87R9480 MLH/JG-D

By:  Toth H.B. No. 3105

A BILL TO BE ENTITLED

AN ACT

relating to unlawful acts and practices of social media platforms; providing a civil penalty.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1.  Chapter 15, Business & Commerce Code, is amended by adding Subchapter F to read as follows:

SUBCHAPTER F. ANTITRUST VIOLATOR LIST

Sec. 15.60.  DEFINITIONS; ANTITRUST VIOLATOR LIST. (a) The definitions provided under Section 113.001 apply to this subchapter.

(b)  The division shall create and maintain an antitrust violator vendor list that contains the names and addresses of persons who have violated state or federal antitrust laws. The division shall publish the initial list on January 1, 2022, and shall update and electronically republish the list quarterly.

Sec. 15.61.  PLACEMENT ON ANTITRUST VIOLATOR LIST. (a) On receiving reasonable information from any source that a person has been convicted of or held liable for a state or federal antitrust violation, the division shall conduct an investigation to determine whether good cause exists to place that person or an affiliate of that person on the antitrust violator vendor list.

(b)  If the investigation by the division is for an antitrust violation related to shadow banning by a social media platform under Chapter 113, the division may subpoena the social media platform for any algorithm related to its shadow banning and any related documentation used within the previous 24 months related to shadow banning.

(c)  If the division finds good cause, the division shall notify the person or affiliate in writing of:

(1)  the intent to place the name of that person or affiliate on the antitrust violator vendor list;

(2)  the person's or affiliate's right to a hearing under Section 15.63;

(3)  the procedure that must be followed to obtain a hearing; and

(4)  the applicable time requirements.

(d)  If the person or affiliate does not request a hearing before the 21st day after the date of receiving notice under this section, the division shall enter a final order placing the name of the person or affiliate on the antitrust violator vendor list.

(e)  A person or affiliate may not be placed on the antitrust violator vendor list without receiving an individual notice of intent from the division.

(f)  Notwithstanding the publication dates of the antitrust violator vendor list, a person or affiliate placed on the list is disqualified from the public contracting and purchasing process under this subchapter as of the date the final order is entered.

Sec. 15.62.  TEMPORARY PLACEMENT ON ANTITRUST VIOLATOR LIST. (a) If a person has been charged or accused of a violation of state or federal antitrust laws in a civil or criminal proceeding brought by the attorney general, a state attorney, or the United States Department of Justice after September 1, 2021, the attorney general may, on a finding of probable cause that a person has likely violated the underlying antitrust laws, temporarily place the person on the antitrust violator vendor list until formal proceedings have concluded.

(b)  If probable cause exists, the attorney general shall notify the person in writing of:

(1)  the intent to temporarily place the person on the antitrust violator vendor list;

(2)  the person's right to a hearing under Section 15.63;

(3)  the procedure that must be followed to obtain a hearing; and

(4)  the applicable time requirements.

(c)  If the person does not request a hearing before the 21st day after the date of receiving notice under this section, the attorney general shall enter a final order temporarily placing the name of the person on the antitrust violator vendor list.

(d)  A person may not be placed on the antitrust violator vendor list without receiving an individual notice of intent from the attorney general.

(e)  If the person is found not guilty of or not liable for violating state or federal antitrust laws, the attorney general shall remove the person from the antitrust violator vendor list.

Sec. 15.63.  HEARING. (a) Not later than the 21st day after the date of receipt of the notice of intent, the person or affiliate may file a petition for a formal hearing under Chapter 2003, Government Code, to determine whether it is in the public interest for that person or affiliate to be placed on the antitrust violator vendor list.

(b)  Notwithstanding the procedures adopted under Section 2003.050, Government Code, the administrative law judge shall enter a final order not later than the 30th day after the date of the formal hearing.

(c)  The final order shall contain:

(1)  findings of fact;

(2)  conclusions of law;

(3)  interpretation of agency rules; and

(4)  any other information required by law or rule to be contained in the final order.

(d)  The final order shall direct the division to place or not place the person or affiliate on the antitrust violator vendor list.

(e)  In determining whether it is in the public interest to place a person or affiliate on the antitrust violator vendor list, the administrative law judge shall consider the following factors:

(1)  whether the person or affiliate committed an antitrust violation;

(2)  the nature and details of the antitrust violation;

(3)  the degree of culpability of the person or affiliate;

(4)  whether the person or affiliate has been reinstated or received clemency in any jurisdiction for the antitrust violation at issue in the proceeding; and

(5)  the needs of public entities for additional competition in procuring goods and services in their respective markets.

(f)  In any proceeding under this section, the division must prove that it is in the public interest for the person or affiliate to be placed on the antitrust violator vendor list. Proof that a person has been convicted, has been held liable, or is an affiliate of a convicted or liable person constitutes prima facie evidence that it is in the public interest for the person or affiliate to be put on the antitrust violator vendor list. Status as an affiliate must be proven by clear and convincing evidence. If the administrative law judge determines that the person was not convicted, was not held liable, or is not an affiliate of a convicted or liable person, the administrative law judge may not direct the person to be placed on the antitrust violator vendor list.

(g)  A person or affiliate who has petitioned for a hearing under this section may offer evidence on any relevant issue. An affidavit alone is not sufficient evidence that the person has not been convicted, has not been held liable, or is not an affiliate of a convicted or liable person. On establishment of a prima facie case that it is in the public interest for the person or affiliate to be put on the antitrust violator vendor list, that person or affiliate may prove by a preponderance of the evidence that it would not be in the public interest to put the person or affiliate on the antitrust violator vendor list, based on the factors in Subsection (e).

(h)  The final order of the administrative law judge is a final agency determination.

Sec. 15.64.  EFFECT OF PLACEMENT ON ANTITRUST VIOLATOR LIST. (a) A person or affiliate who has been placed on the antitrust violator vendor list after being convicted of or held liable for an antitrust violation may not:

(1)  submit a bid, proposal, or reply for a new contract to provide goods or services to a public entity;

(2)  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;

(3)  submit a bid, proposal, or reply for a new lease of real property to a public entity;

(4)  be awarded or perform work as a contractor, supplier, subcontractor, or consultant under a new contract with a public entity; and

(5)  transact any new business with a public entity.

(b)  A public entity may not accept any bid, proposal, or reply from, award any new contract to, or transact any new business with a person or affiliate on the antitrust violator vendor list.

(c)  This section does not apply to contracts that were awarded or business transactions that began before the person or affiliate was placed on the antitrust violator vendor list.

(d)  All invitations to bid, requests for proposals, and invitations to negotiate must contain a statement informing persons of the restriction under Subsection (b).

(e)  A person on the antitrust violator vendor list is not qualified to receive any economic incentives from the state, including state grants, cash grants, tax exemptions, tax refunds, tax credits, state funds, or other state incentives.

(f)  The conviction or liability of a person for an antitrust violation, or placement on the antitrust violator vendor list, may not affect any rights or obligations under any contract, franchise, or other binding agreement that predates the conviction, holding of liability, or placement on the antitrust violator vendor list.

Sec. 15.65.  REMOVAL FROM ANTITRUST VIOLATOR LIST. (a) A person may be removed from the antitrust violator vendor list subject to terms and conditions that may be prescribed by the administrative law judge on a determination that removal is in the public interest.

(b)  In determining whether removal is in the public interest, the administrative law judge shall consider any relevant factors, including the factors in Section 15.63(e).

(c)  The administrative law judge shall determine that removal of the person or affiliate from the antitrust violator vendor list is in the public interest on a showing that:

(1)  the person was found not guilty or not liable;

(2)  the antitrust case was dismissed;

(3)  the court entered a finding in the person's favor;

(4)  the person's conviction or determination of liability was reversed on appeal; or

(5)  the person was pardoned.

(d)  A person on the antitrust violator vendor list may not petition for removal from the list before six months after the date a final order is entered under this subchapter, unless the petition is based on a reversal of or pardon for the conviction or holding of liability, in which case the person may petition at any time.

(e)  The petition must be filed with the division, and the proceeding shall be conducted under the procedures and requirements of this subchapter.

(f)  If a petition is denied, the person or affiliate may not petition for another hearing before nine months after the date of denial, unless the petition is based on a reversal of or pardon for the conviction or holding of liability.

(g)  The division may petition for removal prior to the expiration of the period under Subsection (f) if, in its discretion, it determines that removal would be in the public interest.

SECTION 2.  Subtitle C, Title 5, Business & Commerce Code, is amended by adding Chapter 113 to read as follows:

CHAPTER 113. UNLAWFUL ACTS AND PRACTICES OF SOCIAL MEDIA PLATFORMS

SUBCHAPTER A. GENERAL PROVISIONS

Sec. 113.001.  DEFINITIONS. In this chapter:

(1)  "Affiliate" means:

(A)  a person who controls, is controlled by, or is under common control with another person; or

(B)  a predecessor or successor of a person described by Paragraph (A).

(2)  "Algorithm" means a mathematical set of rules that specify how a group of data behaves or is organized.

(3)  "Antitrust violation" includes violations of both state and federal antitrust law.

(4)  "Candidate" has the meaning assigned by Section 251.001, Election Code.

(5)  "Censor" includes action by a social media platform to delete, regulate, restrict, edit, alter, remove, inhibit publication of, or post an addendum to any content posted by a user.

(6)  "Deplatform" means the permanent removal or ban of a user or suspension of the user's ability to post by a social media platform, or a temporary removal, ban, or suspension of not less than 60 days.

(7)  "Division" means the antitrust division of the Office of Attorney General.

(8)  "Post-prioritization" means the placement or ordering of content to feature some content over others, and does not include prioritization based on monetary payments.

(9)  "Shadow ban" means action by a social media platform to limit or eliminate the exposure of a user or content posted by a user to other users, and includes action that is not apparent to a user.

(10)  "Social media platform" means an information service, system, internet search engine, or access software provider that provides or enables computer access to a computer server by multiple users, and includes a platform operated by a for-profit entity that:

(A)  has annual gross revenues in excess of $100 million; or

(B)  has at least 100 million monthly users globally.

(11)  "User" means a person who has an account on a social media platform, regardless of whether the person posts or has posted content.

Sec. 113.002.  APPLICABILITY. (a) This chapter does not apply to the purchase of goods or services made by any public entity from the Texas Department of Criminal Justice.

(b)  A provision of this chapter may be enforced notwithstanding any state or local law and only to the extent not inconsistent with federal law, including 47 U.S.C. Section 230(e)(3).

SUBCHAPTER B. SOCIAL MEDIA PLATFORMS DUTIES

Sec. 113.051.  GENERAL DUTIES. (a) A social media platform shall publish the standards it uses for determining how to censor, deplatform, and shadow ban users, including definitions of any necessary terms.

(b)  A social media platform shall apply censorship, deplatforming, and shadow banning standards in a consistent manner among all users of the platform.

(c)  A social media platform must inform users of the platform of any changes to the platform's user rules, terms, and agreements before implementing the changes.

(d)  A social media platform shall provide:

(1)  a mechanism to allow a user of the platform to request the number of other users who viewed the user's content; and

(2)  a user of the platform with the number of other users who viewed the user's content when a request is made using the mechanism described by Subdivision (1).

(e)  A social media platform shall:

(1)  categorize algorithms used for post-prioritization and shadow banning based on the type of content and user distinctions made by the algorithms; and

(2)  allow a user to elect to not use post-prioritization and shadow banning algorithm categories and instead view all content in chronological order based on when content was posted.

(f)  A social media platform shall annually provide users with notice on the use of algorithms for post-prioritization and shadow banning and provide users with an opportunity to make the election under Subsection (e)(2).

(g)  A social media platform shall allow a deplatformed user to access or retrieve all of the user's information, content, and data for a period of not less than 60 days after the date the user is deplatformed.

Sec. 113.052.  JOURNALISTIC ENTERPRISE DUTIES. (a) In this section, "journalistic enterprise" means an entity that:

(1)  publishes not less than 100,000 words available online with not less than 50,000 paid subscribers or 100,000 monthly active users;

(2)  publishes not less than 100 hours of audio or video online with not less than 100 million yearly viewers;

(3)  operates a cable channel providing not less than 40 hours of content each week to not less than 100,000 cable television subscribers; or

(4)  operates under a broadcast license issued by the Federal Communications Commission.

(b)  A social media platform may not knowingly take action to censor, deplatform, or shadow ban a user who is a journalistic enterprise based on the content of a publication or broadcast of the journalistic enterprise. Each social media platform shall develop a method for users of the platform to identify themselves as a journalistic enterprise.

(c)  The prohibition described by Subsection (b) does not apply to the post-prioritization of a journalistic enterprise's content based on payments to a platform by the journalistic enterprise for the post-prioritization.

Sec. 113.053.  NOTIFICATION OF CENSORSHIP OR DEPLATFORMING. (a) A social media platform may not censor or deplatform a user without providing notification to the user who posted or attempted to post the content.

(b)  Notice under this section must:

(1)  be in writing;

(2)  be delivered by electronic mail or direct electronic notification to the user not more than 30 days after the censoring or deplatforming action;

(3)  include a thorough explanation of why the social media platform censored or deplatformed the user; and

(4)  include a precise and thorough explanation of how the social media platform became aware of the content, including an explanation of any algorithm used to identify the user's content as objectionable.

(c)  Notwithstanding this section, a social media platform is not required to notify a user if the censored content is obscene, as that term is defined in Section 43.21, Penal Code.

SUBCHAPTER C. CERTAIN RESTRICTIONS RELATED TO CANDIDATES

Sec. 113.101.  POST-PRIORITIZATION AND SHADOW BANNING OF CERTAIN CONTENT PROHIBITED; EXCEPTION. (a) A social media platform may not apply or use a post-prioritization or shadow banning algorithm on content posted by or about a user of the social media platform who is a state or local candidate. Each social media platform shall develop a method for users of the platform to identify themselves as a state or local candidate in an election and protocols to confirm the user's candidacy in that election.

(b)  The prohibition described by Subsection (a) applies only during the period beginning on the date an individual's candidacy in an election begins and ending on the date of the election or the date the individual's candidacy in that election ends.

(c)  The prohibition described by Subsection (a) does not apply to a social media platform's post-prioritization of content based on a user's payment to the social media platform for the post-prioritization.

Sec. 113.102.  DEPLATFORMING PROHIBITED; CIVIL PENALTY. (a) Notwithstanding any state or local law and only to the extent permitted under federal law, a social media platform may not knowingly deplatform a state or local candidate.

(b)  A social media platform that violates this section is liable for a civil penalty of not more than $100,000 for the deplatforming of a state candidate and not more than $10,000 for the deplatforming of a local candidate. Each day of a continuing violation constitutes a separate ground for recovery.

(c)  On request of a deplatformed state or local candidate, the attorney general may bring an action in a district court to collect a civil penalty under this section. The attorney general and the candidate may recover reasonable expenses incurred in obtaining relief under this section, including court costs, attorney's fees, investigation costs, witness fees, and deposition expenses.

Sec. 113.103.  REPORTING REQUIREMENTS. (a) Notwithstanding any state or local law and only to the extent permitted under federal law, a social media platform that provides free advertising to a state or local candidate shall submit to the Texas Ethics Commission, on a form prescribed by the commission, a report that lists the estimated cash value of the free advertising as an in-kind contribution to the candidate.

(b)  For purposes of Subsection (a), a post, comment, or other content posted by or about a state or local candidate on the social media platform that is shown in the same or a similar manner to other posts, comments, or content is not considered free advertising.

SUBCHAPTER D. GENERAL ENFORCEMENT

Sec. 113.151.  DECEPTIVE TRADE PRACTICE. A violation of this chapter is a deceptive trade practice under Subchapter E, Chapter 17, and is actionable under that subchapter.

Sec. 113.152.  PRIVATE ENFORCEMENT. A user may bring a private cause of action against a social media platform for a violation of Section 113.051(b) or 113.053. In an action brought under this section, the court may award to the user:

(1)  not more than $100,000 in statutory damages for each claim;

(2)  actual damages;

(3)  punitive damages, if there are aggravating factors present;

(4)  other forms of equitable relief; and

(5)  if the user was deplatformed in violation of Section 113.051(b), costs and reasonable attorney's fees.

SECTION 3.  Chapter 113, Business & Commerce Code, as added by this Act, applies only to an action taken by a social media platform on and after the effective date of this Act.

SECTION 4.  This Act takes effect immediately if it receives a vote of two-thirds of all the members elected to each house, as provided by Section 39, Article III, Texas Constitution. If this Act does not receive the vote necessary for immediate effect, this Act takes effect September 1, 2021.