

Date of Hearing: April 25, 2023

ASSEMBLY COMMITTEE ON PRIVACY AND CONSUMER PROTECTION

Jesse Gabriel, Chair

AB 1027 (Petrie-Norris) – As Amended April 6, 2023

As Proposed to be Amended

SUBJECT: Social media platforms

SYNOPSIS

This author-sponsored measure would require each large social media platform that operates in California to make publicly available on its website a description of its policies regarding retention of electronic communication information—including, crucially, how long the platform retains such information.

The bill is intended as a policy response to the widespread use of social media platforms to sell fentanyl, a synthetic opioid that the Centers for Disease Control and Prevention reports is causing the overdose deaths of over 150 Americans per day. If a person overdoses or dies after taking fentanyl, and a law enforcement agency reasonably suspects the fentanyl was purchased via a social media platform, this bill should help apprise the agency as to whether there is sufficient time to obtain the records of the transaction before the underlying data is deleted. Publication of these time frames could therefore help ensure that law enforcement efforts in this regard are not wasted.

Committee amendments propose to amend the bill substantially, while still furthering the author's goal of providing more tools to address fentanyl trafficking online. The bill, in its pre-amendment form, was previously heard by the Assembly Judiciary Committee, where it passed on a 9-0-2 vote.

SUMMARY: Requires a social media platform to publicly post on its internet website a general description of its policy regarding the retention of electronic communication information, including how long the platform retains that information. Specifically, **this bill:**

- 1) Requires a social media platform that operates in California, if owned by a business that generated annual revenue in excess of \$100 million in the previous year, to include in a policy statement that it publicly posts on its internet website the following:
 - a) A general description of the social media platform's policy regarding the retention of electronic communication information, as that term is defined under the California Electronic Communications Privacy Act (CalECPA).
 - b) How long the platform retains that information.

EXISTING LAW:

- 1) Provides, pursuant to the California Constitution, that all people have inalienable rights, including the right to pursue and obtain privacy. (Cal. Const., art. I, § 1.)

- 2) Establishes CalECPA, which generally prohibits a government entity from compelling the production of, or access to, electronic communication information without a warrant, wiretap order, an order for electronic reader records, a subpoena, or an order for a pen register or trap and trace device. CalECPA also provides the target whose information is sought the ability to void or modify the warrant or order. (Pen. Code §§ 1546-1546.5.)
- 3) Defines “electronic communication information” under CalECPA as 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 Internet Protocol (IP) address. (Pen. Code § 1546.)
- 4) Requires social media platforms, if owned by a business that generated \$100 million or more in the preceding year, to create, and publicly post on the platform’s internet website, a policy statement that includes all of the following:
 - 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 employed to prevent users from posting or sharing electronic content pertaining to the illegal distribution of a controlled substance. However, this description must not include information that might compromise operational efforts to identify prohibited content or user activity, or otherwise endanger user safety.
 - c) A link to mental health and drug education resources provided by governmental public health authorities.
 - d) A link to the social media platform’s reporting mechanism for illegal or harmful content or behavior, if one exists.
 - e) 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 that term is defined under CalECPA. (Bus. and Prof. Code § 22945(b).)
- 5) Allows the policy statement required by 4) to be posted separately or incorporated within another document or post, including the platform’s terms of service or community guidelines. (Bus. and Prof. Code § 22945(c).)
- 6) Requires a person or entity operating a social media platform to update as necessary the policy statement required by 4). Encourages platforms to consult with specified stakeholders to assist in developing and supporting the policy statement. (Bus. and Prof. Code § 22945(d).)
- 7) Defines “social media platform” as a public or semipublic internet-based service or application that has users in California and that meets both of the following criteria:

- a) A substantial function of the service or application is to connect users in order to allow them to interact socially with each other within the service or application. (A service or application that provides email or direct messaging services does not meet this criterion based solely on that function.)
- b) The service or application allows users to do all of the following:
 - i) Construct a public or semipublic profile for purposes of signing into and using the service or application.
 - ii) Populate a list of other users with whom an individual shares a social connection within the system.
 - iii) Create or post content viewable by other users, including, but not limited to, on message boards, in chat rooms, or through a landing page or main feed that presents the user with content generated by other users. (Bus. & Prof. Code § 22945(a)(3).)

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

COMMENTS:

1) **Background.** According the U.S. Centers for Disease Control and Prevention (CDC), fentanyl, a synthetic opioid up to 50 times stronger than heroin, is currently responsible for over 150 deaths a day in the United States due to overdoses. (CDC, *Fentanyl Facts* (Feb. 23, 2022), available at <https://www.cdc.gov/stopoverdose/fentanyl/index.html>.)

This epidemic of overdoses is exacerbated by the ability of interested parties to use social media platforms to connect with strangers or acquaintances who distribute and sell opioids, making illegal drugs easier and more convenient to purchase. Because the clientele of many social media platforms skews younger, this distribution channel has been especially harmful to teens and young adults. According to a 2021 *Washington Post* article:

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....

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....

(Lerman & De Vynck, *Snapchat, TikTok, Instagram face pressure to stop illegal drug sales as overdose deaths soar*, *Washington Post* (Sep. 28, 2021), available at <https://www.washingtonpost.com/technology/2021/09/28/tiktok-snapchat-fentanyl/>.)

Last year's AB 1628 (Ramos, Chap. 432, Stats. 2022) was enacted in response to such calls for transparency in social media platforms' practices. The bill required each large social media

platform to publicly post on its internet website a policy statement containing information such as (i) the platform's policy on the use of the platform to illegally distribute a controlled substance; (ii) a description of the platform's moderation practices employed to prevent users from sharing content regarding illegal distribution of a controlled substance; and (iii) the platform's policies and procedures for responding to law enforcement inquiries, including warrants, subpoenas, and other court orders compelling production of electronic communications information.

This bill would bolster AB 1628 by further increasing the transparency of large social media platforms' treatment of electronic communications information. Specifically, the bill, as amended, would require each platform to post a general description of its policies regarding the retention of electronic communication information, including how long the platform retains that information.

2) **Author's statement.** According to the author:

Social media platforms currently post a policy statement that includes general information about their terms and usage. [...] By adding this additional policy statement requirement, AB 1027 will provide law enforcement agencies with access to information that could be invaluable in their efforts to investigate online illicit drug transactions.

3) **Why the bill is being amended.** As referred to this Committee, this bill would have required social media platforms to retain the records and contents of a communication between users for at least 168 hours from the time the communication was made. This requirement would have undermined attempts by online drug sellers to delete their messages, or to rely on platform features, such as end-to-end encryption or automatic and rapid deletion of messages, to hide their transactions. In the event a drug overdose or death was tied to a sale made over social media, the bill might have given law enforcement more time to obtain a warrant and acquire the content of communications between the victim and the drug seller.

However, as pointed out by bill opponents, this requirement might have impaired important legislative efforts to protect access to reproductive health care, gender-affirming health care, and information central to LGBTQ identity. For example, ACLU California Action wrote in opposition:

[T]here 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 gender-affirming 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 to simply embarrass people by exposing their personal conversations—will also have more time to hack into it.

This bill is being amended to respond to these two important policy goals: enhancing the ability of law enforcement to identify drug sellers who transact on social media, while preserving

platforms' ability to protect the privacy of lawful conversations that, if exposed, could lead to consequences ranging from shaming to persecution to criminal prosecution.

4) **Committee amendment—providing transparency as to social media platforms' record retention policies.** Committee amendments would delete the existing provisions of the bill and replace it with the following provision:

Business and Professions Code 22945. (b) A social media platform that operates in the state shall create, and publicly post on the social media platform's internet website, a policy statement that includes all of the following:

[...]

(6) A general description of the social media platform's policy on the retention of electronic communication information, as defined in Section 1546 of the Penal Code, including how long the platform retains that information.

The transparency provided by this amendment—particularly specification of how long social media platforms retain electronic communications information—may prove valuable in combatting illegal drug trafficking, as well as other illicit activities, such as sex trafficking and the sharing of child pornography. At present, law enforcement authorities may be unsure of how long they will have to obtain needed records of communications, including valuable metadata (such as the time when a communication took place, the user account(s) involved, and any email addresses, IP addresses, or phone numbers associated with those accounts), from particular platforms. They may therefore waste time seeking records that cannot be obtained (because the data they seek has been deleted), or else wrongly believe it is futile to seek the records (because they incorrectly believe the data will have been deleted). Publication of these time frames may help ensure that law enforcement efforts in this regard are not wasted. That said, it is worth cautioning that publicizing data retention practices may drive drug sellers away from platforms with longer retention periods, thereby, in the long run, further frustrating law enforcement efforts to catch traffickers. But it may also enable those seeking information about reproductive or gender-affirming health care, in jurisdictions where this care is illegal, to choose platforms with shorter retention times in order better protect their privacy—once again revealing how the same platform features that facilitate drug trafficking are also those most important for protecting the vulnerable.

5) **Related legislation.** AB 587 (Gabriel, Chap. 269, Stats. 2022) required social media companies, as defined, to post their terms of service in a manner reasonably designed to inform all users of specified policies and further required social media companies to submit specified semiannual reports to the Attorney General, starting January 1, 2024.

AB 1628 (Ramos, Chap. 432, Stats. 2022) required social media platforms, as defined, that operate in this state to create and publicly post policy statements including specified information regarding platforms' use to illegally distribute controlled substances.

SB 1056 (Umberg, Chap. 881, Stats. 2022) required social media platforms, as defined, to clearly and conspicuously state whether they have mechanisms for reporting violent posts, as defined; and allows a person who is the target, or who believes they are the target, of a violent post to seek an injunction to have the violent post removed.

REGISTERED SUPPORT / OPPOSITION: (Note that these positions were taken in response to the bill in print, not as it is proposed to be amended.)

Support

Alexander Neville Foundation
League of California Cities

Oppose unless Amended

California Chamber of Commerce
Chamber of Progress
Computer & Communications Industry Association
Internet Coalition
Netchoice
Technet

Opposition

ACLU California Action
Electronic Frontier Foundation

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