Questions & Answers
AB 2408 (Cunningham and Wicks)

The Social Media Platform Duty to Children Act

“Facebook’s internal research is aware that there are a variety of problems facing children on Instagram, they know that severe harm is happening to children.”

--Former Facebook Executive and Whistleblower Frances Haugen

“Among teen users [of Instagram] who reported suicidal thoughts, 13% of British users and 6% of American users traced the desire to kill themselves to Instagram.”

--Meta’s internal research

“Facebook has taken big tobacco’s playbook, it has hidden its own research on addiction and the toxic effects of its products. It has … weaponized childhood vulnerabilities against children themselves. It's chosen growth over children’s mental health and well-being, greed over preventing the suffering of children.”

--United States Senator Richard Blumenthal

“I feel bad when I use Instagram, and yet I can’t stop.”

--Teen interviewed by Instagram revealed in leaked documents

“Fully 95% of teens have access to a smartphone, and 45% say they are online 'almost constantly.'”

--Pew Research Center

“Adolescence is …associated with an increased risk for… addictive disorders.”

--Neurobiology of Adolescent Substance Use and Addictive Behaviors: Prevention and Treatment Implications, Adolescent Medicine: State of the Art Reviews

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4 Facebook Whistleblower, supra note 1.
1. **What is the public policy aim of the bill?**

The aim of the bill is simple and narrow: to discourage, through financial accountability, some of the world’s largest and most profitable social media platform corporations from purposefully manipulating their platforms to be addictive to children.

2. **How does the bill work?**

First, the bill creates an express duty of a business entity that operates a social media platform not to addict its child users. This duty includes not addicting child users through:

- the use or sale of a child user’s personal data;
- the engagement of a child user with the platform; or
- the development, design, implementation, or maintenance of any design, feature, or affordance.

Second, the bill permits parents, guardians, and any other person authorized to assert the legal rights of any child user who suffers any injury as a result of a business violating its duty of care to children to bring a legal action to recover or obtain any of the following:

- Actual damages, but in no case shall the total award of damages in a class action be less than one thousand dollars ($1,000) per member of the class.
- A civil penalty of up to twenty-five thousand dollars ($25,000) per child user per calendar year in which the violation occurred.
- An order enjoining a violation or threatened violation of the law.
- Punitive damages.
- An award of no more than twice the amount of reasonable attorney’s fees to a prevailing plaintiff; and costs.

Third, the bill creates a safe harbor from penalties for responsible social media platforms that take basic steps to avoid addicting children.

3. **What platforms would be subject to this bill?**

The bill defines social media platforms as encompassing any digital platform where users can share content and encounter content shared by other users. However, to avoid unfairly impacting small- and medium-size enterprises with limited impacts, this bill only applies to social media platforms controlled by companies earning more than $100 million in annual revenue. In addition, the bill excludes various types of digital platforms, including email providers, search engines, streaming services, file-sharing and collaboration tools, internal business services, and limited-functionality sites like comment sections and product reviews.

The bill will cover many of the most popular social media platforms used by children, including TikTok, Instagram, and Facebook.
4. How many children are being harmed?

Research using widely accepted measures of social media addiction suggests a prevalence rate of approximately 5 percent across the general population.7 The rates of addiction for children may be higher: research shows that rates of behavioral addictions are elevated during adolescence.8 With 22 million American teenagers using Instagram alone,9 it is likely that more than a million young Americans are addicted to social media … at least.

5. What harms are associated with social media addiction?

Several studies have found positive correlations between time spent on social media and rates of suicide and depression among teens, especially girls.10 In reviewing studies about social media use and girls:

Most lump all screen-based activities together (including those that are harmless, such as watching movies or texting with friends), and most lump boys and girls together. Such studies cannot be used to evaluate the more specific hypothesis that Instagram is harmful to girls. It’s like trying to prove that Saturn has rings when all you have is a dozen blurry photos of the entire night sky.

But as the resolution of the pictures increases, the rings appear. The subset of studies that allow researchers to isolate social media, and Instagram in particular, show a much stronger relationship with poor mental health. The same goes for those that zoom in on girls rather than all teens. Girls who use social media heavily are about two or three times more likely to say that they are depressed than girls who use it lightly or not at all.11

Social media addiction has a negative impact on children’s normal socialization and contributes to feelings of social isolation in young people.12 Over time, social media addiction can create a vicious cycle: discomfort with real-life socialization drives lonely youth to internet interactions, which increase the perception of isolation; as tolerance increases, the addicted young person needs to spend more time online to feel its rewards.

Meanwhile, reducing social media use has been shown to result in mental health benefits.13

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7 https://www.addictioncenter.com/drugs/social-media-addiction/
8 Christopher J. Hammond et al., supra note 6.
9 Wells et. al, supra note 2.
12 Brian A. Primack et al., Social Media Use and Perceived Social Isolation Among Young Adults in the US, 53 AM. J. PREVENTATIVE MED. 1 (2017).
6. Do social media companies document these or similar harms?

Yes. One social media company’s own internal documented research confirms the health experts’ findings of the severe harm to some children caused by exposure to their products:

- Among teen users who reported suicidal thoughts, 13% of British users and 6% of American users traced the desire to kill themselves to Instagram.
- About one in five U.S. teenagers with mental health concerns (which Meta’s own research says is “most teens”) say that Instagram makes them feel worse about themselves and their mental health.
- Meta’s research showed that “teens blame Instagram for increases in the rates of anxiety and depression among teens.”
- Instagram’s features create a “perfect storm” of social comparison.14

7. Why would social media companies want to addict child users?

Social media platforms are financially incentivized to deploy design features that increase the likelihood of addiction. Social media platforms offer users access to their platforms and services for free.15 Digital platforms earn “substantially all” of their revenue through digital advertising.16 The “product” that social media companies sell to advertisers is the opportunity to display targeted ads to the platform’s billions of users.17 The time and attention users spend on such platforms (a metric that companies call “user engagement”) are thus critical ingredients in sustaining social media platforms’ profitability.18 Thus, social media companies have a strong financial incentive to design their platforms in ways that maximize the amount of time and attention that users spend logged in.

It is important to note that “user engagement” does not necessarily track a user’s subjective enjoyment or objective health and well-being. In fact, user enjoyment and well-being are sometimes negatively correlated to user engagement. In other words, many users spend even more time on social media when engaging with content they don’t like19 or objectively makes them unhealthier.20

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14 Wells et. al, supra note 2.
19 Facebook’s research “suggests that no matter where we draw the lines for what is allowed, as a piece of content gets close to that line, people will engage with it more on average – even when they tell us afterwards they don’t like the content.” Mark Zuckerberg, A Blueprint for Content Governance and Enforcement, FACEBOOK, Nov. 15, 2018, https://www.facebook.com/notes/751449002072082/.
20 Facebook’s own research has proven that “people reporting problematic use report the site as more valuable to them, highlighting the complex relationship between [Facebook] use and well-being.” Justin Cheng et al., Understanding Perceptions of Problematic Facebook Use, in CHI CONFERENCE ON HUMAN FACTORS IN COMPUTING SYSTEMS PROCEEDINGS (CHI 2019), May 4-9, 2019, Glasgow, Scotland, https://research.facebook.com/publications/understanding-perceptions-of-problematic-facebook-use/.
Thus, social media companies are financially motivated to use design features that maximize user engagement instead of features that would increase user enjoyment or well-being but decrease engagement. Addicted consumers are particularly profitable because their consumption behavior goes beyond normal engagement levels. The extra profit generated by addicted consumers is known as “the addiction surplus.” Because addicted consumers are generally more profitable than consumers who are not addicted, businesses are motivated to create addiction and capture the “addiction surplus.”

8. How do social media companies addict child users? What sort of features and designs are proven to be addictive?

Just as tobacco companies employed scientists and doctors to maximize the addictive properties of the tobacco in their cigarettes, Meta and other social media companies employ neuroscientists and user-interface designers to maximize the addictive properties of their technologies. Until recently, some design leaders boasted openly about such tactics in such industry bestsellers like *Hooked: How to Build Habit-Forming Products* and *Evil by Design*.

Examples of addictive design patterns can be loosely grouped into three buckets. First, the use of “reward schemes,” such as “likes,” take advantage of our desire for validation. Second, the timing of “intermittent variable rewards,” such as loading icons or notifications, make us feel rewarded for staying on the platform longer. Third, the use of design patterns such as bottomless-scroll and auto-play, erode our natural stopping cues. The longer that users engage with social media, the more data is collected about how they respond to these designs, enabling the enhancement and personalization of addictive design features.

As bluntly explained in the BBC’s *Science Focus*:

> And to do this, [the social media companies] build features into their apps that manipulate our brain chemistry. These tricks are borrowed straight from casinos and slot machines, which are widely considered to be some of the most addictive machines ever invented.

Consider the ‘pull-to-refresh’ feature common to social media apps, where dragging the screen downwards prompts the screen to refresh. Not only is the action itself similar to pulling the lever on a slot machine, but it takes advantage...
of our attraction to unpredictability. Psychologists call this ‘intermittent reinforcements’ (and I call it ‘the reason we date jerks’). Sometimes, when we check social media there’s something exciting waiting for us (a ‘reward’), sometimes there’s not. It’s the unpredictability that keeps us coming back.

Once you’re plopped in front of a slot machine, the casino wants to keep you there – that’s why most casinos are windowless with no clocks. Similarly, once you’re trapped in a spiral of infinite scrolling, social media apps don’t want you to look up. That’s why their feeds are deliberately designed to be endless.  

Several former Facebook executives have acknowledged that design features they invented exploit weaknesses in human psychology. Leah Pearlman, co-inventor of Facebook’s “like” button, admitted that she herself had become hooked on Facebook because she had begun basing her sense of self-worth on the number of "likes" she had.  

Sean Parker, Facebook’s first president, admitted that user interface designers “exploit[ed] a vulnerability in human psychology” by rewarding users with “a little dopamine hit” to ensure Facebook would "consume as much of [the users'] time and conscious attention as possible."  

The inventor of the infinite scroll at Mozilla has said that behind each phone home screen, there are teams of engineers working on increasing addictiveness.

9. Is it really appropriate to call social media use disorder an addiction?

“Addiction” has a chemical and a behavioral definition. Gambling, for example, is not a recognized chemical addiction—as drug addiction would be— but a recognized behavioral one.

Meta’s own leaked documents reveal its strategy of purposefully behaviorally addicting children to a known harmful product to earn profits. The Facebook whistleblower explained:

“Facebook has studied a pattern that they call problematic use, what we might more commonly call addiction. It has a very high bar for what it believes [“problematic use”] is.

It means you self-identify that you don’t have control over your usage and that it is materially harming your health, your schoolwork or your physical health.

Five to 6% of 14 year olds have the self-awareness to admit both those questions. It is likely that far more than five to 6% of 14 year olds are addicted to Instagram.”

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32 Andersson, supra note 30.


34 Facebook Whistleblower, supra note 1 (emphases added).
10. Can you summarize based on Meta’s own research what it is about Instagram and social media addicting girls that makes their inability to step away so hurtful?

As one expert observed, “Instagram perpetuates the myth that our happiness and ability to be loved are dependent on external things: For girls, it’s appearance[.]”

The picture-perfect images on Instagram’s news feeds are so potent that they cement these superficial and harmful values into adolescent brains without them even knowing it.”37 Indeed, “observational studies have linked spending more than 2 hours a day on social networking sites and personal electronic devices with high rates of suicidality and depressive symptoms among adolescent girls[.]”38

As summed up by Senator Marsha Blackburn (R-TN) at the whistleblower hearing, using Meta’s own leaked data (emphases supplied):

66% of teen girls on Instagram and 40% of teen boys experience negative social comparisons, this is Facebook’s research.

37 Id.
52% of teen girls who experience negative social comparison on Instagram said it was caused by images related to beauty.

Social comparison is worse on Instagram because it is perceived as real life, but based on celebrity standards.

Social comparison mimics the grief cycle and includes a downward emotional spiral, encompassing a range of emotions from jealousy to self-proclaimed body dysmorphia. Facebook addiction, which Facebook calls, conveniently, problematic use is most severe in teens peeking at age 14.39

Slide from internal Meta (then-Facebook) documents, leaked to the Wall Street Journal:40

11. Why is financial accountability for harms caused the right approach?

Absent public utility-like all-embracing regulation, it is very hard for government by force of overseeing regulation to change a corporation’s harmful behavior when its harmful behavior is the core of its profitable business model and the key to its growth. In such circumstances, the best way of ensuring the corporation abandons harm-causing policies is to prompt self-compliance by making the harmful things risky or unprofitable.

Here, to Meta and other large social media companies, addiction—greater and greater time spent on a site, even when the user wants to reduce their use and is experiencing preoccupation, withdrawal, and other physical or mental harms—is their business model. These companies are

39 Facebook Whistleblower, supra note 1.
intensely focused on increasing the amount of time teens and children spend on their platforms, despite the growing evidence of harm. Meta went so far as to explore creating a version of Instagram specifically for children under 13; they abandoned those plans only after public outcry. These companies know that the more time children spend on these platforms, the more of their data the social media companies can collect, use, and sell to advertisers.

In fact, one recent study found that Meta continues to collect and sell vast amounts of data about its child users, despite promises not to. The reason? Doing so is fantastically profitable and to grow it must continue to explore ambitious ways to glue users to their screens.

As whistleblower Frances Haugen told Congress in testimony last year:

“Until the incentives change, [Meta] will not change. Left alone, [Meta] will continue to make choices that go against the common good, our common good.”

12. Has Meta been the subject of official investigations or lawsuits already regarding this harmful behavior? If so, what are they?

Yes, since the whistleblower’s revelations, Meta has been the subject of multiple investigations and lawsuits regarding the harmful effects of their addictive technologies on children.

- A bipartisan group of state attorneys general have opened an investigation into Meta for violations of consumer protection laws, based on the documents Haugen released.
- The Republican attorney general of Ohio filed a lawsuit against Meta on behalf of Meta investors and the Ohio Public Employees Retirement System for violations of securities laws, arguing that Meta misled the public about, among other things, its platforms’ harmful effects on children.
- The mother of an 11-year-old girl in Connecticut recently sued Meta and Snapchat for wrongful death after her daughter committed suicide. The suit alleges that these companies “knowingly and purposefully designed, manufactured, marketed, and sold social media products that were unreasonably dangerous because they were designed to be addictive to minor users.”

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44 Facebook Whistleblower, supra note 1.
13. Would the bill apply if a company accidentally created an addictive product but the company did not and should not have known it was harmful to children?

No. Social media platform companies would not be held liable under this bill solely for practices or features of social media platforms that the platform operator did not know, and had no reason to know, would cause or contribute to addiction of child users.

Indeed, if the social media platform did not cause any harm, then the platform would not be considered addictive under this bill. The bill holds companies liable if they “addict” child users, which means “to knowingly or negligently cause or contribute to addiction through any act or omission or any combination of acts or omissions.” In the bill, “addiction” is defined as the use of a social media platforms that indicates a preoccupation or obsession with the platform, difficulty withdrawing or reducing use, despite the child’s desire to cease or reduce use and that has caused physical, emotional, developmental, or other harm to the child.

Both addiction and real harm are required to impose liability.

This bill reserved its harshest penalties for companies that affirmatively know their platforms are addictive to children. A company that knowingly or willfully violates the duty not to addict child users under this bill is subject to an additional civil penalty of up to $250,000 per child user.

14. Are businesses that reform their behavior treated differently by the bill?

Yes. This bill includes a safe harbor from the civil penalties for social media platform companies that a) institute quarterly audits of their practices and platform features to detect any practices or features that have the potential to cause or contribute to addiction of children, and b) remove or correct such practices or features within 30 days of completing the audit. Companies that can show in court that they complied with that procedure prior to engaging in the alleged violation of this bill would not be subject to any of this bill’s civil penalties.

15. Isn't this bill preempted by Section 230?

No, this bill would not be preempted by Section 230 because this bill holds companies liable for their own product’s practices and features, not for content that others post on their platforms. Section 230 of the federal Communications Decency Act of 1996 immunizes social media companies, among others, from liability for content that others post on their platforms or services. This bill, on the other hand, expressly states that it shall not be construed as imposing liability for content created by persons or parties other than the social media platform. Instead, this bill targets the harms that result from social media company’s practices and product features that cause children’s addiction to the platform.

48 See proposed Civil Code section 1714.48 (a)(1)-(2).
49 Id. section (c)(3)(A).
51 See proposed Civil Code section 1714.48(f).
Recent court precedent clarifies that Section 230 does not immunize social media companies from harms that their own practices or product features cause. Last year, the Ninth Circuit ruled that Section 230 does not immunize social media platforms from liability for “unreasonable and negligent” design decisions, including product features that encourage users to take harmful actions.\(^{52}\) As the Electronic Frontier Foundation, a proponent of Section 230 generally, explained in support of the Ninth Circuit’s decision, “Section 230 does not protect companies when a claim is premised on harm that flows from the company’s own speech or actions, independent from the speech of other users.”\(^{53}\)

Moreover, Section 230 states that it shall not “be construed to prevent any State from enforcing any State law that is consistent with this section.”\(^{54}\) Our bill is consistent with Section 230, as interpreted by the Ninth Circuit, and would not be preempted by it.

16. Aren’t you discouraging businesses from checking to see if their addictive products are harmful?

Not at all. The bill holds companies liable for knowingly or negligently causing or contributing to the addiction of child users where the addiction causes harm. That means companies will be held liable not just for harms that they know they are causing, but also harms that they reasonably should know they are causing. Unreasonable blindness is no defense. Any suspicion or awareness of addictiveness or harm will create an obligation to look into whether the relevant practices or features are harmful to children.

In addition, as noted above, the bill would immunize social media companies from civil penalties if they regularly audit their practices and features for addiction of child users and promptly correct or remove any features that they find to be causing or contributing to addiction. This creates a further incentive for companies to investigate and fix the addictive aspects of their products.

17. Is Congress considering similar legislation? If so, who is the sponsor and what is its status?

Yes, there are multiple efforts, with one federal bill that specifically targets internet platforms for addicting kids (amongst other provisions). That is the Kids Online Safety Act (KOSA), introduced in February by Senators Richard Blumenthal (D-CT) and Marsha Blackburn (R-TN).\(^{55}\)

The bill proposes creating new responsibilities for tech platforms to protect children from digital harms, including sexual exploitation, the promotion of gambling and alcohol, and rabbit holes of

\(^{52}\) *Lemmon v. Snap*, 995 F.3d 1085, 1094 (9th Cir. 2021) (“In short, Snap is being sued for the predictable consequences of designing Snapchat in such a way that it allegedly encourages dangerous behavior. [Section 230] does not shield Snap from liability for such claims.”).


\(^{54}\) 47 U.S.C. § 230(e)(3).

dangerous material. The bill would require companies to provide settings for families to protect their kids from harmful content and from potential app addiction, with those settings enabled by default. The bill states “In acting in the best interests of minors, a covered platform has a duty to prevent and mitigate the heightened risks of physical, emotional, developmental, or material harms to minors posed by materials on, or engagement with, the platform, including… patterns of use that indicate or encourage addiction-like behaviors.”

For the second bill, in late 2021, the Energy and Commerce Committee Chairman Frank Pallone, Jr. (D-NJ), Communications and Technology Subcommittee Chairman Mike Doyle (D-PA), Consumer Protection and Commerce Subcommittee Chair Jan Schakowsky (D-IL), and Health Subcommittee Chair Anna Eshoo (D-CA) announced new legislation to reform Section 230 of the Communications Decency Act, which shields websites and online platforms from being held liable for third-party content.

The legislation, titled the Justice Against Malicious Algorithms Act, would amend Section 230 to remove absolute immunity in certain instances. Specifically, the bill would lift the Section 230 liability shield when an online platform knowingly or recklessly uses an algorithm or other technology to recommend content that materially contributes to physical or severe emotional injury. The U.S. House Energy and Commerce Committee's Subcommittee on Communications and Technology held a hearing in December 2021 on this bill.

**18. Who can bring a lawsuit under the bill?**

Because the bill is designed to protect child users, the bill specifically allows suits by any person authorized to assert the legal rights of children.

The California Attorney General and certain public prosecutors under California’s Unfair Competition Law would be permitted to bring cases as well.

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56 Id.
57 Kids Online Safety Act (proposed), 117th Congress, (2022). The proposed bill also has transparency and research requirements, by forcing social media companies to publish third-party audits outlining the risks of their platforms for minors and forcing companies to make their data available to independent researchers and academics to study platforms’ impact on young people. The bill also has a much broader reach: it would target all entities that provide “a commercial software application or electronic service that connects to the internet and that is used, or is reasonably likely to be used, by a minor.” It does not exempt smaller companies, and applies to non-profits and common carriers. See id.
59 Id.
19. What remedies are available in a lawsuit?

Private plaintiffs can obtain any combination of:

- Actual damages (only available in individual suits); $1,000 minimum per child for class actions.
- A civil penalty of $25,000 per child user per calendar year in which the company violated its duty.
- An order to stop the company from violating the duty and the acts or practices that led to the violation.
- Attorneys’ fees and costs and any other relief the court deems proper.

Private plaintiffs may also obtain punitive damages and twice the amount of reasonable attorney’s fees. Platforms that are found to have violated the duty knowingly or willfully may also be subject to an additional civil penalty of up to $250,000 per child user. However, the statute provides a set mechanism for companies to avoid civil penalty liability. If a platform operator both maintains a quarterly audit system to detect practices or features that have the potential to addict child users and removes or corrects those practices in a timely manner, they are not subject to civil penalties.