

## HOUSE OF REPRESENTATIVES STAFF FINAL BILL ANALYSIS

**BILL #:** HB 7013 PCB COM 21-01 Technology Transparency

**SPONSOR(S):** Commerce Committee, Ingoglia and others

**TIED BILLS:** CS/HB 7015 **IDEN./SIM. BILLS:** SB 7072

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**FINAL HOUSE FLOOR ACTION:** 77 Y's 38 N's **GOVERNOR'S ACTION:** Approved

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### SUMMARY ANALYSIS

HB 7013 passed the House on April 28, 2021, as SB 7072 as amended. The bill was amended in the Senate on April 29, 2021, and was returned to the House. The House concurred in the Senate amendment and passed the bill as amended on April 29, 2021.

Section 230 of the Federal Communications Decency Act (Section 230) provides immunity from liability for information service providers and social media platforms that, in good faith, remove or restrict from their services information deemed "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected." While this immunity has fostered the growth of certain parts of the internet, recently, there have been criticisms of the broad federal immunity provision due to actions taken or not taken regarding the censorship of users by internet platforms. Government regulators have also recently investigated and initiated cases against certain platforms for antitrust activities.

The bill provides that a social media platform must:

- Publish standards used for determining how to censor, deplatform, and shadow ban users, and apply such standards in a consistent manner
- Inform each user about any changes to its user rules, terms, and agreements before implementing the changes and not make changes more than once every 30 days
- Notify a user in a specified manner within 7 days of censoring or deplatforming the user
- Allow a user to request the number of other individuals who were shown the user's content or posts, and provide such information upon such request by the user
- Provide users with an option to opt out of post-prioritization and shadow banning algorithms to allow sequential or chronological posts and content
- Ensure that posts by or about candidates for office in Florida are not shadow banned
- Ensure that journalistic enterprises are not censored, deplatformed, or shadow banned

A social media platform that fails to comply with these requirements may be found in violation of the Florida Deceptive and Unfair Trade Practices Act by the Department of Legal Affairs (DLA). Additionally, a user may bring a private cause of action against a social media platform for failing to consistently apply certain standards and for censoring or deplatforming without proper notice.

The bill prohibits social media platforms from deplatforming candidates for political office, and allows the Florida Elections Commission to fine a social media platform \$250,000 per day for deplatforming statewide candidates and \$25,000 per day for deplatforming all other candidates. If a social media platform knowingly provides free advertisements for a candidate, such ads are treated as an in-kind contribution and the candidate must be notified.

If a social media platform has been convicted of or held civilly liable for state or federal antitrust violations, such platform, or an affiliate thereof, may be placed on the Antitrust Violator Vendor List (list) by the Department of Management Services and is then prohibited from contracting with public entities. In certain circumstances, DLA may temporarily place a social media platform on the list.

The bill has no fiscal impact on DMS. The DLA has indicated that additional resources will be needed to implement the bill. See *Fiscal Analysis & Economic Impact Statement*.

The bill was approved by the Governor on May 24, 2021, ch. 2021-32, L.O.F., and will become effective on July 1, 2021.

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

**STORAGE NAME:** h7013z.DOCX

**DATE:** 5/20/2021

## I. SUBSTANTIVE INFORMATION

### A. EFFECT OF CHANGES:

#### **Social Media Platforms - Current Situation**

##### ***Section 230***

The federal Communications Decency Act (CDA) was passed in 1996 “to protect children from sexually explicit Internet content.”<sup>1</sup> 47 U.S. Code § 230 (Section 230) was later added to the CDA to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum.<sup>2</sup>

Section 230 states that “[i]t is the policy of the United States—(1) to promote the continued development of the Internet and other interactive computer services and other interactive media; [and] (2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.”<sup>3</sup> To accomplish these goals, Section 230 states that no provider or user of an interactive computer service may be held liable on account of any action:<sup>4</sup>

- 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
- Taken to enable or make available to information content providers or others the technical means to restrict access to material from any person or entity that is responsible for the creation or development of information provided through any interactive computer service.

Section 230 also “assuaged Congressional concern regarding the outcome of two inconsistent judicial decisions,<sup>5</sup> both of which “appl[ie]d traditional defamation law to internet providers.”<sup>6</sup> The first court held that an interactive computer service provider could not be liable for a third party’s defamatory statement, but the second court imposed liability where a service provider filtered content in an effort to block obscene material.<sup>7</sup> To resolve the inconsistency, Section 230 specifies that “[n]o provider ... of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”<sup>8</sup> In light of Congress’s objectives, the judicial circuits are in general agreement that this provision should be construed broadly in favor of immunity.<sup>9</sup>

Additionally, Section 230 specifically addresses how the federal law affects other laws, prohibiting all inconsistent causes of action and liability imposed under any State or local law.<sup>10</sup> However, Section 230 does not affect federal criminal law, intellectual property law, the Electronic Communications Privacy Act of 1986, or sex trafficking laws.

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<sup>1</sup> *Force v. Facebook, Inc.*, 934 F.3d 53, 63 (2d Cir. 2019) (citing *FTC v. LeadClick Media, LLC*, 838 F.3d 158, 173 (2d Cir. 2016) (citing 141 Cong. Rec. S1953 (daily ed. Feb. 1, 1995) (statement of Sen. Exon))).

<sup>2</sup> *Force*, 934 F.3d at 63 (quoting *Ricci v. Teamsters Union Local 456*, 781 F.3d 25, 28 (2d Cir. 2015) (quoting *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997))).

<sup>3</sup> 47 U.S.C. § 230(b)(1)–(2).

<sup>4</sup> 47 U.S.C. § 230(c).

<sup>5</sup> *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991) and *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 31063/94, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995).

<sup>6</sup> *Force*, 934 F.3d at 63 (quoting *LeadClick*, 838 F.3d at 173).

<sup>7</sup> *Force*, 934 F.3d at 63 (quoting *LeadClick*, 838 F.3d at 173 (citing 141 Cong. Rec. H8469-70 (daily ed. Aug. 4, 1995) (statement of Rep. Cox))).

<sup>8</sup> 47 U.S.C. § 230(c)(1).

<sup>9</sup> *Force*, 934 F.3d at 63 (quoting *LeadClick*, 838 F.3d at 173).

<sup>10</sup> 47 U.S.C. § 230(e).

While Section 230 immunity has fostered the free flow of ideas on the Internet, critics have argued that Section 230 shields publishers from liability for allowing harmful content.<sup>11</sup> Recently, there have also been criticisms of the broad immunity provisions or liability shields which allow individuals unhappy with third-party content to sue the user who posted it but not the platform hosting it. Both sides of the political aisle have claimed that internet platforms engage in political censorship and unduly restrict viewpoints.<sup>12</sup>

Congressional and executive proposals to limit immunity for claims relating to platforms purposefully hosting content from those engaging in child exploitation, terrorism, and cyber-stalking have been introduced.<sup>13</sup> Bills have also been filed that would require internet platforms to have clear content moderation policies, submit detailed transparency reports, and remove immunity for platforms that engage in certain advertising practices.<sup>14</sup> Further, legislative proposals have been offered to limit the liability shield for internet providers who restrict speech based on political viewpoints.<sup>15</sup>

### ***Internet and Social Media Platforms***

Individuals access computer systems and interact with such systems and other individuals on the Internet in many ways, including through:

- Social media sites, which are websites and applications allowing users to communicate informally with others, find people, and share similar interests;<sup>16</sup>
- Internet platforms, which are servers used by an Internet provider to support Internet access by their customers;<sup>17</sup>
- Internet search engines, which are computer software used to search data (such as text or a database) for specified information;<sup>18</sup> and
- Access software providers, which are providers of software or enabling tools for content processing.<sup>19</sup>

Such platforms earn revenue through various mechanisms, including:

- Data monetization,<sup>20</sup> a mechanism in which data that is gathered and stored on the millions of users that spend time on free content sites can be sold and used to help e-commerce companies tailor their marketing campaigns to a specific set of online consumers.<sup>21</sup>

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<sup>11</sup> Zoe Bedell and John Major, *What's Next for Section 230? A Roundup of Proposals* Lawfare, (July 29, 2020) <https://www.lawfareblog.com/whats-next-section-230-roundup-proposals> (last visited Feb. 25, 2021).

<sup>12</sup> For example, on May 28, 2020, an executive order was issued by President Trump suggesting that websites "should properly lose" their "limited liability shield" whenever they "remove or restrict access to content" not in good faith. Bedell, *supra* note 11; Exec. Order No.13925, 85 Fed. Reg. 34079 (May 28, 2020).

<sup>13</sup> *Id.*; United States Department of Justice, Department of Justice's Review of Section 230 of the Communications Decency Act of 1996, <https://www.justice.gov/archives/ag/departments-justice-s-review-section-230-communications-decency-act-1996> (last visited Feb. 25, 2021); EARN IT Act of 2020, S.3398, 116th Cong. (2020).

<sup>14</sup> Bedell, *supra* note 11; PACT Act, S.4066, 116th Cong. (2020); BAD ADS Act, S.4337, 116th Cong. (2020).

<sup>15</sup> Bedell, *supra* note 11; Limiting Section 230 Immunity to Good Samaritans Act, S.3983, 116th Cong. (2020).

<sup>16</sup> DelValle Institute Learning Center, *Social Media Platforms*, <https://delvalle.bphc.org/mod/wiki/view.php?pageid=65> (last visited Feb. 24, 2021).

<sup>17</sup> IGI Global, *Internet Platform*, <https://www.igi-global.com/dictionary/internet-platform/15441> (last visited Feb. 24, 2021).

<sup>18</sup> Merriam Webster, *Search Engine*, <https://www.merriam-webster.com/dictionary/search%20engine> (last visited Feb. 24, 2021).

<sup>19</sup> Cornell Law School, Legal Information Institute, *Access Software Provider*, [https://www.law.cornell.edu/definitions/uscode.php?width=840&height=800&iframe=true&def\\_id=47-USC-629364878-1237841280&term\\_occur=1&term\\_src=title:47:chapter:5:subchapter:II:part:I:section:230#:~:text=\(4\)%20Access%20software%20provider%20The,C\)%20transmit%2C%20receive%2C%20display](https://www.law.cornell.edu/definitions/uscode.php?width=840&height=800&iframe=true&def_id=47-USC-629364878-1237841280&term_occur=1&term_src=title:47:chapter:5:subchapter:II:part:I:section:230#:~:text=(4)%20Access%20software%20provider%20The,C)%20transmit%2C%20receive%2C%20display) (last visited Feb. 24, 2021).

<sup>20</sup> The Alexander von Humboldt Institute for Internet and Society, *How do digital platforms make their money?*, July 29, 2019, <https://www.hiig.de/en/how-do-digital-platforms-make-their-money/> (last visited Feb. 27, 2021).

<sup>21</sup> Data gathered may include specific user locations, browsing habits, buying behavior, and unique interests. Investopedia, *How Do Internet Companies Profit with Free Services?*, <https://www.investopedia.com/ask/answers/040215/how-do-internet-companies-profit-if-they-give-away-their-services-free.asp#:~:text=Profit%20Through%20Advertising,content%20is%20through%20advertising%20revenue.&text=Each%20of%20these%20users%20represents.and%20services%20via%20the%20Internet>. (last visited Feb. 27, 2021).

- Subscription or membership fees, a mechanism in which users pay for a particular or unlimited use of the platform infrastructure.<sup>22</sup>
- Transaction fees, a mechanism in which platforms benefit from every transaction that is enabled between two or more actors.<sup>23</sup>

### ***The Florida Deceptive and Unfair Trade Practices Act***

The Florida Deceptive and Unfair Trade Practices Act (FDUTPA) is a consumer and business protection measure that prohibits unfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in trade or commerce.<sup>24</sup> The FDUTPA is based on federal law.<sup>25</sup>

For example, Florida has determined that the following acts or practices are unfair or deceptive:

- Imposing unconscionable prices for the rental or lease of any dwelling unit or self-storage facility during a period of declared state of emergency.<sup>26</sup>
- Failing to abide by storage requirements for personal information and notice requirements for data breaches of such information,<sup>27</sup> and
- Failing to abide by requirements for weight-loss programs.<sup>28</sup>

The state attorney or the Department of Legal Affairs (DLA) may bring FDUTPA actions when it is in the public interest on behalf of consumers or governmental entities.<sup>29</sup> The Office of the State Attorney (SAO) may enforce FDUTPA violations occurring in its jurisdiction. DLA has enforcement authority if the violation is multi-jurisdictional, the state attorney defers in writing, or the state attorney fails to act within 90 days after a written complaint is filed.<sup>30</sup> Consumers may also file suit through private actions.<sup>31</sup>

DLA and the SAO have powers to investigate FDUTPA claims, which include:<sup>32</sup>

- Administering oaths and affirmations;
- Subpoenaing witnesses or matter; and
- Collecting evidence.

DLA and the SAO, as enforcing authorities, may seek the following remedies:

- Declaratory judgments;
- Injunctive relief;
- Actual damages on behalf of consumers and businesses;
- Cease and desist orders; and
- Civil penalties of up to \$10,000 per willful violation.<sup>33</sup>

<sup>22</sup> HIIG, *supra* note 20.

<sup>23</sup> *Id.* An example is AirBnB charging a fee to users transacting on the site.

<sup>24</sup> Chapter 73-124, L.O.F., and s. 501.202, F.S.

<sup>25</sup> D. Matthew Allen, et. al., *The Federal Character of Florida's Deceptive and Unfair Trade Practices Act*, 65 U. MIAMI L. REV. 1083 (Summer 2011).

<sup>26</sup> S. 501.160, F.S.

<sup>27</sup> S. 501.171, F.S.

<sup>28</sup> S. 501.0579, F.S.

<sup>29</sup> S. 501.207(1)(c) and (2), F.S.; see s. 501.203(2), F.S. (defining "enforcing authority" and referring to the office of the state attorney if a violation occurs in or affects the judicial circuit under the office's jurisdiction; or the Department of Legal Affairs if the violation occurs in more than one circuit; or if the office of the state attorney defers to the department in writing; or fails to act within a specified period.); see also David J. Federbush, *FDUTPA for Civil Antitrust: Additional Conduct, Party, and Geographic Coverage; State Actions for Consumer Restitution*, 76 FLORIDA BAR JOURNAL 52, Dec. 2002 (analyzing the merits of FDUTPA and the potential for deterrence of anticompetitive conduct in Florida), available at [http://www.floridabar.org/divcom/jn/jnjournal01.nsf/c0d731e03de9828d852574580042ae7a/99aa165b7d8ac8a485256c8300791ec1!OpenDocument&Highlight=0,business,Division\\*](http://www.floridabar.org/divcom/jn/jnjournal01.nsf/c0d731e03de9828d852574580042ae7a/99aa165b7d8ac8a485256c8300791ec1!OpenDocument&Highlight=0,business,Division*) (last visited on Feb, 21, 2021).

<sup>30</sup> S. 501.203(2), F.S.

<sup>31</sup> S. 501.211, F.S.

<sup>32</sup> S. 501.206(1), F.S.

<sup>33</sup> Ss. 501.207(1), 501.208, and 501.2075, F.S. Civil Penalties are deposited into general revenue. Enforcing authorities may also request attorney fees and costs of investigation or litigation. S. 501.2105, F.S.

FDUTPA actions may not be applicable to or brought against certain entities.<sup>34</sup>

### ***Freedom of Speech***

The First Amendment of the United States Constitution protects the right to freedom of expression from government interference. The First Amendment applies to the federal government, and, under the Due Process Clause of the Fourteenth Amendment, to state governments.<sup>35</sup>

The most basic component of freedom of expression is the right to freedom of speech, which right may be exercised by words or actions, and applies to online speech.<sup>36</sup> The United States Supreme Court (Supreme Court) requires the government to provide a compelling state interest for the interference with the right of free speech where it attempts to regulate the speech's content.<sup>37</sup>

Businesses have some of the same First Amendment rights as individuals.<sup>38</sup> Generally, a business cannot be compelled to host speech with which it disagrees absent a mandate with a narrowly tailored means of serving a compelling state interest.<sup>39</sup> Businesses also have a right to unrestricted independent expenditures for political communications and elections as a form of corporate speech.<sup>40</sup>

### ***Supremacy Clause***

Article VI, Paragraph 2 of the United States Constitution, commonly referred to as the Supremacy Clause, establishes that the federal constitution, and federal law generally, take precedence over state laws and constitutions. The Supremacy Clause also prohibits states from interfering with the federal government's exercise of its constitutional powers, and from assuming any functions that are exclusively entrusted to the federal government. It does not, however, allow the federal government to review or veto state laws before they take effect.<sup>41</sup>

### **Social Media Platforms - Effect of the Bill**

The bill makes the following Legislative findings:

- Social media platforms represent an extraordinary advance in communication technology for Floridians.
- Users should be afforded control over their personal information related to social media platforms.
- Floridians increasingly rely on social media platforms to express their opinions.
- Social media platforms have transformed into the new public town square.
- Social media platforms have become as important for conveying public opinion as public utilities are for supporting modern society.
- Social media platforms hold a unique place in preserving first amendment protections for all Floridians and should be treated similarly to common carriers.
- Social media platforms that unfairly censor, shadow ban, deplatform, or apply post-prioritization algorithms to Florida candidates, Florida users, or Florida residents are not acting in good faith.

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<sup>34</sup> S. 501.212(4), F.S.

<sup>35</sup> Cornell Law School, Legal Information Institute, *First Amendment*, [https://www.law.cornell.edu/wex/first\\_amendment](https://www.law.cornell.edu/wex/first_amendment) (last visited Feb. 23, 2021); *Santa Clara v. Southern Pacific Railroad Co.*, 118 U.S. 394 (1886).

<sup>36</sup> *Reno v. ACLU*, 521 U.S. 844 (1997); Jason Kelley, *Section 230 is Good, Actually*, Electronic Frontier Foundation (de. 3, 2020) <https://www.eff.org/deeplinks/2020/12/section-230-good-actually> (last visited Feb. 25, 2021).

<sup>37</sup> Cornell Law School, *supra* note 34.

<sup>38</sup> *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010).

<sup>39</sup> *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530 (1980); *First National Bank of Boston v. Bellotti*, 438 U.S. (1978); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974); *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, 475 U.S. 1 (1986).

<sup>40</sup> *Citizens United*, *supra* note 38.

<sup>41</sup> Cornell Law School, Legal Information Institute, *Supremacy Clause*, [https://www.law.cornell.edu/wex/supremacy\\_clause](https://www.law.cornell.edu/wex/supremacy_clause) (last visited Feb. 23, 2021).

- Social media platforms should not take any action in bad faith to restrict access or availability to Floridians.
- Social media platforms have unfairly censored, shadow banned, deplatformed, and applied post-prioritization algorithms to Floridians.
- The state has a substantial interest in protecting its residents from inconsistent and unfair actions by social media platforms.
- The state must vigorously enforce state law to protect Floridians.

The bill defines:

- “Social media platform” as any information service, system, Internet search engine, or access software provider that:
  - Provides or enables computer access by multiple users to a computer server, including an Internet platform and/or a social media site;
  - Operates as a sole proprietorship, partnership, limited liability company, corporation, association, or other legal entity;
  - Does business in the state; and
  - Satisfies at least one of the following thresholds:
    - Annual gross revenues in excess of \$100 million, as adjusted in January of each odd-numbered year to reflect any increase in the Consumer Price Index.
    - At least 100 million monthly individual platform participants globally.
  - The term does not include any information service, system, Internet search engine, or access software provider operated by a company that owns and operates a theme park or entertainment complex as defined in s. 509.013, F.S.<sup>42</sup>
- “User” as a person who resides or is domiciled in the state and who has an account on a social media platform, regardless of whether the person posts or has posted content or material to the social media platform.
- “Algorithm” as a mathematical set of rules that specify how a group of data behaves and that will assist in ranking search results and maintaining order or that is used in sorting or ranking content or material based on relevancy or other factors instead of using published time or chronological order of such content or material.
- “Censor” to include any action taken by a social media platform to delete, regulate, restrict, edit, alter, inhibit the publication or republication of, suspend a right to post, remove, or post an addendum to any content or material posted by a user. This term also includes actions to inhibit the ability of a user to be viewable by or to interact with another user of the social media platform.
- “Deplatform” as the action or practice by a social media platform to permanently delete or ban a user or to temporarily delete or ban a user from the social media platform for more than 14 days.
- “Post-prioritization” as action by a social media platform to place, feature, or prioritize certain content or material ahead of, below, or in a more or less prominent position than others in a newsfeed, feed, view, or search results. The term does not include post-prioritization of content and material of a third party, including other users, based on payments by that third party, to the social media platform.
- “Shadow ban” as action by a social media platform, through any means, whether the action is determined by a natural person or an algorithm, to limit or eliminate the exposure of a user or content or material posted by a user to other platform users. This term includes acts of shadow banning by a social media platform that are not readily apparent to a user.
- “Journalistic enterprise” as an entity doing business in Florida that:
  - Publishes in excess of 100,000 words available online with at least 50,000 paid subscribers or 100,000 monthly active users;

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<sup>42</sup> S. 509.013(9), F.S. (“Theme park or entertainment complex” means a complex comprised of at least 25 contiguous acres owned and controlled by the same business entity and which contains permanent exhibitions and a variety of recreational activities and has a minimum of 1 million visitors annually.)

- Publishes 100 hours of audio or video available online with at least 100 million viewers annually;
- Operates a cable channel that provides more than 40 hours of content per week to more than 100,000 cable television subscribers; or
- Operates under a broadcast license issued by the Federal Communications Commission.

The bill requires a social media platform to:

- Publish the standards, including detailed definitions, it uses or has used for determining how to censor, deplatform, and shadow ban users, and apply such standards in a consistent manner among users on the platform.
- Inform each user about any changes to its user rules, terms, and agreements before implementing the changes and not make such changes more than once every 30 days.
- Provide a mechanism that allows a user to request the number of other individual platform participants who were provided or shown the user's content or posts, and provide that information upon request.
- Categorize algorithms used for post-prioritization and shadow banning and provide users with an annual notice on the use of algorithms for post-prioritization and shadow banning. Users must be able to opt out of post-prioritization and shadow banning algorithm categories to allow sequential or chronological posts and content, and this opt-out opportunity must be reoffered annually.
- Allow a user who has been deplatformed to access or retrieve all of the user's information, content, material, and data for at least 60 days after being deplatformed.

The bill prohibits a social media platform from:

- Censoring or shadow banning a user's content or material or deplatforming a user from the social media platform in a way that would otherwise violate FDUTPA, or without notifying the user who posted or attempted to post the content or material, which notification must:
  - Be in writing;
  - Be delivered via electronic mail or direct electronic notification to the user within 7 days of the censoring action;
  - Include a thorough rationale explaining the reason that the social media platform censored the user; and
  - Include a precise and thorough explanation of how the social media platform became aware of the censored content or material, including a thorough explanation of the algorithms used, if any, to identify or flag the user's content or material as objectionable.
- Applying or using post-prioritization or shadow banning algorithms for content and material posted by or about a user who is known by the social media platform to be a candidate for office in Florida,<sup>43</sup> beginning on the date of qualification and ending on the date of the election or the date the candidate ceases to be a candidate.
  - Post-prioritization of certain content or material from or about a candidate for office based on payments to the social media platform by such candidate for office or a third party is not a violation.
  - Social media platforms must provide users with a method to identify themselves as qualified candidates, and may confirm such qualification by reviewing the website of the Division of Elections of the Department of State or the website of the local supervisor of elections.
- Taking any action to censor, deplatform, or shadow ban a journalistic enterprise based on the content of its publication or broadcast.
  - Post-prioritization of certain journalistic enterprise content based on payments to the social media platform by such journalistic enterprise is not a violation.
  - Social media platforms may censor, deplatform, or shadow ban a journalistic enterprise for obscene content or material.

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<sup>43</sup> S. 106.011 (3)(e)(A candidate is a person who files qualification papers and subscribes to a candidate's oath as required by law.)

The bill also provides that a social media platform is not required to notify a user of a censoring action if the censored content or material is obscene, meaning content or material that:

- The average person, applying contemporary community standards, would find, taken as a whole, appeals to the prurient interest;
- Depicts or describes, in a patently offensive way, sexual conduct as specifically defined herein; and
- Taken as a whole, lacks serious literary, artistic, political, or scientific value.<sup>44</sup>

If a social media platform fails to comply with any of the foregoing requirements, the bill provides that the social media platform commits an unfair or deceptive trade act or practice in violation of FDUTPA. If DLA, by its own inquiry or as a result of a complaint, suspects that such a violation is imminent, occurring, or has occurred, DLA may investigate the suspected violation in accordance with FDUTPA. In an investigation by DLA into alleged violations, DLA's investigative powers include, but are not limited to, the ability to subpoena any algorithm used by a social media platform related to any alleged violation.

Although actions may be brought under FDUTPA, the bill places certain limitations on the application of s. 501.211, F.S., and the bill does not follow FDUTPA's applicability provisions in s. 501.212, F.S., and is, therefore, more broad in application.

A individual user may only bring a private cause of action against a social media platform for failing to:

- Notify such user of an act of censoring or deplatforming, or
- Apply censorship, deplatforming, and shadow banning standards in a consistent manner.

In such an action, the court may award the following remedies to the user:

- Up to \$100,000 in statutory damages per proven claim;
- Actual damages;
- If aggravating factors are present, punitive damages;
- Other forms of equitable relief, including injunctive relief; and
- If the user was deplatformed, costs and reasonable attorney fees.

Each failure to comply with the individual requirements in the bill are a separate violation, act, or practice by the social media platform. However, the bill provides that these provisions may only be enforced to the extent they are not inconsistent with federal law and 47 U.S.C. s. 230(e)(3), and notwithstanding any other provision of state law.

For purposes of bringing an action in accordance with the bill, a social media platform that censors, shadow bans, deplatforms, or applies post-prioritization algorithms to candidates and users in the state is conclusively presumed to be both engaged in substantial and not isolated activities within the state and operating, conducting, engaging in, or carrying on a business, and doing business in this state, and is therefore subject to the jurisdiction of the courts of the state.

## **Antitrust Laws, and State Contracts and Incentives - Current Situation**

### ***Antitrust Law***

Healthy competition in economic markets keeps prices low and quality high for consumers. When one entity becomes too strong, it can stifle competition, leading to higher prices and harm to consumers.

Antitrust law exists to protect competition, but not necessarily individual competitors, in economic markets, based on the idea that an unregulated market will lead to the creation of coercive

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<sup>44</sup> S. 847.011(10), F.S.



monopolies.<sup>45</sup> Federal antitrust law includes the Sherman Antitrust Act, the Clayton Act, and the Federal Trade Commission Act. These laws are enforced in federal district court<sup>46</sup> by the U.S. Department of Justice (DOJ), the Federal Trade Commission (FTC), state Attorneys General, and private plaintiffs. Antitrust case law is well-developed, and it is often difficult to distinguish aggressive, pro-competitive conduct—which is legal—from predatory, anti-competitive conduct.<sup>47</sup>

The Clayton Act<sup>48</sup> prohibits specific business actions, including mergers and acquisitions, which may substantially lessen competition. To determine whether a merger violates the Clayton Act, a court must decide whether the merger is likely to create an appreciable danger of anticompetitive effects. The plaintiff must establish a prima facie case that a transaction is anticompetitive, such as by showing that an acquisition will significantly increase market concentration and lessen competition.<sup>49</sup> The burden then shifts to the defendant to rebut the prima facie case, such as by introducing evidence casting doubt on the plaintiff's prediction of anticompetitive effects.<sup>50</sup> If the defendant rebuts the prima facie case, the plaintiff has the final burden to demonstrate an antitrust violation.<sup>51</sup> If the plaintiff prevails, the customary remedy is for the court to order divestiture and unwind the merger.<sup>52</sup>

The Sherman Antitrust Act<sup>53</sup> prohibits any attempt to restrain trade or form a monopoly. A monopoly has two elements: (1) monopoly power and (2) willful acquisition or maintenance of that power, as opposed to power naturally resulting from a superior product, acumen, or historic accident. Stated differently, a plaintiff must prove the defendant acquired the monopoly power in a "predatory" manner. Penalties for violating the Sherman Act include up to ten years' imprisonment and a fine up to \$100 million for a corporation or \$1 million for any other person.<sup>54</sup>

The Florida Antitrust Act of 1980<sup>55</sup> is intended to complement federal antitrust law in order to foster effective competition. Implemented by the Office of the Attorney General (OAG), the Act essentially mirrors the federal Sherman Act, and prohibits:<sup>56</sup>

- Every contract, combination, or conspiracy in restraint of trade or commerce;<sup>57</sup> and
- Monopolization or attempted monopolization of any part of trade or commerce.<sup>58</sup>

A Florida antitrust law violation is punishable by up to three years' imprisonment and fines up to \$1 million for a corporation and \$100,000 for any other person.<sup>59</sup> There is also a private right of action for any person injured by certain antitrust violations.<sup>60</sup>

Florida law does not provide a corollary to the federal Clayton Act, which specifically targets mergers and acquisitions that may lessen competition. However, the Attorney General considers the Florida Antitrust Act of 1980 and FDUTPA broad enough to encompass those types of violations.<sup>61</sup>

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<sup>45</sup> John J. Miles, *Antitrust Primer*, 20140513 AHLA Seminar Papers 1 (2014) (stating the purpose of antitrust law is to "protect and promote competition as the primary method by which this country allocates scarce resources to maximize the welfare of consumers.").

<sup>46</sup> Steven Fox, *Litigation Under Florida's Deceptive and Unfair Trade Practices Act, the Florida Antitrust Act, or Federal Antitrust Statutes*, The Florida Bar, Business Litigation in Florida (2017) (federal district courts have exclusive jurisdiction over federal antitrust actions).

<sup>47</sup> Animesh Ballabh, *Antitrust Law: An Overview*, 88 J. Pat. & Trademark Off. Soc'y 877 (2006); John J. Miles, *Antitrust Primer*, 20140513 AHLA Seminar Papers 1 (2014).

<sup>48</sup> 15 U.S.C. s. 18.

<sup>49</sup> *Olin Corp. v. FTC*, 986 F.2d 1295, 1305 (9th Cir. 1993) (discussing how plaintiff's establishment of a prima facie case on statistical evidence is first step in analysis); *Chicago Bridge & Iron Co. v. FTC*, 534 F.3d 410, 423 (5th Cir. 2008).

<sup>50</sup> *Id.*

<sup>51</sup> *Chicago Bridge & Iron*, 534 F.3d at 423.

<sup>52</sup> *St. Alphonsus Med. Ctr. v. St. Luke's Health Sys.*, 778 F.3d 775, 792 (9th Cir. 2015).

<sup>53</sup> 15 U.S.C. ss. 1 et seq.

<sup>54</sup> 15 U.S.C. s. 1.

<sup>55</sup> Ss. 542.15 – 542.36, F.S.

<sup>56</sup> S. 542.16, F.S.

<sup>57</sup> S. 542.18, F.S.

<sup>58</sup> S. 542.19, F.S.

<sup>59</sup> S. 542.21, F.S.

<sup>60</sup> Ss. 542.21 and 542.22, F.S.

<sup>61</sup> Florida Attorney General, *Antitrust*, <http://myfloridalegal.com/antitrust> (last visited Feb 23, 2021).

## *Antitrust Actions Against Internet Platforms*

Critics have argued for years that internet platforms like Google, Apple, Facebook and Amazon improperly built empires over commerce, communications and culture, and then abused their power. Recently, federal and state regulators investigated and brought antitrust cases against these platforms.<sup>62</sup> For example, the FTC and over 40 states, including Florida, have brought an action against Facebook for allegedly buying smaller rivals to maintain market dominance.<sup>63</sup> Also, DOJ and 11 states, including Florida, have brought an action against Google for allegedly manipulating search engine results.<sup>64</sup>

## ***Procurement of Commodities and Services***

Chapter 287, F.S., regulates state agency<sup>65</sup> procurement of personal property and services. Depending on the cost and characteristics of the needed goods or services, agencies may utilize a variety of procurement methods that include:

- Single source contracts, which are used when an agency determines that only one vendor is available to provide a commodity or service at the time of purchase;
- Invitations to bid, which are used when an agency determines that standard services or goods will meet needs, wide competition is available, and the vendor's experience will not greatly influence the agency's results;
- Requests for proposals, which are used when the procurement requirements allow for consideration of various solutions and the agency believes more than two or three vendors exist who can provide the required goods or services; and
- Invitations to negotiate, which are used when negotiations are determined to be necessary to obtain the best value and involve a request for highly complex, customized, mission-critical services.<sup>66</sup>

For contracts for commodities or services in excess of \$35,000, agencies must utilize a competitive solicitation process.<sup>67</sup> However, specified contractual services and commodities are not subject to competitive solicitation requirements.<sup>68</sup>

The Department of Management Services (DMS) is statutorily designated as the central executive agency procurement authority and its responsibilities include overseeing agency implementation of the procurement process,<sup>69</sup> creating uniform agency procurement rules,<sup>70</sup> implementing the online procurement program,<sup>71</sup> and establishing state term contracts.<sup>72</sup> The agency procurement process is partly decentralized in that agencies, except in the case of state term contracts, may procure goods and services themselves in accordance with requirements set forth in statute and rule, rather than placing orders through DMS.

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<sup>62</sup> David McCabe, Cecilia Kang, and Daisuke Wakabayashi, *Google's Legal Peril Grows in Face of Third Antitrust Suit*, New York Times (Dec. 17, 2020), <https://www.nytimes.com/2020/12/17/technology/google-antitrust-monopoly.html> (last visited Feb. 25, 2021).

<sup>63</sup> *Id.*; *Federal Trade Commission v. Facebook, Inc.*, No. 1:20-cv-03590 (D.C. Cir. 2020).

<sup>64</sup> McCabe, *supra* note 59; *United States Department of Justice v. Google LLC*, No. 1:20-cv-03010 (D.C. Cir. 2020).

<sup>65</sup> S. 287.012(1), F.S., defines the term "agency" as any of the various state officers, departments, boards, commissions, divisions, bureaus, and councils and any other unit of organization, however designated, of the executive branch of state government. "Agency" does not include the university and college boards of trustees or the state universities and colleges.

<sup>66</sup> See ss. 287.012(6) and 287.057(1), F.S.

<sup>67</sup> S. 287.057(1), F.S., requires all projects that exceed the Category Two threshold amount (\$35,000) contained in s. 287.017, F.S., to be competitively procured.

<sup>68</sup> See s. 287.057(3)(e), F.S.

<sup>69</sup> See ss. 287.032 and 287.042, F.S.

<sup>70</sup> See ss. 287.032(2) and 287.042(3), (4), and (12), F.S.

<sup>71</sup> See s. 287.057(23), F.S.

<sup>72</sup> See ss. 287.042(2), 287.056, and 287.1345, F.S.

Certain persons and their affiliates are prohibited from contracting with public entities for services and goods, with certain exceptions, if they have been identified by DMS as violating certain restrictions and have been placed on one of the following lists:<sup>73</sup>

- Convicted Vendor List,
- Discriminatory Vendor List,
- Scrutinized Companies with Activities in Sudan List,
- Scrutinized Companies with Activities in the Iran Petroleum Energy Sector List, and
- Scrutinized Companies that Boycott Israel List.

### ***Economic Incentives***

The Department of Economic Opportunity (DEO) advances Florida's economy by championing the state's economic development vision and by administering state and federal programs and initiatives to help visitors, citizens, businesses, and communities.<sup>74</sup> Enterprise Florida, Inc. (EFI) is a nonprofit corporation established by the Legislature to serve as the state's main economic development organization.<sup>75</sup> EFI is required to enter into a performance-based contract with DEO.<sup>76</sup>

EFI works with businesses and economic development partners to determine whether projects are eligible for state economic development incentives. A project must be vetted by EFI and EFI must determine that incentives are necessary to secure a deal in order for an incentive package to be developed and sent to DEO for further review. Once the incentive package is finalized, DEO and other appropriate state bodies issue formal approvals.

Florida has a number of incentive programs intended to promote economic development in the state. These programs come in a variety of forms including tax refunds, tax credits, tax exemptions, and cash grants under ch. 288, F.S. Businesses interested in expanding or relocating in Florida learn about the state's economic incentive programs through several channels, including EFI, state and local economic development organizations, and private site selection consultants. Businesses can apply for more than one incentive to support their expansion or relocation projects.<sup>77</sup>

Once a company begins the application process, EFI notifies the division so that it may begin the formal due diligence process to determine the business's statutory eligibility and financial standing. When due diligence and the application are complete, EFI determines what incentives and associated amounts may be available to the applicant and makes an approval or disapproval recommendation to DEO's executive director. If the business is approved, DEO will develop a contract or agreement with the applicant that specifies the total incentive amount, performance conditions that must be met to receive payment, payment schedule, and sanctions for failure to meet performance conditions.<sup>78</sup>

### **Antitrust Laws and State Contracts and Incentives - Effect of the Bill**

The bill defines:

- "Person" as a natural person or an entity organized under the laws of any state or of the United States who operates as a social media platform, with the legal power to enter into a binding contract and which bids or applies to bid on contracts let by a public entity, or which otherwise transacts or applies to transact business with a public entity. The term includes those officers,

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<sup>73</sup> Ss. 287.133-135, F.S.

<sup>74</sup> S. 20.60(4)(b)(f), F.S.; Florida Department of Economic Opportunity, *About Us*, <https://floridajobs.org/about-us> (last visited Feb. 22, 2021).

<sup>75</sup> S. 288.901, F.S. Chapter 92-277, Laws of Fla., created EFI, while ch. 96-320, Laws of Fla, established EFI as a public-private partnership.

<sup>76</sup> S. 20.60(1), F.S., requires DEO to "establish annual performance standards for Enterprise Florida, Inc., CareerSource Florida, Inc., the Florida Tourism Industry Marketing Corporation, and Space Florida and report annually on how these performance measures are being met."

<sup>77</sup> OPPAGA, Report No. 16-09, p. 50-51.

<sup>78</sup> *Id.*

directors, executives, partners, shareholders, employees, members, and agents who are active in management of an entity.

- “Affiliate” as:
  - A predecessor or successor of a person convicted of or held civilly liable for an antitrust violation; or
  - An entity under the control of any natural person who is active in the management of the entity and who has been convicted of or held civilly liable for an antitrust violation. The term includes those officers, directors, executives, partners, shareholders, employees, members, and agents who are active in the management of an affiliate. The term also includes a person who knowingly enters into a joint venture with a person who has violated an antitrust law during the preceding 36 months.
- “Antitrust violation” as any failure to comply with state or federal antitrust law as determined in a civil or criminal proceeding brought by the Attorney General, a state attorney, a similar body or agency of another state, the Federal Trade Commission, or the United States Department of Justice.
- “Convicted or held civilly liable” as a criminal finding of responsibility or guilt or conviction, with or without an adjudication of guilt, being held civilly responsible or liable, or having a judgment levied for an antitrust violation, in any federal or state trial court of record relating to charges brought by indictment, information, or complaint on or after July 1, 2021, as a result of a jury verdict, nonjury trial, or entry of a plea of guilty or nolo contendere or other order finding responsibility or liability.
- “Public entity” as the state and any of its departments or agencies.

### ***Antitrust Violator Vendor List***

If a person has been convicted of or held civilly liable for antitrust violations, the bill allows DMS to place such person, or an affiliate of such person, on the Antitrust Violator Vendor List (list). A person or affiliate placed on the list may not:

- Submit a bid, proposal, or reply for any new contract to provide any goods or services to a public entity;
- Submit a bid, proposal, or reply for a new contract with a public entity for the construction or repair of a public building or public work;
- Submit a bid, proposal, or reply on new leases of real property to a public entity;
- Be awarded or perform work as a contractor, supplier, subcontractor, or consultant under a new contract with a public entity; or
- Transact new business with a public entity.

The bill prohibits a public entity from accepting a bid, proposal, or reply from, awarding a new contract to, or transacting new business with any person or affiliate on the list unless that person or affiliate has been removed from the list. This prohibition does not apply to contracts that were awarded or business transactions that began before a person or an affiliate was placed on the list or before July 1, 2021, whichever date occurs later.

DMS must maintain the list with the names and addresses of the people or affiliates who have been disqualified from the public contracting and purchasing process. DMS must electronically publish the initial antitrust violator vendor list on January 1, 2022, and publish an updated version of the list quarterly thereafter. A person or affiliate on the list is disqualified as of the date the final order placing them on the list is entered.

After receiving a notice of a judgment, sentence, or order from any source that a person was convicted or held civilly liable for antitrust violations, DMS must investigate and verify the information. If the information is verified, DMS must immediately notify the person or affiliate in writing of its intent to place the name of that person or affiliate on the list, and of the person's or affiliate's right to a hearing, the procedure that must be followed, and the applicable time requirements. If the person or affiliate does not request a hearing, DMS must enter a final order placing the name of the person or affiliate on the

list. A person or affiliate may not be placed on the list without receiving an individual notice of intent from DMS.

The bill allows a person or affiliate to dispute placement on the list. After receipt of the notice of intent, the person or affiliate may file a petition for a formal hearing under the Administrative Procedures Act to determine whether it is in the public interest for the person or affiliate to be placed on the list. In a formal hearing, DMS must prove that it is in the public interest for the person or affiliate to be placed on the list. Proof that a person was convicted or was held civilly liable for antitrust violations, or that an entity is an affiliate of such a person constitutes a prima facie case that it is in the public interest for the person or affiliate to be put on the list. Status as an affiliate must be proven by clear and convincing evidence. The ownership by one person of shares constituting a controlling interest in another person, or a pooling of equipment or income among persons when not for fair market value under an arm's length agreement, is a prima facie case that one person controls another person.

In determining whether it is in the public interest to place a person or affiliate on the list, the bill requires the administrative law judge to consider:

- Whether the person or affiliate was convicted or held civilly liable for antitrust violation.
- The nature and details of the antitrust violation.
- The degree of culpability of the person or affiliate proposed to be placed on the antitrust violator vendor list.
- Reinstatement or clemency in any jurisdiction in relation to the antitrust violation at issue in the proceeding.
- The needs of public entities for additional competition in the procurement of goods and services in their respective markets.
- The effect of the antitrust violations on Floridians.

Upon establishment of a prima facie case that it is in the public interest for the person or affiliate to whom DMS has given notice to be put on the list, the person or affiliate may prove by a preponderance of the evidence that it would not be in the public interest to put them on the list, based upon evidence addressing the factors above.

### ***Temporary List Placement Procedure***

The bill allows any person charged or accused of any state or federal antitrust law in a civil or criminal proceeding brought by the OAG, a state attorney, the Federal Trade Commission, or the United States Department of Justice on or after July 1, 2021, to be placed on the list temporarily by the OAG. The OAG may make a finding of probable cause that a person has likely violated the underlying antitrust laws and temporarily place such person on the list until such proceeding has concluded. However, affiliates may not be placed on the list under this temporary procedure.

If the OAG determines that probable cause exists, the OAG must notify the person in writing of its intent to temporarily place the person on the list, and of the person's right to a hearing, the procedure that must be followed, and the applicable time requirements. If the person does not request a hearing, the OAG must enter a final order temporarily placing the person on the list. A person may not be placed on the list without receiving a notice of intent from the OAG.

After receipt of the notice of intent, the person may file a petition for a formal hearing under the Administrative Procedures Act to determine whether it is in the public interest for the person to be temporarily placed on the list. In determining whether it is in the public interest to temporarily place a person on the list, the administrative law judge must consider the:

- Likelihood the person will be convicted or held civilly liable for the antitrust violation.
- Nature and details of the antitrust violation.
- Degree of culpability of the person proposed to be placed on the list.

- Needs of public entities for additional competition in the procurement of goods and services in their respective markets.
- Effect of the antitrust violations on Floridians.

The OAG has the burden to prove that it is in the public interest to place the person on the temporary antitrust violator vendor list. Unless the administrative law judge determines that it is in the public interest to temporarily place a person on the antitrust violator vendor list, that person may not be placed on the list.

### ***Removal from the List***

The bills allows a person or affiliate to petition for removal from the list no sooner than 6 months after the date a final order is entered, but if the petition is based upon a reversal of the conviction or liability on appellate review or pardon, the person may petition at any time. The petition must be filed with DMS.

A person or affiliate may be removed from the list under the terms and conditions prescribed by the administrative law judge upon a determination that removal is in the public interest. In determining whether removal would be in the public interest, the administrative law judge must consider any relevant factors. However, upon proof that a person was found not guilty or not civilly liable for the antitrust violation, the antitrust violation case was dismissed, the court entered a finding in the person's favor, the person's conviction or determination of liability has been reversed on appeal, or that the person has been pardoned, the administrative law judge must determine that removal of the person or an affiliate from the list is in the public interest.

If the petition for removal is denied, the person or affiliate may not petition for another hearing on removal for a period of 9 months after the date of denial, unless the petition is based upon a reversal of the conviction on appellate review or a pardon. DMS may petition for removal before the expiration of such period if it determines that removal would be in the public interest.

### ***Economic Incentives and Exceptions***

The bill excludes a person or entity who has been placed on the list from being a qualified applicant for economic incentives,<sup>79</sup> and such person or entity is not qualified to receive such economic incentives. However, placement on the list does not affect any rights or obligations under any contract, franchise, or other binding agreement predating such placement.

This exclusion does not apply to any activities regulated by the Public Service Commission or to the purchase of goods or services made by any public entity from the Department of Corrections, from the nonprofit corporation organized to operate correctional work programs, or from any accredited nonprofit workshop designed to assist blind and other severely handicapped individuals to achieve maximum personal independence. The exclusion also does not apply to any contract with a public entity to provide any goods or services for emergency response efforts related to a state of emergency declaration issued by the Governor.

These limitations may only be enforced to the extent not inconsistent with federal law, and notwithstanding any other provision of state law.

### **Candidates for Office and In-kind Contributions – Current Situation**

#### ***Violations of Florida Election Law***

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<sup>79</sup> “Economic incentives” means state grants, cash grants, tax exemptions, tax refunds, tax credits, state funds, and other state incentives under chapter 288 or administered by Enterprise Florida, Inc.

The Division of Elections (division) under the Florida Department of State ensures compliance with election laws, provides statewide coordination of election administration, and promotes public participation in the electoral process. The division consists of three bureaus - the Bureau of Election Records, the Bureau of Voter Registration Services, and the Bureau of Voting Systems Certification.<sup>80</sup>

The Florida Elections Commission (commission) has the sole civil jurisdiction to investigate and determine violations of the portion of the Florida Election Code in Chapters 104 and 106, Florida Statutes, but only after receiving either a legally sufficient sworn complaint or information from the division. The commission determines probable cause based on the investigator's report, the recommendation of counsel for the commission, the complaint, and staff recommendations, as well as any written statements submitted by the respondent and any oral statements made at the hearing.<sup>81</sup> If probable cause has been found by the commission, a respondent may agree to a consent order, elect to have a formal administrative hearing conducted by an administrative law judge in the Division of Administrative Hearings, or to elect to have a formal or informal hearing conducted before the commission.<sup>82</sup>

In order to carry out its responsibilities, the commission may subpoena any person in the state, doing business in the state, or who has filed or is required to have filed any application, document, papers, or other information with an office or agency of this state or a political subdivision thereof, and require the production of any papers, books, or other records relevant to any investigation, including the records and accounts of any bank or trust company doing business in this state.<sup>83</sup>

Actions for violation of chapters 104 and 106, Florida Statutes, must be commenced within two years from the violation date.<sup>84</sup> Civil penalties for such violations are generally limited to not more than \$1,000 per count or violation.<sup>85</sup> Other penalties may include permanent or temporary injunctions, and restraining orders.<sup>86</sup> Any civil penalty or fine assessed is deposited into the General Revenue Fund.<sup>87</sup>

### ***In-kind Contributions to Candidates***

"Candidate" means a person who:<sup>88</sup>

- Seeks to qualify for nomination or election by means of the petitioning process;
- Seeks to qualify for election as a write-in candidate;
- Receives contributions or makes expenditures, or consents for any other person to receive contributions or make expenditures, with a view to bringing about his or her nomination or election to, or retention in, public office;
- Appoints a treasurer and designates a primary depository; or
- Files qualification papers and subscribes to a candidate's oath as required by law.

Generally, "political committee" means a combination of two or more individuals, or a person other than an individual, that, in an aggregate amount in excess of \$500 during a single calendar year:

- accepts contributions for the purpose of making contributions to any candidate, political committee, affiliated party committee, or political party;
- accepts contributions for the purpose of expressly advocating the election or defeat of a candidate or the passage or defeat of an issue;

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<sup>80</sup> Florida Department of State, Division of Elections, *About Us*, <https://dos.myflorida.com/elections/about-us/> (last visited Feb. 21, 2021).

<sup>81</sup> S. 106.25(4), F.S.

<sup>82</sup> S. 106.25(5), F.S.

<sup>83</sup> S. 106.26(1), F.S.

<sup>84</sup> S. 106.28, F.S.

<sup>85</sup> S. 106.265(1), F.S.

<sup>86</sup> S. 106.27, F.S.

<sup>87</sup> S. 106.265(4), (5), F.S.

<sup>88</sup> S. 106.011(3), F.S.

- makes expenditures that expressly advocate the election or defeat of a candidate or the passage or defeat of an issue; or
- makes contributions to a common fund, other than a joint checking account between spouses, from which contributions are made to any candidate, political committee, affiliated party committee, or political party.<sup>89</sup>

Candidates and political committees must report all contributions, loans, expenditures, distributions, and transfers, regardless of the amount.<sup>90</sup> They must report the full name and address of each person making the contribution or receiving the expenditure and, for contributions over \$100, the occupation.<sup>91</sup>

An in-kind contribution<sup>92</sup> is anything of value except money made for the purpose of influencing the results of an election.<sup>93</sup> The valuation of an in-kind contribution is fair market value, and in-kind contributions are subject to the same contribution limitations as money.<sup>94</sup>

### **Candidates for Office and In-kind Contributions – Effect of the Bill**

The bill provides that a social media platform may not willfully deplatform a candidate for office who is known by the social media platform to be a candidate, beginning on the date of qualification and ending on the date of the election or the date the candidate ceases to be a candidate.<sup>95</sup>

A social media platform must provide each user a method by which the user may be identified as a qualified candidate and which provides sufficient information to allow the social media platform to confirm the user's qualification by reviewing the division's website or the website of the local supervisor of elections.

If the commission finds that a social media platform has willfully deplatformed a candidate, the social media platform may be fined \$250,000 per day for deplatforming a statewide candidate and \$25,000 per day for deplatforming all other candidates.

The bill also provides that if a social media platform willfully provides free advertisement to a candidate, it must be reported as an in-kind contribution to the candidate. Free advertising does not include posts, content, material, and comments made on the social media platform that are shown in the same or similar way as those from other users.

For the purposes of this section, the bill defines:

- "Candidate" as a person who files qualification papers and subscribes to a candidate's oath as required by law.<sup>96</sup>
- "Deplatform" and "social media platform" as having the same meaning as in the newly created s. 501.2041, F.S., related to unfair and deceptive trade practices by social media platforms.

The bill provides that this provision may only be enforced to the extent not inconsistent with federal law and 47 U.S.C. s. 230(e)(3), and notwithstanding any other provision of state law.

The bill has an effective date of July 1, 2021.

<sup>89</sup> S. 106.11(16)(a), F.S.

<sup>90</sup> Ss. 106.011(5) and 106.07(1), F.S.

<sup>91</sup> S. 106.07(4)(a), F.S.

<sup>92</sup> Examples of in-kind contributions include food provided for a fundraiser free of charge, donated tickets to an event, and certain kinds of free advertisement. DE 04-06 Fla. Op. Dept. of State, Div. of Elections (2004).

<https://opinions.dos.state.fl.us/searchable/pdf/2004/de0406.pdf>.

<sup>93</sup> Florida Department of State, Division of Elections, *Campaign Finance*, <https://dos.myflorida.com/elections/candidates-committees/campaign-finance/> (last visited Feb. 21, 2021).

<sup>94</sup> Ss. 106.011(5) and 106.055, F.S.

<sup>95</sup> The bill creates s. 106.072, F.S., entitled Social media deplatforming of political candidates, within Chapter 106, Campaign Financing, F.S.

<sup>96</sup> S. 106.011 (3)(e), F.S.



## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

#### 1. Revenues:

The bill may increase state revenues related to fines or civil penalties collected for violations included in the bill. The estimated impact is indeterminate.

#### 2. Expenditures:

DMS has indicated the department will not need additional resources to implement the bill.<sup>97</sup>

DLA has indicated that additional resources will be needed to implement the bill including one paralegal, one attorney, and a total of \$177,608 in budget authority from the Legal Affairs Revolving Trust Fund.<sup>98</sup> However, as of March 12, 2021, the DLA/OAG has 202 vacant positions including 128 vacant over 180 days.<sup>99</sup>

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

#### 1. Revenues:

None.

#### 2. Expenditures:

None.

### C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill will require social media platforms to implement systems in conformance with the bill that will help protect Florida consumers and businesses using such platforms.

### D. FISCAL COMMENTS:

None.

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<sup>97</sup> Email from Tami Fillyaw, Chief of Staff, DMS, FW: HB 7013, (Mar. 12, 2021).

<sup>98</sup> Email from Sarah Nortelus, Deputy Director of Administration, OAG, Draft Amount, (Mar. 12, 2021).

<sup>99</sup> Vacancy Report, Mar. 12, 2021, on file with the House Appropriations Committee.