AMENDMENT NO. _______ Calendar No. _______

Purpose: In the nature of a substitute.


S. 1080

To amend the Controlled Substances Act to require electronic communication service providers and remote computing services to report to the Attorney General certain controlled substances violations.

Referred to the Committee on ________________ and ordered to be printed

Ordered to lie on the table and to be printed

AMENDMENT IN THE NATURE OF A SUBSTITUTE intended to be proposed by Mr. DURBIN

Viz:

1 Strike all after the enacting clause and insert the following:
2
3 SECTION 1. SHORT TITLE.
4 This Act may be cited as the “Cooper Davis Act”.
5
6 SEC. 2. REPORTING REQUIREMENTS OF ELECTRONIC COMMUNICATION SERVICE PROVIDERS AND REMOTE COMPUTING SERVICES FOR CERTAIN CONTROLLED SUBSTANCES VIOLATIONS.
7
8 (a) Amendments to Controlled Substances Act.—
(1) IN GENERAL.—Part E of the Controlled Substances Act (21 U.S.C. 871 et seq.) is amended by adding at the end the following:

“SEC. 521. REPORTING REQUIREMENTS OF ELECTRONIC COMMUNICATION SERVICE PROVIDERS AND REMOTE COMPUTING SERVICES FOR CERTAIN CONTROLLED SUBSTANCES VIOLATIONS.

“(a) DEFINITIONS.—In this section—

“(1) the term ‘electronic communication service’ has the meaning given that term in section 2510 of title 18, United States Code;

“(2) the term ‘electronic mail address’ has the meaning given that term in section 3 of the CAN-SPAM Act of 2003 (15 U.S.C. 7702);

“(3) the term ‘Internet’ has the meaning given that term in section 1101 of the Internet Tax Freedom Act (47 U.S.C. 151 note);

“(4) the term ‘provider’ means an electronic communication service provider or remote computing service;

“(5) the term ‘remote computing service’ has the meaning given that term in section 2711 of title 18, United States Code; and
“(6) the term ‘website’ means any collection of material placed in a computer server-based file archive so that it is publicly accessible, over the Internet, using hypertext transfer protocol or any successor protocol.

“(b) DUTY TO REPORT.—

“(1) GENERAL DUTY.—In order to reduce the proliferation of the unlawful sale, distribution, or manufacture (as applicable) of counterfeit substances and certain controlled substances, a provider shall, as soon as reasonably possible after obtaining actual knowledge of any facts or circumstances described in paragraph (2), and in any event not later than 60 days after obtaining such knowledge, submit to the Drug Enforcement Administration a report containing—

“(A) the mailing address, telephone number, facsimile number, and electronic mailing address of, and individual point of contact for, such provider;

“(B) information described in subsection (c) concerning such facts or circumstances; and

“(C) for purposes of subsection (j), information indicating whether the facts or circumstances were discovered through content
moderation conducted by a human or via a non-
human method, including use of an algorithm,
machine learning, or other means.

“(2) FACTS OR CIRCUMSTANCES.—The facts or
circumstances described in this paragraph are any
facts or circumstances establishing that a crime is
being or has already been committed involving—

“(A) creating, manufacturing, distributing,
dispensing, or possession with intent to manu-
facture, distribute, or dispense—

“(i) fentanyl; or

“(ii) methamphetamine;

“(B) creating, manufacturing, distributing,
dispensing, or possession with intent to manu-
facture, distribute, or dispense a counterfeit
substance, including a counterfeit substance
purporting to be a prescription drug; or

“(C) offering, dispensing, or administering
an actual or purported prescription pain medi-
cation or prescription stimulant by any indi-
vidual or entity that is not a practitioner or on-
line pharmacy, including an individual or entity
that falsely claims to be a practitioner or online
pharmacy.
“(3) Permitted actions based on reasonable belief.—In order to reduce the proliferation of the unlawful sale, distribution, or manufacture (as applicable) of counterfeit substances and certain controlled substances, if a provider has a reasonable belief that facts or circumstances described in paragraph (2) exist, the provider may submit to the Drug Enforcement Administration a report described in paragraph (1).

“(c) Contents of report.—

“(1) In general.—To the extent the information is within the custody or control of a provider, the facts or circumstances included in each report under subsection (b)(1)—

“(A) shall include, to the extent that it is applicable and reasonably available, information relating to the account involved in the commission of a crime described in subsection (b)(2), such as the name, address, electronic mail address, user or account identification, Internet Protocol address, uniform resource locator, screen names or monikers for the account used or any other accounts associated with the account user, or any other identifying information, including self-reported identifying information,
tion, but not including the contents of a wire communication or electronic communication, as those terms are defined in section 2510 of title 18, United States Code, except as provided in subparagraph (B) of this paragraph; and

“(B) may, at the sole discretion of the provider, include the information described in paragraph (2) of this subsection.

“(2) OTHER INFORMATION.—The information referred to in paragraph (1)(B) is the following:

“(A) HISTORICAL REFERENCE.—Information relating to when and how a user, subscriber, or customer of a provider uploaded, transmitted, or received content relating to the report or when and how content relating to the report was reported to or discovered by the provider, including a date and time stamp and time zone.

“(B) GEOGRAPHIC LOCATION INFORMATION.—Information relating to the geographic location of the involved individual or website, which may include the Internet Protocol address or verified address, or, if not reasonably available, at least one form of geographic identifying information, including area code or ZIP
Code, provided by the user, subscriber, or customer, or stored or obtained by the provider, and any information as to whether a virtual private network was used.

“(C) Data relating to facts or circumstances.—Any data, including symbols, photos, video, icons, or direct messages, relating to activity involving the facts or circumstances described in subsection (b)(2) or other content relating to the crime.

“(D) Complete communication.—The complete communication containing the information of the crime described in subsection (b)(2), including—

“(i) any data or information regarding the transmission of the communication; and

“(ii) any data or other digital files contained in, or attached to, the communication.

“(3) User, subscriber, or customer submitted reports.—In the case of a report under subsection (b)(3), the provider may, at its sole discretion, include in the report information submitted to the provider by a user, subscriber, or customer al-
leging facts or circumstances described in subsection 
(b)(2) if the provider, upon review, has a reasonable 
belief that the alleged facts or circumstances exist.

“(d) HANDLING OF REPORTS.—Upon receipt of a re-
port submitted under subsection (b), the Drug Enforce-
ment Administration—

“(1) shall conduct a preliminary review of such 
report; and 

“(2) after completing the preliminary review, 
shall—

“(A) conduct further investigation of the 
report, which may include making the report 
available to other Federal, State, or local law 
enforcement agencies involved in the investiga-
tion of crimes described in subsection (b)(2), if 
the Drug Enforcement Administration deter-
mines that the report facially contains sufficient 
information to warrant and permit further in-
vestigation; or 

“(B) conclude that no further investigative 
steps are warranted or possible, or that insuffi-
cient evidence exists to make a determination, 
and close the report.

“(e) ATTORNEY GENERAL RESPONSIBILITIES.—
“(1) IN GENERAL.—The Attorney General shall enforce this section.

“(2) DESIGNATION OF FEDERAL AGENCIES.— The Attorney General may designate a Federal law enforcement agency or agencies to which the Drug Enforcement Administration may forward a report under subsection (d).

“(3) DATA MINIMIZATION REQUIREMENTS.— The Attorney General shall take reasonable measures to—

“(A) limit the storage of a report submitted under subsection (b) and its contents to the amount that is necessary to carry out the investigation of crimes described in subsection (b)(2); and

“(B) store a report submitted under subsection (b) and its contents only as long as is reasonably necessary to carry out an investigation of crimes described in subsection (b)(2) or make the report available to other agencies under subsection (d)(2)(A), after which time the report and its contents shall be deleted unless the preservation of a report has future evidentiary value.

“(f) FAILURE TO COMPLY WITH REQUIREMENTS.—
“(1) Criminal penalty.—

“(A) Offense.—It shall be unlawful for a provider to knowingly fail to submit a report required under subsection (b)(1).

“(B) Penalty.—A provider that violates subparagraph (A) shall be fined—

“(i) in the case of an initial violation, not more than $190,000; and

“(ii) in the case of any second or subsequent violation, not more than $380,000.

“(2) Civil penalty.—In addition to any other available civil or criminal penalty, a provider shall be liable to the United States Government for a civil penalty in an amount not less than $50,000 and not more than $100,000 if the provider knowingly submits a report under subsection (b) that—

“(A) contains materially false or fraudulent information; or

“(B) omits information described in subsection (c)(1)(A) that is reasonably available.

“(g) Protection of Privacy.—Nothing in this section shall be construed to—

“(1) require a provider to monitor any user, subscriber, or customer of that provider;
“(2) require a provider to monitor the content
of any communication of any person described in
paragraph (1);
“(3) require a provider to affirmatively search,
screen, or scan for facts or circumstances described
in subsection (b)(2); or
“(4) permit actual knowledge to be proven
based solely on a provider’s decision not to engage
in additional verification or investigation to discover
facts and circumstances that are not readily appar-
ent, so long as the provider does not deliberately
blind itself to those violations.
“(h) CONDITIONS OF DISCLOSURE OF INFORMATION
CONTAINED WITHIN REPORT.—
“(1) IN GENERAL.—Except as provided in para-
graph (2), a law enforcement agency that receives a
report under subsection (d) shall not disclose any in-
formation contained in that report.
“(2) PERMITTED DISCLOSURES BY LAW EN-
FORCEMENT.—A law enforcement agency may dis-
close information in a report received under sub-
section (d)—
“(A) to an attorney for the government for
use in the performance of the official duties of
that attorney, including providing discovery to a
defendant;

“(B) to such officers and employees of that
law enforcement agency, as may be necessary in
the performance of their investigative and rec-
ordkeeping functions;

“(C) to such other government personnel
(including personnel of a State or subdivision of
a State) as are determined to be necessary by
an attorney for the government to assist the at-
torney in the performance of the official duties
of the attorney in enforcing Federal criminal
law;

“(D) if the report discloses an apparent
violation of State criminal law, to an appro-
priate official of a State or subdivision of a
State for the purpose of enforcing such State
law;

“(E) to a defendant in a criminal case or
the attorney for that defendant to the extent
the information relates to a criminal charge
pending against that defendant;

“(F) to a provider if necessary to facilitate
response to legal process issued in connection to
a criminal investigation, prosecution, or post-
conviction remedy relating to that report;

“(G) as ordered by a court upon a showing
of good cause and pursuant to any protective
orders or other conditions that the court may
impose; and

“(H) in order to facilitate the enforcement
of the penalties authorized under subsection (f).

“(i) Preservation.—

“(1) In general.—

“(A) Request to preserve contents.—

“(i) In general.—Subject to clause
(ii), for the purposes of this section, a com-
pleted submission by a provider of a report
to the Drug Enforcement Administration
under subsection (b)(1) shall be treated as
a request to preserve the contents provided
in the report, and any data or other digital
files that are reasonably accessible and
may provide context or additional informa-
tion about the reported material or person,
for 90 days after the submission to the
Drug Enforcement Administration.
“(ii) LIMITATIONS ON EXTENSION OF PRESERVATION PERIOD.—

“(I) STORED COMMUNICATIONS ACT.—The Drug Enforcement Admin-
istration may not submit a request to a provider to continue preservation of
the contents of a report or other data described in clause (i) under section 2703(f) of title 18, United States Code, beyond the required period of preservation under clause (i) of this subparagraph unless the Drug En-
forcement Administration has an ac-
tive or pending investigation involving the user, subscriber, or customer ac-
count at issue in the report.

“(II) RULE OF CONSTRUC-
TION.—Nothing in subclause (I) shall preclude another Federal, State, or local law enforcement agency from seeking continued preservation of the contents of a report or other data de-
scribed in clause (i) under section 2703(f) of title 18, United States Code.
“(B) Notification to User.—A provider may not notify a user, subscriber, or customer of the provider of a preservation request described in subparagraph (A) unless—

“(i) the provider has notified the Drug Enforcement Administration of its intent to provide that notice; and

“(ii) 45 business days have elapsed since the notification under clause (i).

“(2) Protection of Preserved Materials.—A provider preserving materials under this section shall maintain the materials in a secure location and take appropriate steps to limit access to the materials by agents or employees of the service to that access necessary to comply with the requirements of this subsection.

“(3) Authorities and Duties Not Affected.—Nothing in this section shall be construed as replacing, amending, or otherwise interfering with the authorities and duties under section 2703 of title 18, United States Code.

“(4) Relation to Reporting Requirement.—Submission of a report as required by subsection (b)(1) does not satisfy the obligations under this subsection.
“(j) ANNUAL REPORT.—Not later than 1 year after the date of enactment of the Cooper Davis Act, and annually thereafter, the Drug Enforcement Administration shall publish a report that includes, for the reporting period—

“(1) the total number of reports received from providers under subsection (b)(1);

“(2) the number of reports received under subsection (b)(1) disaggregated by—

“(A) the provider on whose electronic communication service or remote computing service the crime for which there are facts or circumstances occurred; and

“(B) the subsidiary of a provider, if any, on whose electronic communication service or remote computing service the crime for which there are facts or circumstances occurred;

“(3) the number of reports received under subsection (b)(1) that led to convictions in cases investigated by the Drug Enforcement Administration;

“(4) the number of reports received under subsection (b)(1) that lacked actionable information;

“(5) the number of reports received under subsection (b)(1) where the facts or circumstances of a crime were discovered through—
“(A) content moderation conducted by a human;

“(B) a non-human method including use of an algorithm, machine learning, or other means;

“(6) the number of reports received under subsection (b)(1) that were made available to other law enforcement agencies, disaggregated by—

“(A) the number of reports made available to Federal law enforcement agencies;

“(B) the number of reports made available to State law enforcement agencies; and

“(C) the number of reports made available to local law enforcement agencies; and

“(7) the number of requests to providers to continue preservation of the contents of a report or other data described in subsection (i)(1)(A)(i) submitted by the Drug Enforcement Administration under section 2703(f) of title 18, United States Code.

“(k) Prohibition on Submission of User, Subscriber, Customer, or Anonymous Reports by Law Enforcement.—

“(1) In general.—No Federal, Tribal, State, or local law enforcement officer acting in an official
capacity may submit a report to a provider or arrange for another individual to submit a report to a provider on behalf of the officer under this section.

“(2) Remedy for violation.—No part of the contents of a provider’s report made under subsections (b)(1) or (b)(3) and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if that provider report resulted from an action prohibited by paragraph (1) of this subsection.

“(l) Exemption for Providers of Broadband Internet Access Service.—Subsections (b) through (k) shall not apply to a provider of broadband internet access service, as that term is defined in section 8.1(b) of title 47, Code of Federal Regulations (or any successor regulation), insofar as the provider is acting as a provider of such service.”.

(2) Technical and Conforming Amendment.—The table of contents for the Controlled Substances Act (21 U.S.C. 801 et seq.) is amended by inserting after the item relating to section 520 the following:
(b) Conforming Amendments to Stored Communications Act.—

(1) In general.—Section 2702 of title 18, United States Code, is amended—

(A) in subsection (b)—

(i) in paragraph (8), by striking “or” at the end;

(ii) in paragraph (9), by striking the period at the end and inserting “; or”; and

(iii) by adding at the end the following:

“(10) to the Drug Enforcement Administration, in connection with a report submitted thereto under section 521 of the Controlled Substances Act.”; and

(B) in subsection (c)—

(i) in paragraph (6), by striking “or” at the end;

(ii) in paragraph (7), by striking the period at the end and inserting “; or”; and

(iii) by adding at the end the following:

“(8) to the Drug Enforcement Administration, in connection with a report submitted thereto under section 521 of the Controlled Substances Act.”.
(2) TECHNICAL AMENDMENT.—Paragraph (7) of section 2702(b) of title 18, United States Code, is amended to read as follows:

“(7) to a law enforcement agency if the contents—

“(A) were inadvertently obtained by the service provider; and

“(B) appear to pertain to the commission of a crime;”.

SEC. 3. SEVERABILITY.

If any provision of this Act or amendment made by this Act, or the application of such a provision or amendment to any person or circumstance, is held to be unconstitutional, the remaining provisions of this Act and amendments made by this Act, and the application of such provision or amendment to any other person or circumstance, shall not be affected thereby.