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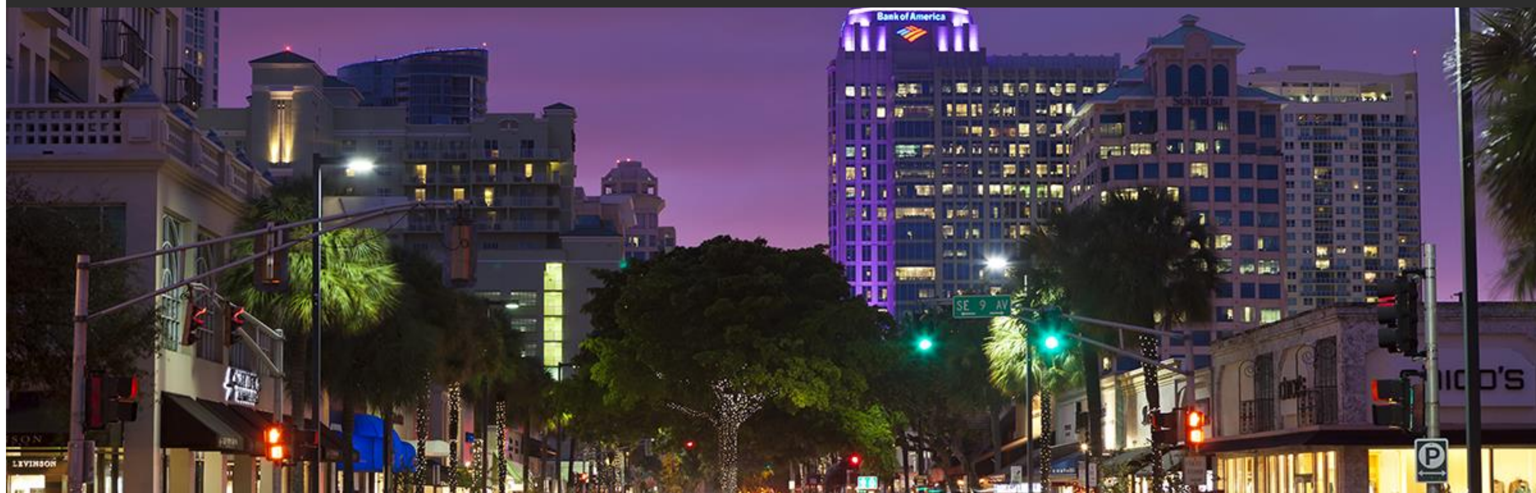

June 2021

Florida's New Social Media Law Has Ramifications Beyond Political Realm

On May 24, 2021, Florida Gov. DeSantis signed Senate Bill 7072 (the Act), restricting the ability of social media companies to "deplatform" a candidate running for public office in Florida. *See* Fla. Stat. §§ 106.072, 501.2041. While the law is principally directed toward prohibiting willful censorship of political candidates, the law has potential ramifications for social media companies, businesses, and individuals beyond the political realm. The Act defines "deplatform" as "the action or practice by a social media platform[1] 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."

As to political candidates, the Act applies from the date the candidate qualifies for office through the date of the election or when the candidate otherwise ceases to be a candidate. When this law goes into effect on July 1, 2021, the statute permits the Florida Elections Commission to fine violators $250,000 per day for a candidate for statewide office and $25,000 per day for a candidate for "other offices."[2]

[1] The law targets social media companies with annual gross revenues in excess of $100 million or at least 100 million monthly individual platform participants globally, and exempts theme parks.
[2] "Other offices" is not defined, so it may include candidates for federal office, depending on whether the Florida Election Commission has the jurisdiction to impose such fine.

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New Requirements Under Florida's Deceptive and Unfair Trade Practices Act

In addition to a regulatory fine, the Act creates a new basis for a claim under Florida's Deceptive and Unfair Trade Practices Act (FDUTPA) when a social media platform censors or shadow bans a user's content or material or deplatforms a user from the social media platform in an inconsistent manner among users or without notice to the user.

The definitions of "censor" and "shadow ban" are broad. "Censor includes 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. The 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."

"Shadow ban means 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 users of the social media platform. This term includes acts of shadow banning by a social media platform which are not readily apparent to a user."

Importantly, under the new law, a violation of FDUTPA may occur even if the individual is not a candidate for public office. In addition, the Act applies only to "users," defined as a "person who resides or is domiciled in this state."

The new law also requires, among other things, social media companies to:

- Publish standards, including detailed definitions it uses or has used for determining how to censor, deplatform, and shadow ban;
- Inform users about any changes to its user rules, terms, and agreements, before implementing the changes and prohibits changes more than once every 30 days; and
- Provide users an annual notice on the use of algorithms for post-prioritization and shadow banning.

The Florida Department of Legal Affairs is granted the authority to investigate suspected violations of the new FDUTPA provisions and enforce them through a civil or administrative action.

Private Causes of Action

The Act creates a private cause of action for two violations and allows the user to recover to $100,000 in statutory damages per proven claim, actual damages, punitive damages if aggravating factors exist, other forms of equitable relief, and in certain cases, costs and reasonable attorneys' fees. The first private right of action is created when the social media company is alleged to have failed to "apply censorship, deplatforming, and shadow banning standards in a consistent manner among its users on the platform." The Act does require 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." However, the Act does not articulate a standard for consistency or how it is to be measured.

The Act also creates a second private right of action for censoring, shadow banning, or deplatforming a user "without notifying the user who posted or attempted to post the content or material." Notice to the user must be (1) in writing, (2) delivered via electronic mail or other electronic notification within seven days of the censoring action, (3) include the rationale for the censoring action, and (4) include a precise and thorough explanation of how the social media platform became aware of the censored content or

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material, including a thorough explanation of the algorithms used, if any, to identify or flag the user's content or material as objectionable. The notice required raises questions with regard to shadow banning. While the definitions of "censoring" and "deplatform[ing]" are generally directed toward individual users, "shadow banning" includes action by an algorithm that may limit exposure of content or material.

Some of the aspects of the Act appear to be unclear. Section 2 of the Act categorizes a violation of "any of the provisions of this subsection" as "an unfair or deceptive act or practice as specified in FDUTPA,[3] which includes a private right of action for any deceptive acts or practices[4] and its own exemptions."[5] In apparent contrast, Section 6 of the Act grants a private right of action only for violations of the consistency and notification provisions, creates its own remedies, and contains its own exemptions.[6]

Potential Unconstitutionality and Preemption by Existing Federal Law

Florida's law may conflict with the First Amendment and federal Communications Decency Act (CDA), 47 U.S.C. § 230(c)(1), which the Florida Supreme Court has held applies in Florida courts and preempts Florida law.[7] The CDA provides that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." The CDA provides "'broad federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service."[8] The CDA also provides that a provider of an interactive computer service cannot be held liable for "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." 47 U.S.C. § 230(c)(2)(A). The CDA defines an "interactive computer service" as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet."[9]

There are federal court decisions holding that Twitter and Facebook are interactive computer services protected by the CDA.[10] In turn, the CDA defines "information content provider" as "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service."[11] Section 230(c)(1) of "the CDA bars a plaintiff's claims when (1) defendant is a provider or user of an interactive computer service; (2) the relevant content contains information provided by another information content provider; and (3) the complaint seeks to hold defendant liable for its exercise of a publisher's traditional editorial functions – such as deciding whether to publish, withdraw, postpone or alter content."[12] Courts have consistently found CDA immunity

[3] § 501.204, Fla. Stat.
[4] § 501.211, Fla. Stat.
[5] § 501.212, Fla. Stat.
[6] The legislative history suggests the more limited private right of action. *Bill Analysis & Fiscal Impact Statement*, SB 7072, FLA. GOV'T OVERSIGHT AND ACCOUNTABILITY COMMITTEE (Apr. 16, 2021).
[7] *Doe v. Am. Online, Inc.*, 783 So. 2d 1010, 1017 (Fla. 2001).
[8] *Almeida v. Amazon.com*, 456 F.3d 1316, 1321 (11th Cir. 2006) (*quoting Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997)).
[9] 47 U.S.C. § 230(f)(2).
[10] *See Mezey v. Twitter, Inc.*, No. 1:18-cv-21069-KMM, 2018 U.S. Dist. LEXIS 121775, at *3 (S.D. Fla. July 19, 2018) ("Twitter—as a platform that transmits, receives, displays, organizes, and hosts content—is an interactive computer service."); *Klayman v. Zuckerberg*, 753 F.3d 1354, 1357-58, (D.C. Cir. 2014) (Facebook is interactive computer service under the CDA).
[11] 47 U.S.C. § 230(f)(3).
[12] *Mezey v. Twitter, Inc.*, Case No. 1:18-CV-21069, 2018 U.S. Dist. LEXIS 121775, at *2 (S.D. Fla. Jul. 19, 2018).

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grounds even where discrimination is alleged[13] or the social media company failed to follow its own terms and conditions[14] and treated certain speech unequally.[15]

Current Litigation Surrounding Florida's New Law

Litigation has already ensued challenging Florida's new social media law, alleging that the law is unconstitutional and conflicts with, and is therefore preempted by, federal law.[16] The district court presiding over the litigation has already fast-tracked it, setting a hearing on a preliminary injunction for June 28. Notably, the Florida Legislature may have taken the conflict with federal law into account by adding into the Act that Florida's new law "may only be enforced to the extent not inconsistent with federal law." Only time will tell whether Florida's new law passes judicial scrutiny.

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[13] *Barry Cohen v. Google, LLC*, 18-24591-CIV-GRAHAM/MCALILEY, (S.D. Fla. Jun. 26, 2019) DE 36.
[14] *Bennett v. Google, LLC*, 882 F.3d 1163 (D.C. Cir. 2018)
[15] *Noah v. AOL Time Warner Inc.*, 261 F. Supp. 2d 532, 535-40 (E.D. Va. May 15, 2003), *aff'd*, 2004 U.S. App. LEXIS 5495, at *1 (4th Cir. Nov. 14, 2003).
[16] *Netchoice, LLC etc. et al v. Ashley Brooke Moody, etc. et al.*, Civil Action No. 21-cv-00220-RH-MAF (U.S. District Court, N.D. Fla. filed May 27, 2021).