

SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2021-2022 Regular Session

AB 35 (Chau)
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Fiscal: Yes
Urgency: No
AWM

SUBJECT

Social media platforms: false information

DIGEST

This bill requires social media platforms, as defined, to disclose in an easy-to-find location whether they have a policy to combat misinformation.

EXECUTIVE SUMMARY

This bill is intended to combat the negative impact of false information that is available on internet-based social media by requiring a person or entity that operates a social media platform, as defined, to disclose in an easily accessible location whether the platform has a policy to address the spread of false information. The bill establishes a tiered system of civil penalties for failure to comply, which may be sought in a civil action brought by the Attorney General or other public prosecutors. The author has proposed to amend the definitions of "social media platform" and clarify the scope of the bill's application.

This bill is sponsored by the author. It is opposed by the Electronic Frontier Foundation.

PROPOSED CHANGES TO THE LAW

Existing state law:

- 1) Prohibits false or deceptive advertising to consumers about the nature of any property, product, or service, including false or misleading statements made in print, over the internet, or any other advertising method. (Bus. & Prof. Code, § 17500.)
- 2) Defines libel as a false and unprivileged publication by writing, printing, or any other representation that exposes any person to hatred, contempt, ridicule, or obloquy, or which causes that person to be shunned or avoided, or which has a tendency to injure that person in their occupation. (Civ. Code, §§ 45 & 47.)
- 3) Requires certain businesses to disclose the existence and details of specified policies, including:
 - a) Operators of commercial websites or online services that collect personally identifiable information about individual consumers residing in California who use or visit the website must conspicuously post its privacy policy. (Bus. & Prof. Code, § 22575.)
 - b) Retailers and manufacturers doing business in this state and having annual worldwide gross receipts over \$100,000,000 must disclose online whether the business has a policy to combat human trafficking and, if so, certain details about that policy. (Civ. Code, § 1714.43.)
 - c) End-users of automated license plate recognition technology must post its usage and privacy policy on its website. (Civ. Code, § 1798.90.53.)
 - d) Campus bookstores at public postsecondary educational institutions must post in-store or online a disclosure of its retail pricing policy on new and used textbooks. (Educ. Code, § 66406.7(f).)

Existing federal law:

- 1) Provides that no provider or user of a website shall be treated as the publisher or speaker of any information provided by another information content provider, and that no provider of a website shall be held liable on account of any action voluntarily taken in good faith to restrict the availability of materials that the provider determines to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected. (47 U.S.C. § 230(c) (Section 230).)
- 2) Provides that no cause of action and liability may be imposed under any state law that is inconstant with the law set forth in 1). (47 U.S.C. § 230(e).)

This bill:

- 1) Requires a person that operates a social media platform to disclose whether or not that social media platform has a policy or mechanism in place to address the spread of misinformation with respect to, at a minimum, all of the following:
 - a) Reducing the spread of misinformation that contributes to the risk of imminent violence or physical harm.
 - b) Reducing the spread of harmful, inauthentic content.
 - c) Practices intended to deceptively and substantially manipulate or disrupt the behavior of users on the social media platform.
- 2) Requires the person that operates a social media platform to make the required disclosure easily accessible on the social media platform's internet website and mobile application, as applicable.
- 3) Provides that a person in violation of the disclosure requirement shall be subject to a civil penalty as follows:
 - a) \$5,000 for the first violation.
 - b) \$10,000 for the second violation.
 - c) \$20,000 for the third and each subsequent violation.
- 4) Provides that the civil penalty may be assessed and recovered in the name of the people of the State of California by the Attorney General or by any district attorney, county counsel, or city attorney in any court of competent jurisdiction.
 - a) If the action is brought by the Attorney General, half of the penalty collected will be paid to the treasurer of the county in which the judgment was entered, and half to the State Treasurer.
 - b) If the action is brought by a district attorney or county counsel, the entire amount of the penalty shall be paid to the treasurer in the county in which the judgment was entered.
 - c) If the action is brought by a city attorney or city prosecutor, half of the penalty shall be paid to the treasurer of the county in which the judgment was entered and half to the city.
- 5) Defines "social media platform" as an internet-based service that generated at least \$100,000,000 in gross revenue during the preceding calendar year and allows individuals to do all of the following:
 - a) Construct a public or semipublic profile within a bounded system created by the service.
 - b) Create a list of other users with whom an individual shares a connection within the system.
 - c) View and navigate a list of other users' individual connections.

- 6) Excludes from the definition of “social media platform”:
 - a) Electronic mail and direct messaging between users or groups of users.
 - b) A comment section on a digital news internet website, or consumer reviews of products and services on an online commerce internet website.
 - c) An internet-based subscription streaming service that is offered to customers for the exclusive purpose of transmitting licensed media, including audio or video files, in a continuous flow from the internet-based service to the end user.
 - d) Services that operate for the sole purpose of cloud storage or shared document or file collaboration.
 - e) Services that operate for the sole purpose of providing, creating, or interacting with data visualization platforms, libraries, or hubs.

- 7) Provides that the duties and obligations imposed by this chapter are cumulative to any other duties or obligations imposed under other law and shall not be construed to relieve any party from any duties or obligations imposed under other law.

COMMENTS

1. Author’s Comment

According to the author:

The potentially dangerous effects of social media disinformation first entered the nation’s consciousness in the presidential election of 2016 and reached deadly levels on January 6 of this year, when persons mobilized by claims of election fraud and various conspiracy theories unlawfully entered and occupied the U.S. Capitol in an apparent effort to stop the confirmation of Electoral College votes.

What is more, misinformation escalated as the 2020 Presidential election went on, and led to reports of the belief of voter fraud. Such news persisted even as experts and political leadership debunked the misinformation. Additionally, the increase in violence against the Asian American and Pacific Islander (AAPI) community has grown due to the circulation of erroneous misinformation about how AAPIs caused COVID-19, when they are just as much the victims of the pandemic as anyone else. The impact of misinformation is a reality for those having to deal with hate crimes or death threats for debunking the belief of voter fraud.

During the early stages of the COVID-19 pandemic many Americans relied on social media to find information, which led to some believing in scams touting cures for the virus. Once a vaccine was produced, more misinformation arose around how the vaccines allowed for GPS tracking. Despite the expert testimonies to the contrary, this has resulted in negative emotional, psychological

and financial impacts for those that believe the claims. Bad actors are gleefully pushing these narratives for personal gain on social media platforms.

According to the Pew Research Center, in 2020, 53 percent of U.S. adults got their news from social media which is up from 47 percent in 2018. In another survey by Statista, 10 percent of U.S. adults knowingly shared made up news online in 2019 and approximately 50 percent shared a news story, only finding out later that the news story was made up.

These surveys show that misinformation has led to confusion and a growing mistrust of news organizations by Americans. The topic of misinformation, also known as fake news, has been debated and reported on by almost every major news organizations and Americans are all the more wary of them. Yet the data shows that Americans continue to rely on news being shared on social media platforms.

AB 35 would help address this issue by requiring social media platforms to disclose whether or not they have a policy to address the spread of misinformation. This will give users and the public the ability to assess the information they are consuming and how platforms are stopping the spread of misinformation.

2. Misinformation on the internet; who should be the arbiter of truth?

Misinformation on social media unquestionably poses a danger to public health: One study found that the more people rely on social media as their main news source, the more likely they are to believe misinformation about the COVID-19 pandemic.¹ Another found that a mere 12 people are responsible for 65 percent of the false and misleading claims about COVID-19 vaccines on Facebook, Instagram, and Twitter.² Misinformation online hinders natural disaster responses, such as when social media posts contain incorrect or out-of-date information.³ Misinformation is even threatening our democracy: in the 2020 election, social media were rife with misinformation such as the

¹ Su, *It doesn't take a village to fall for misinformation: Social media use, discussion heterogeneity preference, worry of the virus, faith in scientists, and COVID-19-related misinformation beliefs*, *Telematics and Information*, Vol. 58 (May 2021).

² Bond, *Just 12 People Are Behind Most Vaccine Hoaxes On Social Media, Research Shows*, NPR (May 14, 2021), <https://www.npr.org/2021/05/13/996570855/disinformation-dozen-test-facebooks-twitters-ability-to-curb-vaccine-hoaxes> [last visited Jul. 9, 2021].

³ United States Department of Homeland Security, *Countering False Information on Social Media in Disasters and Emergencies* (Mar. 2018), available at https://www.dhs.gov/sites/default/files/publications/SMWG_Countering-False-Info-Social-Media-Disasters-Emergencies_Mar2018-508.pdf [last visited Jul. 9, 2021].

incorrect election date,⁴ and then social media became a hotbed of misinformation about the results of the election that culminated with the attack on the United States Capitol.⁵

In these hyperpartisan times, the argument that social media platforms should be engaging in content moderation is made by parties on both the right and the left. Former President Trump and some Congressional Republicans have called for the repeal of Section 230, the federal statute that provides immunity to social media companies against being sued for content on their sites posted by users.⁶ Three Senate Democrats have also introduced a bill to limit Section 230's immunity provision in cases where a person seeks an injunction from a platform's failure to move material that is "likely to cause irreparable harm," and provides that Section 230 does not affect existing civil rights, antitrust, and sexual harassment laws.⁷

With respect to social media users harassing and threatening other users, it seems relatively uncontroversial to assume that platforms are in the best position to control their own users and penalize them for harassment and threats. With respect to misinformation, however, calls for social media companies to police misinformation necessarily ask social media companies to determine what is true and false; those doing the calling generally seem to assume that it is their version of the truth that will prevail. But tasking for-profit companies with the decision of whether information is true or not could easily result in social media companies making content decisions based on whether removing, or maintaining, a post will hurt their bottom lines; it is also easy to imagine a scenario in which social media companies block or stifle information critical of their businesses or that take political positions with which the companies disagree. Moreover, if a requirement to moderate content came with the threat of civil liability for failing to do so, the social media company would have every incentive to err on the side of removing any potentially untrue content, which could ultimately stifle a significant range of discourse and render social media platforms useless for anything but the most anodyne statements.

⁴ Fessler, *Robocalls, Rumors And Emails: Last-Minute Election Disinformation Floods Voters*, NPR (Oct. 24, 2020), <https://www.npr.org/2020/10/24/927300432/robocalls-rumors-and-emails-last-minute-election-disinformation-floods-voters> [last visited Jul. 9, 2021].

⁵ Frenkel, *How Misinformation 'Superspreaders' Seed False Election Theories*, New York Times (Nov. 23, 2020), <https://www.nytimes.com/2020/11/23/technology/election-misinformation-facebook-twitter.html> [last visited Jul. 9, 2021]; Bump, *The chain between Trump's misinformation and violent anger remains unbroken*, Washington Post (May 12, 2021), <https://www.washingtonpost.com/politics/2021/05/12/chain-between-trumps-misinformation-violent-anger-remains-unbroken/> [last visited Jul. 9, 2021]. Many of the insurrectionists who attacked the Capitol and are now facing criminal charges plan to argue, as a defense, that they were acting reasonably in light of the election-theft claims spread by the former president and on social media. (E.g., Associated Press, *Defense for some Capitol rioters: election misinformation*, Boston Herald (May 29, 2021), <https://www.bostonherald.com/2021/05/29/defense-for-some-capitol-rioters-election-misinformation/> [last visited Jul. 9, 2021].

⁶ Brown, *What Is Section 230 – And Why Does Trump Want to Change It?*, Forbes (May 28, 2020), <https://www.forbes.com/sites/abrambrown/2020/05/28/what-is-section-230-and-why-does-trump-want-to-change-it/?sh=5b038aa8389d> [last visited Jul. 9, 2021].

⁷ S. 299 (Warner, 117th Congress, 2021).

3. This bill requires social media platforms to post whether or not the platform has a policy or mechanism to address the spread of misinformation

This bill requires a person that operates a social media platform – the definition of which is discussed further in Part 4 of this analysis – to disclose, in an easy-to-find location on its webpage and mobile site, whether or not it has a policy or mechanism to address the spread of information with respect to, at a minimum:

- Reducing the spread of misinformation that contributes to the risk of imminent violence or physical harm.
- Reducing the spread of harmful, verifiably inauthentic content.
- Practices intended to deceptively and substantially manipulate or disrupt the behavior of users on the social media platform.

The bill does not require the disclosure to explain the policy, or to adopt any particular policy or take any action with respect to misinformation; it merely requires social media platforms to disclose whether such a policy exists. The penalty for failing to post this information is \$5,000 for the first violation, \$10,000 for the second violation, and \$20,000 for the third violation. According to the author, this bill will help staunch the flow of misinformation by providing users information about whether social media platforms have misinformation policies.

At the time this analysis is being published, many, if not all, of the most popular social media companies already post information regarding their content moderation policies.⁸ The bill might require these companies to modify the exact phrasing of their posted notices, but it does not appear that the bill would result in significantly more information being available to users. Platforms that have openly rejected the notion of engaging in content moderation, such as Parler, are also upfront about that decision.⁹ It is therefore unclear to what extent this bill would provide users with any new

⁸ See, e.g., Facebook Community Standards, “Integrity and Authenticity,” Facebook.com, https://www.facebook.com/communitystandards/integrity_authenticity [last visited Jul. 9, 2021]; *id.*, “False News,” Facebook.com, https://www.facebook.com/communitystandards/false_news [last visited Jul. 9, 2021]; Instagram Help Center – Policies and Reporting, “Reducing the Spread of False Information,” [https://help.instagram.com/1735798276553028/?helpref=hc_fnav&bc\[0\]=Instagram%20Help&bc\[1\]=Policies%20and%20Reporting](https://help.instagram.com/1735798276553028/?helpref=hc_fnav&bc[0]=Instagram%20Help&bc[1]=Policies%20and%20Reporting) [last visited Jul. 9, 2021]; Snapchat Community Guidelines, “Impersonation, Deceptive Practices & False Information,” Snap, Inc., <https://snap.com/en-US/community-guidelines> [last visited Jul. 9, 2021]; Tiktok Community Guidelines, “Misleading or infringing content,” TikTok.com, <https://www.tiktok.com/creators/creator-portal/en-us/community-guidelines-and-safety/community-guidelines/> [last visited Jul. 9, 2021]; Twitter General guidelines and policies, “Synthetic and manipulated media policy,” Twitter.com, <https://help.twitter.com/en/rules-and-policies/manipulated-media> [last visited Jul. 9, 2021]; You Tube Help, “COVID-19 medical misinformation policy,” YouTube.com, https://support.google.com/youtube/answer/9891785?hl=en&ref_topic=9282436 [last visited Jul. 9, 2021].

⁹ See Parler Community Guidelines, Parler.com (Jul. 8, 2021), <https://legal.parler.com/documents/guidelines.pdf> [last visited Jul. 9, 2021].

information; it is also unclear whether the availability of this information would meaningfully change users' social media behaviors or preferences.

4. The definition of "social media platform" as proposed to be amended by the author

Defining "social media" is notoriously difficult. Existing definitions in state law are generally drawn broadly because they are aimed at regulating the content of *users* of social media, not the social media companies themselves.¹⁰ Federal law has taken an "I know it when I see it approach," simply declining to define the term.¹¹ Many of the exemptions in this bill were added in response to stakeholder concerns that the definition of "social media platform" was overbroad and would encompass clearly non-social media services.

The definition of "social media platform" in this bill also had the potential to conflict with another bill pending before this Committee, AB 587 (Gabriel, 2021). Both bills are intended to require social media companies to post certain information about their content moderation policies, though AB 587 is much broader in scope. Because the bills are both geared at regulating the same entities, it could have created confusion in the law if they defined the entities to be regulated differently. At the request of the Committee, the authors' offices collaborated to devise harmonized definitions for both bills. The author therefore proposes to amend the bill to include the following definitions and exemptions:

- "Social media company" is a person or entity that owns or operates one or more social media platforms.
- "Social media platform" means an internet-based service that allows users to do all of the following:
 - Construct a public or semipublic profile within a bounded system created by the service.
 - Populate a list of other users with whom an individual shares a connection within the system.
 - View and navigate a list of connections made by other individuals within the system.
- The bill does not apply to:
 - A social media company that generated less than one hundred million dollars (\$100,000,000) in gross revenue during the preceding calendar year.
 - A service that exclusively conveys electronic mail.
 - A service that exclusively facilitates direct messaging between users.

¹⁰ *E.g.*, Ed. Code, §§ 234.6 (anti-cyber-bullying statute), 49-73.6 (addressing when a public school may gather student information obtained for social media); Gov. Code, § 54952.2 (addressing when members of a local legislative body may engage in social media communications without violating the Brown Act).

¹¹ *E.g.*, 6 U.S.C. § 195d.

- 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.
- Consumer reviews of products or services on an internet website that serves the exclusive purpose of facilitating online commerce.
- An internet-based subscription streaming service that is offered to consumers for the exclusive purpose of transmitting licensed media, including audio or video files, in a continuous flow from the internet-based service to the end user, and does not host user-generated content.
- A service that operates for the exclusive purpose of cloud storage or shared document or file collaboration.

5. This bill's notice requirement likely does not constitute impermissible compelled speech under the First Amendment

The United States Supreme Court has held that posting on social networking and/or social media sites constitutes communicative activity protected by the First Amendment.¹² As a general rule, the government “may not suppress lawful speech as the means to suppress unlawful speech.”¹³ In addition, the First Amendment places restrictions on compelled speech. However, the case law generally affords a wide berth to laws that regulate commercial speech by requiring disclosures that convey purely factual information and that are reasonably related to the state’s interest in preventing the deception of consumers.¹⁴

As discussed above, this bill does not impose any obligation on social media platforms to moderate content or remove posts containing misinformation. The bill only requires social media platforms to disclose *whether* they have a policy or mechanism for doing so. As such, this bill likely imposes a purely factual disclosure requirement that is permissible under the First Amendment.

6. Arguments in Opposition

According to bill opponent Electronic Frontier Foundation:

[Key] terms in the bill are undefined, vague, or overbroad.

¹² E.g., *Packingham v. North Carolina* (2017) 137 S.Ct. 1730, 1735-1736.

¹³ *Ashcroft v. Free Speech Coalition* (2002) 535 U.S. 234, 255; see also *United States v. Alvarez* (2012) 567 U.S. 709, 717 (Supreme Court “has rejected as ‘startling and dangerous’ a ‘free-floating test for First Amendment coverage...[based on] an ad hoc balancing of relative social costs and benefits’ ” [alterations in original]).

¹⁴ See *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n* (1980) 447 U.S. 557; *Zauderer v. Office of Disciplinary Counsel of Supreme Court* (1985) 471 U.S. 626.

First, the term “social media platform” is defined very broadly, and could encompass chat and other communications technologies that use the internet and involve information sharing, such as for listervs or other group communications tools such as Slack. One’s own twitter feed/following might be a “persistent virtual network.” We appreciate that the bill exempts both email and the comments section of a digital news internet website, but these express exclusions do not address the breadth of the definition.

Similarly, the term “misinformation” is barely defined, and the three prongs – “reducing the spread of information that contributes to the risk of imminent violence or physical harm,” “Reducing the spread of harmful, verifiably inauthentic content,” and “Practices intended to deceptively and substantially manipulate or disrupt the behavior of users on the social media platform” – are quite subjective.

We think the First Amendment demands more clarity from bills that seek to regulate speech.

SUPPORT

None known

OPPOSITION

Electronic Frontier Foundation

RELATED LEGISLATION

Pending Legislation:

SB 388 (Stern, 2021) requires a social media platform company, as defined, that, in combination with each subsidiary and affiliate of the service, has 25,000,000 or more unique monthly visitors or users for a majority of the preceding 12 months, to report to the Department of Justice by April 1, 2022, and annually thereafter, certain information relating to its efforts to prevent, mitigate the effects of, and remove potentially harmful content. SB 388 is pending before the Senate Judiciary Committee.

AB 1379 (Eduardo Garcia, 2021) requires an online platform that has 10,000,000 or more unique monthly United States visitors or users for a majority of months during the preceding 12 months that targets political advertising, as defined, to make available an application programming interface or other technical capability to enable qualified third parties to conduct independent analysis of bias and unlawful discriminatory impact of that targeted advertising. AB 1379 is pending before the Assembly Elections Committee.

AB 1114 (Gallagher, 2021) requires a social media company located in California to develop a policy or mechanism to address content or communications that constitute unprotected speech, including obscenity, incitement of imminent lawless action, and true threats, or that purport to state factual information that is demonstrably false. AB 1114 is pending before the Assembly Arts, Entertainment, Sports, Tourism, and Internet Media Committee.

AB 613 (Cristina Garcia, 2021) requires social media platforms, as defined, or users or advertisers posting on a social media platform, to place text or marking within or adjacent to retouched images that have been posted on the platform for promotional or commercial purposes, and specify how that retouched image was altered. AB 613 is pending before the Assembly Privacy and Consumer Protection Committee.

AB 587 (Gabriel, 2021) requires social media companies, as defined, to post their terms of service and report certain information to the Attorney General on a quarterly basis. AB 587 is pending before the Senate Judiciary Committee and will be heard on the same day as this bill.

Prior Legislation:

SB 890 (Pan, 2020) would have required social media companies to remove images and videos depicting crimes, as specified, and imposed civil penalties for failing to do so. SB 890 died in the Senate Judiciary Committee.

AB 2391 (Gallagher, 2020) would have prohibited social media sites from removing user-posted content on the basis of the political affiliation or viewpoint of that content, except where the social media site is, by its terms and conditions, limited to the promotion of only certain viewpoints and values and the removed content conflicts with those viewpoints or values. AB 2391 died in the Assembly Committee on Arts, Entertainment, Sports, Tourism, and Media.

AB 2442 (Chau, 2020) was substantially similar to this bill and would have required social media companies to disclose the existence, or lack thereof, of a misinformation policy, and imposed civil penalties for failing to do so. AB 2442 died in the Senate Judiciary Committee.

AB 1316 (Gallagher, 2019) would have prohibited social media sites from removing user-posted content on the basis of the political affiliation or viewpoint of that content, except where the social media site is, by its terms and conditions, limited to the promotion of only certain viewpoints and values and the removed content conflicts with those viewpoints or values. AB 1316 was held on the floor of the Assembly and was re-introduced as AB 2931 (2020).

AB 288 (Cunningham, 2019) would have required a social networking service, at the request of a user, to permanently remove personally identifiable information and not sell the information to third parties, within a commercially reasonable time of the request. AB 288 died in the Assembly Committee on Privacy and Consumer Protection.

SB 1424 (Pan, 2018) would have established a privately funded advisory group to study the problem of the spread of false information through Internet-based social media platforms, and draft a model strategic plan for Internet-based social media platforms to use to mitigate this problem. SB 1424 was vetoed by Governor Brown, whose veto message stated that, as evidenced by the numerous studies by academic and policy groups on the spread of false information, the creation of a statutory advisory group to examine this issue is not necessary.

AB 3169 (Gallagher, 2018) would have prohibited social media sites from removing content on the basis of the political affiliation or viewpoint of the content, and prohibited internet search engines from removing or manipulating content from search results on the basis of the political affiliation or viewpoint of the content. AB 3169 died in the Assembly Committee on Privacy and Consumer Protection.

PRIOR VOTES:

Assembly Floor (Ayes 59, Noes 16)

Assembly Appropriations Committee (Ayes 12, Noes 3)

Assembly Arts, Entertainment, Sports, Tourism, and Internet Media Committee (Ayes 4, Noes 1)

Assembly Judiciary Committee (Ayes 8, Noes 2)
