

SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2023-2024 Regular Session

AB 1027 (Petrie-Norris)
Version: July 3, 2023
Hearing Date: July 6, 2023
Fiscal: Yes
Urgency: No
CK

SUBJECT

Social media platforms: drug safety policies

DIGEST

This bill requires social media platforms to disclose their policies regarding retention of electronic communication information and sharing of information related to drug distribution. The bill adds controlled substance distribution as a category of content for purposes of the required terms of service reporting.

EXECUTIVE SUMMARY

The scourge of drug sales involving minors online is given a face through the anecdotes of people who are active drug users and parents of people who have overdosed on fentanyl that cite social media as an often used platform to advertise and sell drugs. Evidence shows that social media platforms have in fact become an increasingly popular avenue for the distribution and sale of illegal drugs, especially to younger generations. This includes fentanyl, a synthetic opioid that is 50 to 100 times stronger than morphine.

Recent laws have required more transparency from social media platforms about their policies and required them to report quantitative data on their content moderation efforts. The author argues that drug dealers have capitalized on the anonymity of social media sites to target their sales to pre-teens, teens and unhoused youth.

This bill requires social media platforms to include in their already required policy statements a general description of the platform's policy on the retention of electronic communication information and sharing of specified information. In addition, the bill adds to existing terms of service reporting requirements an obligation to disclose policies on addressing the distribution of controlled substances on the platform and data on the number of times such content was flagged and actioned. The bill also mandates platforms to retain specified user information and material for 90 days. A

previous version of the bill was supported by the Peace Officers' Research Association and TechNet. It is opposed by ACLU California Action and the Electronic Frontier Foundation.

PROPOSED CHANGES TO THE LAW

Existing federal law:

- 1) Provides a right to free speech and expression. (U.S. Const., 1st amend; Cal. Const., art 1, § 2.)
- 2) 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. § 230(c)(2).)
- 3) 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. § 230(c)(2).)

Existing state 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 include specified disclosures. (Bus. & Prof. Code § 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 § 1798.130.)
- 3) Defines "controlled substance" as a drug, substance, or immediate precursor which is listed in any schedule I through V. (Health & Saf. Code § 11007.)
- 4) Requires a social media platform to create, and publicly post on the platform's website, a policy statement with specified information, including:

- a) the social media platform's policy on the use of the platform to illegally distribute a controlled substance;
 - b) 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 a controlled substance;
 - c) a link to the platform's reporting mechanism for illegal or harmful content or behavior on the online platform; and
 - d) a general description of the platform's policies and procedures for responding to law enforcement inquiries, including warrants, subpoenas, and other court orders compelling the production of or access to electronic communication information, as defined in CalECPA. (Bus. & Prof. Code § 22945(b).)
- 5) Provides that the preceding statute does not apply to social media platforms that generated less than \$100 million in gross revenue during the preceding calendar year. The law expires on January 1, 2028. (Bus. & Prof. Code § 22945.)
- 6) Requires a social media company to post terms of service for each social media platform owned or operated by the company in a manner reasonably designed to inform all users of the social media platform of the existence and contents of the terms of service. (Bus. & Prof. Code § 22676.)
- 7) Requires social media companies to submit a terms of service report, on a semiannual basis, starting January 1, 2024, to the Attorney General, who must make it available to the public in a searchable repository on its website. The terms of service report must include specified information, including:
- a) a statement of whether the current version of the terms of service defines specified categories of content, and, if so, the definitions of those categories, including any subcategories. This includes hate speech, racism, extremism, harassment, disinformation, misinformation, and foreign political interference;
 - b) a detailed description of content moderation practices used by the social media company for that platform, including:
 - i. any policies intended to address the above categories of content;
 - ii. how automated content moderation systems enforce terms of service and when these systems involve human review;
 - iii. how the social media company responds to user reports of violations of the terms of service;
 - iv. how the social media company would remove individual pieces of content, users, or groups that violate the terms of service, or take broader action against individual users or against groups of users that violate the terms of service; and

- c) information on content that was flagged by the social media company as content belonging to any of the above categories, including the total number of all of the following:
 - i. flagged items of content;
 - ii. actioned items of content;
 - iii. actioned items of content that resulted in action taken by the social media company against the user or users responsible;
 - iv. actioned items of content that were removed, demonetized, or deprioritized by the social media company; and
 - v. times actioned items of content were viewed or shared by users; and
 - d) all information required in the previous section shall also be disaggregated into the category of content, the type of content, the type of media, and how the content was flagged and actioned. (Bus. & Prof. Code § 22677.)
- 8) Subject companies in violation of the preceding statute to penalties of up to \$15,000 per violation per day to be sought by specified public prosecutors. (Bus. & Prof. Code § 22678.)
- 9) Establishes the California Electronic Communications Privacy Act (CalECPA), which prohibits a government entity from compelling the production of or access to electronic communication information from a service provider, as defined, except as specified, including pursuant to a lawful warrant or wiretap order. (Pen. Code § 1546.1.)
- 10) Defines “electronic communication information,” for purposes of CalECPA, 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 § 1546.)
- 11) Establishes the California Consumer Privacy Act (CCPA), which grants consumers certain rights with regard to their personal information, including enhanced notice, access, and disclosure; the right to deletion; the right to restrict the sale of information; and protection from discrimination for exercising these rights. It places attendant obligations on businesses to respect those rights. (Civ. Code § 1798.100 et seq.)
- 12) Provides that a consumer shall have the right, at any time, to direct a business that sells or shares personal information about the consumer to third parties not

to sell or shares the consumer's personal information. This right may be referred to as the right to opt-out of sale or sharing. (Civ. Code § 1798.120.)

- 13) Grants consumers the right to request that a business delete any personal information about the consumer which the business has collected from the consumer. (Civ Code § 1798.105.)
- 14) Provides that a business need not comply with the CCPA to the extent it restricts the business' ability to carry out certain conduct, including complying with federal, state, or local laws or to cooperate with law enforcement. This also includes cooperating with a government agency request for emergency access to a consumer's personal information if a natural person is at risk or danger of death or serious physical injury where certain circumstances are met. (Civ. Code § 1798.145(a).)
- 15) Establishes the CPRA, which amends the CCPA and creates the PPA, which is charged with implementing these privacy laws, promulgating regulations, and carrying out enforcement actions. (Civ. Code § 798.100 et seq.; Proposition 24 (2020).)
- 16) Permits amendment of the CPRA by a majority vote of each house of the Legislature and the signature of the Governor, provided such amendments are consistent with and further the purpose and intent of this act as set forth therein. (Proposition 24 § 25 (2020).)

This bill:

- 1) Removes the sunset from the law requiring platforms to issue policy statements about controlled substance policies¹ and applies it to social media platforms with gross revenue below \$100 million.
- 2) Requires a social media platform's policy statement regarding controlled substance distribution to include a general description of the platform's:
 - a) policy on the retention of electronic communication information, as defined in CalECPA, including how long the platform retains that information; and
 - b) policies and procedures governing when a platform proactively shares relevant information pertaining to the illegal distribution of a controlled substance.

¹ The author has stated they intend to amend the bill to reinstate the sunset.

- 3) Requires the Attorney General to identify a clear and designated point of contact within the Department of Justice to direct reports by a social media platform of actioned content or accounts that indicate an “eminent” threat to human life.
- 4) States that the above section of law requiring these policy statements does not prohibit a social media platform from disclosing account and user information when requested by law enforcement pursuant to Section 1798.145 of the Civil Code. However, it also provides that it does not authorize a governmental entity to compel the production of or access to content or electronic communication information, as defined in Section 1546 of the Penal Code, from a service provider, or compel the production of or access to electronic device information, as defined in Section 1546 of the Penal Code, from any person or entity other than the authorized possessor of the device except pursuant to Section 1546.1 of the Penal Code and Section 22945.
- 5) Mandates a reporting mechanism for illegal or harmful content or behavior on platforms.²
- 6) Requires a social media platform to retain data on content it has taken action to take down or remove for a violation of a policy prohibiting the unlawful sale, distribution, amplification, or otherwise proliferation of controlled substances and related paraphernalia. A social media platform shall retain the content that violated a policy and the user name of the violating account at issue for a period of 90 days.
- 7) Adds controlled substance distribution to the categories of content that must be included in required terms of service reports.

COMMENTS

1. Issues with illegal online drug activity

This bill is motivated by the increase in the use of social media to buy and sell illegal drugs. One tragic example:

Last winter, Megan Macintosh found her 18-year-old son Chase unconscious after she says he experimented with pills. He died just over a month later, likely from a pill laced with fentanyl from an unknown source.

Macintosh turned to his social media for answers. Looking through her son’s Snapchat, she said she saw bags of pills and mushrooms. “I felt

² The author has stated they intend to amend the bill to remove this provision.

really helpless like there's really nothing I can do when I saw how prevalent it was, how many people were in his feed," she said.

The drug trade is booming on social media, according to Kathleen Miles, who works for the Center on Illicit Networks and Transnational Organized Crime. "I think social media can be great, but it also has a really dark side of it," Miles said.

With fentanyl in high circulation, the risks are often deadly. The U.S. recorded more than 100,000 drug overdose deaths in a 12-month period for the first time, according to the Centers for Disease Control and Prevention. It's the highest number of drug overdose deaths ever recorded in a year.³

The Drug Enforcement Administration has warned of the alarming increase in the availability and lethality of fake prescription pills containing fentanyl and methamphetamine and issued a public safety alert that "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."⁴

2. Drug Safety Policies on Online Platforms

This bill attempts to tackle the incidence of drug distribution online by bolstering existing laws requiring more transparency from social media platforms.

a. *Disclosing retention policies*

AB 1628 (Ramos, Ch. 432, Stats. 2022) requires social media platforms to create and post a policy statement that includes their policies regarding distribution of controlled substances and its prevention, reporting mechanisms, and resources. Specifically, the statement must include the platform's policy on the use of the platform to illegally distribute a controlled substance, which in most cases will likely be to disallow it. The statement must describe the platform's policies for responding to law enforcement inquiries, but does not require any specific policy. The statement must also include a general description of the online platform's moderation practices that are geared toward preventing content related to the illegal distribution of drugs as well as a link to

³ Tom Hanson, *Teens have easier access to drugs as illegal trade booms on social media* (November 30, 2021) CBS News, <https://www.cbsnews.com/news/social-media-teens-drug-access/>. All internet citations are current as of July 1, 2023.

⁴ Devlin Barrett & Elizabeth Dwoskin, *With overdose deaths soaring, DEA warns about fentanyl-, meth-laced pills* (September 27, 2021) The Washington Post, https://www.washingtonpost.com/national-security/dea-warning-counterfeit-drugs/2021/09/27/448fcb18-1f27-11ec-b3d6-8cdebe60d3e2_story.html.

the platform's reporting mechanism for illegal or harmful content, if one exists. The platforms are to update the policy statement as necessary. The law only applies to platforms that generated at least \$100 million in gross revenue and sunsets on January 1, 2028.

This bill seeks greater transparency from social media platforms by requiring these reports to also include a general description of the social media platform's policy on the retention of electronic communication information, as defined in CalECPA, including how long the platform retains that information. In addition, it requires a general description of the platform's policies and procedures governing when a platform proactively shares relevant information pertaining to the illegal distribution of a controlled substance.

b. Controlled substance distribution reporting

Another bill, AB 587 (Gabriel, Ch. 269, Stats. 2022), also established transparency and reporting requirements on social media platforms. The law requires social media platforms to post their terms of service. These policies must include information about how users can ask questions, how they can flag content or users in violation, and a list of potential actions that the company might take in response. To ensure meaningful access, the terms of service must be posted in a manner reasonably designed to inform all users of their existence and contents and be available in all Medi-Cal threshold languages in which the social media platform offers product features.

AB 587 also requires a detailed terms of service report to be compiled by these companies and submitted on a semiannual basis to the Attorney General, who must make it available to the public in a searchable repository on its website. The terms of service report must include specified information, including a statement of whether the current version of the terms of service defines specified categories of content, and, if so, the definitions of those categories, including any subcategories. This includes hate speech, racism, extremism, harassment, disinformation, misinformation, and foreign political interference. Specific content moderation practices or other policies focused on these various categories of content are required to be included.

The law also required detailed information on flagged and actioned content, including the total number of all of the following:

- flagged items of content;
- actioned items of content;
- actioned items of content that resulted in action taken by the social media company against the user or users responsible;
- actioned items of content that were removed, demonetized, or deprioritized by the social media company; and
- times actioned items of content were viewed or shared by users.

In addition, all this information must also be disaggregated into the category of content, the type of content, the type of media, and how the content was flagged and actioned.

This bill bolsters the AB 587 reporting requirements by adding a new category of content to be reported on, controlled substance distribution. This will help provide more significant and quantitative evidence of the scope of the problem and what is being done about it. Just as with the existing law, any violations are subject to public enforcement.

c. Forced retention of information

The bill also requires a social media platform to retain data on content it has taken action to take down or remove for a violation of a policy prohibiting the unlawful sale, distribution, amplification, or otherwise proliferation of controlled substances and related paraphernalia. A social media platform is required to retain the content that violated a policy and the user name of the violating account at issue for a period of 90 days.

This forced retention of information raises some thorny legal issues and may interfere with existing consumer rights.

For instance, the CCPA, as amended by the CPRA, grants a series of rights to consumers, including the right to delete information held by businesses. Section 25 of the CPRA requires any amendments thereto to be in line with the purpose and intent of the law:

The provisions of this Act may be amended after its approval by the voters by a statute that is passed by a vote of a majority of the members of each house of the Legislature and signed by the Governor, **provided that** such amendments are consistent with and further the purpose and intent of this Act as set forth in Section 3, including amendments to the exemptions in Section 1798.145 if the laws upon which the exemptions are based are amended to enhance privacy and are consistent with and further the purposes and intent of this Act

Section 3 declares that “it is the purpose and intent of the people of the State of California to further protect consumers’ rights, including the constitutional right of privacy.” It then lays out a series of guiding principles. These include various consumer rights such as:

- consumers should know who is collecting their personal information;
- consumers should have control over how their personal information is used; and
- consumers should benefit from businesses’ use of their personal information.

This limitation on amendments applies not only to the specific CCPA provisions amended by the ballot initiative but also other relevant statutes, regardless of whether the CPRA makes any substantive change thereto. Given the retention provision may interfere directly with the rights provided under the CCPA, it may run afoul of the CPRA restriction.

In addition, given that the retention provision is essentially a government mandate on private businesses to seize certain personal information of private individuals, Fourth Amendment issues arguably arise. Groups in opposition highlight these, and other, concerns.

The Electronic Frontier Foundation writes:

Our organization had been opposed to the initial version of this bill but removed opposition when a 7-day mandatory retention period was deleted from the bill. Now that it has been amended to include a 90-day retention period for “actioned content,” we must again raise our concerns about this bill’s effect.

While we understand and respect Asm. Petrie-Norris’ goal of addressing the fentanyl crisis, this bill would considerably undermine people’s autonomy over the privacy of their communications. It may also conflict with the federal and California constitutions. Government-mandated data retention of people’s communications raises serious Fourth Amendment issues.

There are several reasons that a person may wish to delete records of their personal conversations promptly. Many choose to automatically delete messages for convenience’s sake. But there are several instances where being able to delete information whenever you want carries greater importance. For example, a student may be speaking to a friend about a potential decision to become public about their sexual orientation in messages, and not wish for their parents to see it.

This is particularly true right now, as many states across the country pass laws criminalizing certain types of healthcare. A person seeking reproductive or genderaffirming care that’s criminalized in their state may speak to a support group about receiving that care. Law enforcement officials seeking to prosecute people seeking or supporting this kind of health care will have far more time to request access to that information if this bill requires its retention. Those seeking to expose that information – whether to bring lawsuits under bounty-style state laws around reproductive care, or simply to embarrass people by exposing their personal conversations – will also have more time to hack into it.

ACLU California Action writes in opposition to the bill:

This bill could be weaponized against the most vulnerable communities in California and across the country. Testosterone – a drug used widely for gender-affirming healthcare, particularly for transgender men – is listed as a controlled substance in both California statute and federal definitions of controlled substances. As many states across the country pass laws criminalizing certain types of healthcare, some transgender people may be forced to purchase testosterone using nontraditional methods. Social media platforms would then be required to retain this extremely sensitive health information for 90 days, giving law enforcement officials in other states far more time to subpoena information that would assist in investigating transgender people.

Additionally, bad actors seeking to expose health information – whether to bring lawsuits under bounty-style state laws relating to reproductive or gender-affirming care, or to simply embarrass people by exposing their personal conversations – will have more time to hack into social media platforms. Facebook messages have already been used in one case to investigate a person for her alleged abortion.

d. Additional provisions that arguably need clarification

The bill also includes a requirement for the Attorney General to identify a clear and designated point of contact within the Department of Justice to direct reports by a social media platform of actioned content or accounts that indicate an imminent⁵ threat to human life. This is ostensibly to make sure platforms can easily discern to whom they should report certain criminal activity. However, it is unclear whether the Attorney General is the right office to be communicating potentially life-endangering conduct. In addition, the author states the intent of this is address situations where platforms are looking to *voluntarily and proactively* report such information. The author has agreed to the following amendment to make this clearer:

“The Attorney General shall identify a clear and designated point of contact within the Department of Justice to direct *proactive and voluntary* reports by a social media platform of actioned content or accounts that indicate an ~~eminent~~ *imminent* threat to human life.”

The bill also states that this chapter of law, requiring these policy statements and now the retention requirement, does not prohibit a social media platform from disclosing account and user information when requested by law enforcement pursuant to Section

⁵ The bill in print references “eminent” threats. The author likely intends this to refer to “imminent” threats.

1798.145 of the Civil Code. However, it also provides that it does not authorize a governmental entity to compel the production of or access to content or electronic communication information, as defined in Section 1546 of the Penal Code, from a service provider, or compel the production of or access to electronic device information, as defined in Section 1546 of the Penal Code, from any person or entity other than the authorized possessor of the device except pursuant to Section 1546.1 of the Penal Code and Section 22945.

These sections could benefit from more clarity. To avoid conflicting with other laws, including CalECPA, the author has agreed to amend Sections 22945.3(a) and 22945.7 and replace it with the following provision:

“Nothing in this chapter shall be construed to alter the rights or obligations established in any other law, including, but not limited to, the California Electronic Communications Privacy Act, Penal Code Section 1546 et seq., and the California Consumer Privacy Act, Civil Code Section 1798.100 et seq.”

This would effectuate the author’s stated intent with these provisions while avoiding unintended consequences.

3. Stakeholder positions

According to the author:

Two disturbing trends have dramatically escalated the dangers of fentanyl: the deceptive use of fentanyl in counterfeit pills and the use of social media to traffic these drugs to young people. Drug dealers have capitalized on the anonymity of social media sites to target their sales to pre-teens, teens and unhoused youth. These sites have chat settings designed to erase chat history after just a few hours, making it incredibly difficult for law enforcement to track and prosecute online fentanyl traffickers. By requiring social media platforms to enact more stringent data collection, reporting, and storage requirements, AB 1027 offers important assistance to law enforcement agencies as they continue to fight this deadly epidemic.

Several position letters in support largely focus on a previous version of the bill before multiple sets of recent amendments went into print.

SUPPORT

Peace Officers’ Research Association of California (previous version)

TechNet (previous version)

OPPOSITION

ACLU California Action
Electronic Frontier Foundation

RELATED LEGISLATION

Pending Legislation: SB 60 (Umberg, 2023) authorizes a person to seek an order requiring a social media platform to remove content that includes an offer to transport, import into this state, sell, furnish, administer, or give away a controlled substance in violation of the law. SB 60 is currently in the Assembly Appropriations Committee.

Prior Legislation:

AB 587 (Gabriel, Ch. 269, Stats. 2022) *See* Comment 2.

AB 1628 (Ramos, Ch. 432, Stats. 2022) *See* Comment 2.

PRIOR VOTES:

The following votes are relevant to a previous version of the bill:

Assembly Floor (Ayes 77, Noes 0)
Assembly Appropriations Committee (Ayes 15, Noes 0)
Assembly Privacy and Consumer Protection Committee (Ayes 11, Noes 0)
Assembly Judiciary Committee (Ayes 9, Noes 0)
