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Legal Sidebar

UPDATE: Section 230 and the Executive Order on Preventing Online Censorship

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Update: On October 15, 2020, Federal Communications Commission (FCC) Chairman Ajit Pai announced that the FCC will adopt rules interpreting Section 230 of the Communications Decency Act. FCC General Counsel Tom Johnson confirmed that his office has advised Chairman Pai that "the FCC has the legal authority to interpret Section 230." Chairman Pai's statement comes after the National Telecommunications and Information Administration petitioned the FCC for rulemaking. On August 3, 2020, the FCC invited public comment on the petition for 45 days and received more than 20,000 comments in response.

The original post from June 3, 2020, is below.

On May 28, 2020, President Trump issued the Executive Order on Preventing Online Censorship (EO), expressing the executive branch's views on Section 230 of the federal Communications Decency Act. As discussed in this Legal Sidebar, Section 230, under certain circumstances, immunizes online content providers from liability for merely hosting others' content. The EO stakes out a position in existing interpretive disputes about the law's meaning and instructs federal agencies, including the Department of Commerce, the Federal Communications Commission (FCC), the Federal Trade Commission (FTC), and the Department of Justice, to take certain actions to implement this understanding.

This Legal Sidebar explores the legal implications of the EO. It first briefly describes how courts have interpreted Section 230 before explaining what the EO says. Next, the Sidebar discusses the FCC and FTC's authority to enforce Section 230, focusing on the EO's instructions to these agencies, before concluding with a discussion of how international trade obligations affect the United States' ability to modify Section 230.

Section 230 and Litigation over Online Speech

Section 230 creates federal immunity for providers and users of "interactive computer services," generally preventing them from being held liable for hosting content that someone else created. For example, if someone writes and posts a defamatory statement on Twitter, the defamed person could sue the tweet's author. Section 230, however, would likely require a court to dismiss any lawsuits against Twitter or a second Twitter user who merely retweets the original statement without comment—so long as neither

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Twitter nor the second Twitter user helped to develop the initial tweet. Section 230 was enacted in 1996 in response to a trial court ruling that allowed an online platform to be subject to liability for hosting defamatory speech, in part because the platform had said it would police its site for unwanted speech. Congress was concerned that this ruling created a perverse incentive for sites to refrain from monitoring content to avoid liability. Section 230 can be seen as speech-protective: by barring lawsuits that would punish platforms for hosting speech, it may encourage platforms to err on the side of hosting more content, while still allowing sites to take down content they see as objectionable. To this end, Section 230 contains two different provisions that courts have generally viewed as two distinct liability shields.

First, Section 230(c)(1) states that interactive computer service providers and users may not "be treated as the publisher or speaker of any information provided by another" person. This provision has been broadly interpreted to bar a wide variety of suits that would treat service providers as the publisher of another's content, including claims of defamation, negligence, discrimination under the Civil Rights Act of 1964, and state criminal prosecutions. However, if a site helps develop the unlawful content, courts have ruled that Section 230(c)(1) immunity does not apply. Accordingly, courts have, for example, rejected applying Section 230 to cases brought by the FTC against a defendant website that solicited or was involved in publishing allegedly unlawful content. More generally, Section 230 will not bar suits that seek to hold sites liable for their own conduct, rather than another's content. But courts have said that acts inherent to publishing, such as reviewing, suggesting, and sometimes even editing content, may not, by themselves, qualify as helping develop the challenged content. As a consequence, Section 230(c)(1) immunity can apply regardless of whether the site chooses to actively police content or whether it chooses to take a more hands-off approach.

Second, Section 230(c)(2) provides that interactive computer service providers and users may not be "held liable" for any voluntary, "good faith" action "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." Section 230(c)(2) also immunizes providing "the technical means to restrict access" to objectionable material. Unlike Section 230(c)(1), Section 230(c)(2) applies only to *good faith* actions to restrict objectionable material. Courts have ruled that allegations of anticompetitive motives can demonstrate bad faith, disqualifying sites from claiming Section 230(c)(2) immunity. There are, however, relatively few published federal court cases interpreting this provision.

Because Section 230(c)(2) contains a good-faith requirement and Section 230(c)(1) does not, some courts have recognized the importance of determining when each immunity provision applies. At least one decision suggests that Section 230(c)(2) applies when a service provider "*does* filter out offensive material," while Section 230(c)(1) applies when providers "*refrain* from filtering or censoring the information on their sites." But, as one scholar has noted, other courts have cited Section 230(c)(1) when dismissing claims predicated on takedowns. Another possibility is that Section 230(c)(1) does not apply when the plaintiff's *own* content is at issue—that is, while Section 230(c)(1) immunity only applies if a third party created the disputed content, Section 230(c)(2) can apply when a person sues a site for taking down the plaintiff's own content. Again, however, other decisions suggest that courts may apply Section 230(c)(1) even when the suit involves the plaintiff's own content. A third view is that Section 230(c)(2) might apply if the provider helps develop content and is therefore ineligible for (c)(1) immunity. In short, court rulings are inconsistent on the question of when each of the two immunity provisions governs.

Section 230(e) expressly states that the law will not bar liability in certain cases. Defendants may not claim Section 230 immunity in federal criminal prosecutions, cases involving intellectual property laws, suits under the Electronic Communications Privacy Act or "similar" state laws, and certain civil actions and state criminal prosecutions relating to sex trafficking.

If Section 230's liability shield does not apply, the person being sued will not automatically be held liable. Instead, it means only that courts can continue to adjudicate the case. But because Section 230 lawsuits often attempt to impose liability based on a person's speech, it remains possible that the First

Amendment's Free Speech Clause could require courts to dismiss claims in Section 230's absence. Courts may be hesitant to hold defendants liable for many types of online speech, unless it is clear that the speech falls into a category of traditionally regulable speech. And in cases concerning online platforms' liability resulting from decisions about what types of speech to host, some courts have held that the First Amendment requires dismissal of lawsuits that would punish sites for exercising editorial discretion protected by the Free Speech Clause.

Executive Order on Preventing Online Censorship

The EO begins by stating in Section 1 the President's belief that online platforms are engaging in "selective censorship," harming national discourse and restricting Americans' speech. Section 2 turns to the interpretation of Section 230(c), arguing that the "scope" of this immunity provision "should be clarified" and the law should not be extended to platforms that "engage in deceptive or pretextual actions" to censor "certain viewpoints." The EO maintains that Congress intended Section 230(c) to only protect service providers that engage in "Good Samaritan" blocking of harmful content. Section 2 further states that providers should not be entitled to Section 230(c)(2) immunity if they remove content without acting in "good faith," including by taking "deceptive or pretextual actions (often contrary to their stated terms of service)" to suppress certain viewpoints.

Section 2 also directs the Commerce Secretary, "in consultation with the Attorney General, and acting through the National Telecommunications and Information Administration (NTIA)," to request the FCC to issue regulations interpreting Section 230. Among other things, the EO, perhaps in response to the Section 230 jurisprudence discussed above, specifies that FCC's proposed regulations should clarify: (1) "the interaction between" Section 230(c)(1) and (c)(2) to explain when a service provider that cannot obtain Section 230(c)(2) immunity is also ineligible for protection under (c)(1); and (2) the meaning of "good faith" in Section 230(c)(2), including whether violating terms of service or failing to provide procedural protections qualifies as bad faith.

Section 4 of the EO instructs the FTC to "consider taking action, as appropriate and consistent with applicable law, to prohibit unfair or deceptive acts or practices." Specifically, the EO suggests that if platforms "restrict speech in ways that do not align with those entities' public representations about" how they monitor content on their sites, these acts may qualify as unfair or deceptive practices under the FTC Act. The EO also directs the FTC to consider whether complaints of "online censorship" received by the White House "allege violations of law," and whether to develop a report on these complaints.

The other provisions of the EO assign additional tasks to more executive departments. Section 3 of the EO requires agency review of federal spending on advertising and marketing on online platforms, and Sections 5 and 6 contain instructions for the Attorney General to establish a working group and propose federal legislation to implement the policies announced in the EO.

FCC Rules

While much of the EO is precatory in nature, perhaps the most notable terms are found in the provisions that seek to clarify Section 230's meaning by having the Secretary of Commerce, through the NTIA, petition the FCC to issue new rules on the topic. The responses to the EO from the FCC, an independent agency tasked with overseeing federal communications policy and headed by five commissioners of both parties, have ranged from supportive to critical. However, the responses leave unresolved one critical issue: the FCC's authority to issue rules interpreting Section 230.

The Administrative Procedure Act and FCC regulations implementing it permit any interested person to petition the FCC for rulemaking. Section 555(b) of the Administrative Procedure Act requires agencies to act on petitions within a "reasonable time," while FCC regulations provide only that the FCC "may act on a petition for rule making at any time" after the deadline for other interested persons to respond. Various

provisions of the Communications Act of 1934—including Sections 4(i), 201(b), and 303(r)—permit the FCC to issue rules necessary for the FCC to perform its functions or implement the Communications Act. An argument can be made that the FCC may rely on these provisions to issue rules in response to the EO because Congress enacted Section 230 as an amendment to Title II of the Communications Act.

Assuming the FCC issues rules interpreting Section 230 in line with the views of the EO, the question remains as to the legal import of those new rules. Section 230 immunity is largely addressed by private parties in litigation and typically does not involve the FCC. Supreme Court precedent counsels courts, under certain circumstances, to defer to the FCC's views on the statutes that it administers. These deference doctrines, if found applicable by a court, would require deference to the agency's interpretation of Section 230 and its determination that it has the authority to regulate on Section 230's meaning. One feature distinguishing Section 230 from other statutes the FCC interprets is that Section 230 does not mention the FCC at all. It is unclear if the operative provisions of Section 230 are "administered" by the FCC: the FCC does not take regulatory action related to Section 230, and the statute does not include any direction for the agency to regulate. However, Section 230's inclusion in a statutory scheme administered by the FCC may provide support for deferring to the agency's views.

If a reviewing court determines that the FCC is authorized to issue rules interpreting Section 230, it will defer to the FCC's reasonable interpretation of the statute so long as the statute is silent or ambiguous with respect to the FCC's views. If, however, the court determines that Section 230 is unambiguous, or that the FCC's interpretation of the statute is unreasonable, it will decline to adopt the agency's interpretation. Additionally, under Supreme Court precedent, a court may accord the FCC's rule "respect proportional to its power to persuade" if the court believes that Section 230 does not confer on the FCC authority to make regulations with the force of law.

FTC Enforcement

Another potentially important provision in the EO is Section 4 and its contemplation of an enforcement role for the FTC—an agency with the dual mission of protecting consumers and promoting competition in the marketplace—with respect to online platforms. The EO only directs the FTC to "consider" taking action, possibly because the Supreme Court has described the FTC as independent from executive authority, other than in the President's selection of commissioners. However, the Commission could potentially, on its own accord, bring an enforcement action against entities covered by Section 230. However, if the FTC took such an action it would need to clear two hurdles: it would need to show that the company's content moderation practices (1) are deceptive or unfair *and* (2) fall outside of Section 230's liability shield.

With respect to the first issue, the FTC has jurisdiction to enforce the FTC Act's broad prohibition on "unfair or deceptive acts or practices" against most individuals and entities. Under the "deceptive" part of this authority, the FTC has often brought enforcement actions against companies who make misrepresentations to consumers, such as when a company contradicts its posted policies. Consequently, it is possible that the FTC could bring an enforcement action against a company for misrepresenting its content moderation practices to consumers, provided the FTC determines the misrepresentation is "material" and likely to mislead a reasonable consumer. Along with "deceptive" conduct, the FTC could bring an enforcement action if it believes a company's content moderation practices are "unfair." To establish unfairness, the FTC would have to show, among other things, that the conduct "causes or is likely to cause substantial injury to consumers." It may be difficult for the FTC to establish that a company's content moderation practices causes substantial injury, however, because the agency has said that injury under the unfairness prong is largely limited to "monetary harm" or "health and safety risks."

If a company's content moderation practices are "unfair or deceptive" under the FTC Act, the FTC would still need to show that the company is not entitled to the Section 230's liability shield. In particular, the

Commission would need to show that the conduct falls under Section 230(c)(2)—because conduct falling under Section 230(c)(1) receives unqualified immunity, so long as the site did not contribute to any disputed content—and that the company did not act in "good faith." As discussed earlier, there is uncertainty surrounding both of these issues. As a result, the FTC's ability to use its authority to stop companies' deceptive content moderation practices may circularly hinge on the issues that the EO seeks clarification on from the FCC in Section 2.

International Trade Considerations

The EO could also affect the United States' international obligations. The United States has sought to limit the liability of internet computer service providers and information content providers in its recent trade agreements. Currently, the United States-Mexico-Canada Agreement (USMCA) and United States-Japan Agreement on Digital Trade (U.S.-Japan Agreement) contain such provisions. The United States has also indicated an interest in incorporating similar protections into future trade agreements with the United Kingdom and Kenya. In provisions that largely track the text of Section 230, USMCA and the U.S.-Japan Agreement prohibit the parties to the trade agreements from creating laws that treat interactive computer service providers as information content providers except "to the extent the supplier or user has, in whole or in part, created, or developed the information." Additionally, the parties may not impose liability for "any action voluntarily taken in good faith … to restrict access to or availability of material . . . that the supplier … considers to be harmful or objectionable."

These general prohibitions are subject to certain exceptions drawn from the World Trade Organization's General Agreement on Trade in Services. Both U.S. trade agreements allow the parties to adopt measures to protect public morals. USMCA further permits the parties to adopt measures to maintain public order; protect human, animal or plant life or health; or to secure compliance with other domestic laws or regulations. However, any such measure cannot create "arbitrary or unjustifiable discrimination between countries where like conditions prevail" and cannot be "a disguised restriction on trade in services."

Depending on how Section 230 is interpreted as a result of the EO, any resulting actions could be in tension with the Unites States' international trade obligations under USMCA, which is scheduled to enter into force (i.e., become legally binding) on July 1, 2020, and the U.S.-Japan Agreement, which is already legally binding on the United States. If a party to these agreements believes the United States has acted contrary to its obligations, it may potentially impose countermeasures against the United States (e.g., raise tariffs or suspend other trade benefits) consistent with the relevant dispute settlement arrangement or with general rules of international law. The executive branch may argue that its clarifications of Section 230 are consistent with the text of the current domestic statute and with the provisions in international trade agreements, so that any executive branch actions implementing the EO's interpretations of the law would not breach the United States' international trade obligations. Such an interpretation would not, however, bar a U.S. trade partner from disagreeing and initiating a dispute or otherwise attempting to impose countermeasures.

Considerations for Congress

The EO does not, on its own, alter Section 230 or its interpretation by the courts. Because the EO itself does not change the law, potential litigants who want to contest the validity of the EO's legal interpretations or its directions to executive agencies may have to wait until agencies act to implement the EO. However, one group has already filed a lawsuit arguing that the EO violates the First Amendment. This challenge, and any others, may face some procedural hurdles. In particular, any plaintiffs will have to prove that they have standing, and it is unclear whether anyone has suffered a "concrete and particularized" injury attributable to the EO, or whether the controversy is ripe for adjudication.

In the meantime, if Congress disagrees with how Section 230 has been interpreted by the executive branch or courts—or if it simply wants to resolve open interpretive questions—Congress can amend Section 230 to expressly state when its immunity provisions apply and outline the executive branch's authority to interpret or enforce the law. For example, one bill introduced in the 116th Congress would expressly grant the FTC authority to review sites' content moderation practices. Congressional action amending Section 230 could also limit the executive branch's ability to implement the EO, if executive action would be inconsistent with the new statutory authority. However, in amending Section 230, Congress may consider limits on its ability to act, including the free speech protections of the First Amendment as well as the United States' international trade obligations. The First Amendment restricts the government's ability to regulate online speech, and courts would likely apply heightened scrutiny to any regulation that makes distinctions based on the content or viewpoint of the regulated speech. With respect to trade obligations, Congress may also consider whether to approve any future trade agreement that incorporates provisions limiting the liability of interactive computer service providers.

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