendar year, comment sections on news websites, consumer review sections on e-commerce websites, and vendors licensed under existing laws regulating distribution of commercial cannabis. The amendment would also instead define “online platform” to mean an internet-based service that allows users to do all of the following: 1) construct a public or semipublic profile within a bounded system created by the service; 2) populate a list of other users with whom an individual shares a connection within the system; and 3) post or share user-generated content with other users.

Author’s amendment:

On page 2, line 11, after “(2)”, insert “(A)”; strike “electronic” and insert “*internet-based*”.

On page 2, line 12, strike “its”, and after “to”, insert: “*do all of the following:*”

(i) Construct a public or semipublic profile within a bounded system created by the service.

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

(iii) Post”

On page 2, line 12, strike “post”, strike “electronic” and insert “*user-generated*”, strike “,” and insert “.”.

On page 2, strike lines 13-15, inclusive.

On page 3, after line 23, insert: “*(e) This chapter shall not apply to any of the following:*”

(1) A business that generated less than one hundred million dollars (\$100,000,000) in gross revenue during the preceding calendar year.

(2) A section for user-generated comments on a digital news internet website that otherwise exclusively hosts content published by a person or entity described in subdivision (b) of Section 2 of Article I of the California Constitution.

(3) Consumer reviews of products or services on an internet website that serves the exclusive purpose of facilitating online commerce.

(4) Persons licensed pursuant to Division 10 (commencing with Section 26000) of the Business & Professions Code.

On page 3, line 24, strike “(e)” and insert “(f)”.

- 6) Required link for mental health and drug education resources lacks standards for accuracy and quality, and could consequently result in harm to users:** The bill in print would require that the policy developed and posted pursuant to the bill include “a link to mental health and drug education resources for users.” The bill provides no further clarification on the required or intended content these resources must include, nor does the bill define standards of quality, accuracy, or authority with respect to those resources. The bill would thus require operators of online platforms, most of whom likely lack the expertise necessary to properly vet the validity and efficacy of those resources, to make decisions about what resources to provide. Not only could this potentially open up the platforms to liability for the resources the opt to include, but it could also do more harm than good in combating the underlying mental health and substance use antecedents of fentanyl abuse, as the provided resources could be incomplete, inaccurate, or even dangerous.

To ensure that the resources provided are authoritative, thoroughly vetted, and include relevant and accurate content, the author has offered the following amendment to strike the general requirement for a link to mental health and drug education resources and instead specify a link to the “Substance Basics: Fentanyl” educational resource published in accordance with CDPH’s Overdose Prevention Initiative by the department’s Substance and Addiction Prevention Branch found here:

<https://www.cdph.ca.gov/Programs/CCDPHP/sapb/Pages/Fentanyl.aspx>

This resource includes thorough, digestible, evidence-based information concerning the risks associated with fentanyl, California’s efforts to combat its abuse, and additional links to vetted resources for reducing associated harms. It is therefore unlikely that required inclusion of this resource in the mandatory policy statement would be found to be an unconstitutional violation of the First Amendment’s prohibition on government compelled commercial speech, as the information therein is reasonably related to the State’s interest in protect consumers from the harms of illicit drug trade and use, is purely factual and noncontroversial, and its inclusion is not unjustified or unduly burdensome. (*See, e.g., Zauderer v. Office of Disciplinary Counsel of Supreme Court* (1985) 471 U.S. 626.)

Author’s amendment:

On page 3, line 1, strike “mental health and drug education resources” and insert “*the Department of Public Health Overdose Prevention Initiative’s “Substance Basics: Fentanyl” educational resource.*”

On page 3, strike line 2.

7) Requiring a mechanism for accepting law enforcement requests for legal process or official inquiries could expose law enforcement agencies to liability under CalECPA:

The California Electronic Communications Privacy Act (CalECPA) prohibits a government agency, including a law enforcement agency, from compelling a service provider (e.g. an online platform) to produce or provide access to electronic communication information, e.g. private messages exchanged via social media, absent a warrant or court order, except under specified circumstances. The bill in print requires the policy statement developed and published by an online platform to include “a link to the online platform’s resources for law enforcement officials, including a mechanism for requesting legal process and making official inquiries.” Case law interpreting CalECPA provides little direction on whether requests for electronic communication information from service providers by law enforcement are legally equivalent to compelling the production of that information. It is therefore possible that requiring the online platform to provide a link to a mechanism for making official inquiries and requesting legal process, depending on the nature of that mechanism, could put law enforcement agencies in a position where they may be exposed to liability under CalECPA for utilizing that mechanism to request information.

Terms of service statements and community guidelines are also generally intended to educate users as to the policies and procedures of the platform, rather than to provide information specifically to law enforcement. As such, it would seemingly be more informative to a user attempting to evaluate engagement with a platform if the policy instead included information on the platform’s policies and procedures for responding to warrants and other inquiries from law enforcement, rather than requiring a particular mechanism to be included. To better inform users as to the nature of the relationship between the platform and law enforcement agencies, and to avoid possible CalECPA liability for law enforcement agencies utilizing provided mechanisms, the author has offered the following amendment:

Author’s amendment:

On page 3, line 7, strike “link to the” and insert “*general description of the*”; strike “resources for” and insert “*policies and procedures for responding to*”.

On page 3, strike line 8.

On page 3, line 9, strike “and making official inquiries” and insert “*inquiries, including warrants, subpoenas, and other court orders compelling the production of or access to electronic communication information, as defined in Section 1546 of Chapter 3.6 of Title 12 of Part 2 of the Penal Code*”.

8) Mandatory consulting by a private business with other private parties in development of the platform’s policy is unprecedented and may raise issues of compelled speech: The bill in print requires a person or entity operating an online platform in California to “[c]onsult with nonprofits, safety advocates, and survivors to assist in developing and supporting the policy statement created pursuant” to the bill’s provisions. It is not clear specifically what

this required consultation entails, nor how a business can go about identifying appropriate parties for consultation. Additionally, First Amendment case law concerning compelled commercial speech is not instructive on the authority of the government to require a private business or other person to consult with particular individuals or organizations. While California law frequently requires government entities, such as taskforces, working groups, agencies, commissions, and boards to consult with experts, stakeholders, and those with relevant lived experience, imposing this type of requirement on a private entity appears to be unprecedented. It is possible that requiring such consultation would not run afoul of the First Amendment, but to reduce the likelihood of a constitutional challenge, the author has offered the following amendment:

Author's amendment:

On page 3, line 20, strike "Consult" and insert "*Consider consulting*".

- 9) **Related legislation:** AB 587 (Gabriel) would require social media companies, as defined, to post their terms of service in a manner reasonably designed to inform all users of specified policies and would require a social media company to submit quarterly reports, as specified, to the Attorney General (AG).

AB 2273 (Wicks, Cunningham) would establish the California Age-Appropriate Design Code Act which generally would require businesses that create goods, services, or product features likely to be accessed by children to comply with specified standards, including considering the best interests of children likely to access that service when designing, developing, and providing that service.

AB 2879 (Low) would require social media platforms to provide a mechanism by which school administrators may report instances of cyberbullying and would require social media platforms to include the platform's cyberbullying reporting procedures in the platform's terms of service.

- 10) **Prior legislation:** AB 35 (Chau, 2021) would have required social media platforms, as defined, to disclose whether or not that social media platform has a policy or mechanism in place to address the spread of misinformation, as specified. This bill has been substantially amended to concern civil damages related to medical malpractice under the authorship of Asm. Reyes, and is currently in the Senate Judiciary Committee.

AB 1379 (E. Garcia, 2021) would have prohibited a social media platform from amplifying, in a manner that violates its terms of service or written public promises, content that is in violation of the platform's terms of service. This bill died in the Assembly Committee on Elections.

AB 1316 (Gallagher, 2019) would have prohibited social media internet website operators located in California, as defined, from removing or manipulating content from that site on the basis of the political affiliation or political viewpoint of that content, except as specified. This bill was held in the Assembly Rules Committee.

AB 3169 (Gallagher, 2018) would have prohibited any person who operates a social media internet website or search engine located in California, as specified, from removing or

manipulating content on the basis of the political affiliation or political viewpoint of that content. This bill died in the Assembly Committee on Privacy & Consumer Protection.

AB 68 (Simitian, Ch. 829, Stats. 2003) requires an operator of an internet website or online service that collects personally identifiable information from California residents to conspicuously post its privacy policy on its website or online service and to comply with that policy, as specified.

REGISTERED SUPPORT / OPPOSITION:

Support

City of Redlands
County of Orange
San Bernardino County Sheriff's Department

Opposition

None on file

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