

CLIENT ALERT

President Trump's Social Media Executive Order Would Restrict Legal Protections for Internet Speech

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Following months of speculation, and apparently triggered by Twitter's decision to label two of his tweets with "fact checking" notices, President Trump yesterday signed an Executive Order that is apparently intended to cut back liability protection currently afforded under federal law to social media platforms that edit or eliminate third-party content that violates terms of service.

The Executive Order creates a framework for the administration to petition the Federal Communications Commission to propose new regulations restricting the scope of immunity provided to Internet service providers under Section 230 of the Communications Decency Act (CDA). Section 230 is a powerful law that provides websites, blogs, and social networks that host third-party speech with liability protection against a range of laws that might otherwise hold them legally responsible for what their users say and do. Over twenty years of decisions, courts have regularly interpreted Section 230 to extend broad immunity to any Internet service provider whose conduct falls within traditional editorial functions, such as deciding whether to publish, withdraw, postpone, or alter third-party content. Given the breadth of protection it affords, this law has been heralded by judges, academics, and the tech community as one of the most important pieces of legislation protecting speech on the Internet and as a key factor in the rise of a robust market for social media and Internet-based speech. The order threatens to rewrite this important protection.

Specifically, CDA Section 230 currently affords liability protection to Internet service providers who, in "good faith," edit or remove content deemed to be "obscene, lewd, lascivious, filthy, excessively violent, harassing or otherwise objectionable." Pursuant to these provisions, most online social media platforms have developed robust policies for the moderation of content and embedded them into the terms of service that all users are required to agree to before using those services.

Under the guise of ensuring federal oversight of the platforms' exercise of "good faith," the EO proposes a multivariate federal attack on the scope of Section 230 protections.

First, in asking the Department of Commerce to file a petition with the Federal Communications Commission (an independent agency), the order plainly invites the FCC to engage in rulemaking delineating what "good faith" means in this context. Notably, the Executive Order purports to define "good faith" as requiring due process before the ISP takes down offending content or bans a user for violating the terms of service. This has never been a requirement before and is plainly an attempt to require the government's input in a private actor's decision-making process. It is unclear whether the FCC, which does not administer Section 230, even has such authority or wishes to enter into this fray. However, by asking other executive agencies to "petition" the FCC for this action, the Executive Order tacitly acknowledges that the President does not have the power to command that the FCC do this.

Second, the Executive Order would bar federal agencies from spending taxpayer dollars for "advertising" on social media platforms that "violate free speech principles," presumably by engaging in censorship of particular political viewpoints. The

biggest federal spender this would affect is without a doubt the Department of Defense, which uses a variety of social media for recruiting.

Third, the Executive Order invites the Federal Trade Commission, which has jurisdiction under Section 5 of the FTC Act to “consider taking action” against unfair and deceptive acts and practices of the social media platforms (calling out Twitter and Facebook specifically) insofar as they are allegedly censoring content based on political viewpoints, in a manner that contradicts representations in their respective terms of service. This is probably not an expansion of the FTC’s existing authority, but rather an effort to pressure the FTC (another independent agency) to actually undertake such investigations by raising the specter of GOP oversight in Congress.

Fourth, and in unusual White House recognition of the growing power of State Attorneys General to obtain results the federal government cannot, the Executive Order asks the U.S. Attorney General to convene a working group of State Attorneys General for the purpose of discussing independent investigations, pursuant to various state unfair and deceptive acts and practices acts (UDAPs). The White House will act as a conduit to this working group for complaints about allegedly improper censorship. The Order also directs this working group to “develop model legislation for consideration by legislatures in States where existing statutes do not protect Americans from such unfair and deceptive acts and practices.” This follows the model successfully put into place by the conservative American Legislative Exchange Council, which has promulgated model state statutes widely.

The Executive Order is the latest salvo in a steadily growing conservative backlash against the media, which the White House perceives to have a liberal bias. If successful and not struck down through legal action, it would threaten the interaction between public and private sectors on First Amendment grounds. It is a bedrock constitutional principle that the First Amendment applies only to state actors, not private media. Indeed, on May 27, 2020, the U.S. Court of Appeals for the D.C. Circuit resoundingly rejected a lawsuit from Freedom Watch against four major technology companies alleging bias in banning certain users from posting content on the platforms. The unanimous court held that, despite the technology companies’ broad market power, their independent decisions to ban users from their platforms do not violate the First Amendment because they are not state actors. Moreover, the court held that social media companies are not places of “public accommodation” subject to state Human Rights Act prohibitions against discrimination.

The Executive Order has received immediate and resounding academic criticism. It is expected to face a number of legal challenges. However, if left unchanged, it could have far reaching implications for companies relying on hosting third-party content. Twitter itself weighed in this morning:

This EO is a reactionary and politicized approach to a landmark law. [#Section230](#) protects American innovation and freedom of expression, and it’s underpinned by democratic values. Attempts to unilaterally erode it threaten the future of online speech and Internet freedoms.

— Twitter Public Policy (@Policy) [May 29, 2020](#)

Crowell & Moring has been discussing the Order with our clients. Along with our clients, we are considering legal options, which include the possibility of forming coalitions to consider legal challenge. We will continue to monitor developments and will provide updates that will position businesses to adequately protect their business practices.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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