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Is Section 230 Going to Change? The FTC, DOJ and FCC Signal Significant Change for Online Businesses

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The U.S. Department of Justice' Antitrust Division (DOJ) recently hosted a forum on "Big-Tech Censorship"¹ in which key Trump Administration officials announced their desire to reform, or entirely overhaul, Section 230 of the Communications Decency Act. The Federal Trade Commission's (FTC) previously inquired into "tech censorship" and requested public comments from those who "may have been harmed by technology platforms that limited their ability to share ideas or affiliations freely and openly."² That request for information (FTC RFI) remained open through May 21, 2025.

This action could be the first step that the Trump Administration takes to amend Section 230 of the Communications Decency Act – a provision of federal law that has been called the "bedrock upon which the internet has flourished"³ and that advocates have stated "[t]he free and open internet as we know it couldn't exist without[.]"⁴

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The DOJ forum marks the first time key agency leaders from the DOJ, FTC, and Federal Communications Commission (FCC) explicitly addressed their views on the application of Section 230 and desired changes to it. DOJ, FTC and FCC leaders criticized how many courts and commentators have interpreted Section 230 and proposed a different interpretation of Section 230 that, in their view, better aligns with the law's text. Specifically, they espoused a view that while Section 230 immunity generally protects platforms that allow third-party content on their websites, that immunity does not extend to decisions to remove third-party content or deplatform users. They also expressed a willingness to both rule-make in this area and take enforcement actions against what they called "censorship cartels."

THE DOJ FORUM ON BIG-TECH CENSORSHIP

Highlights of the significant comments are:

- *Brendan Carr, FCC Chair.* Chair Carr stated that the FCC will "push the envelope on Section 230 reform" to "smash the censorship cartel." He explained

Section 230

that Section 230 can and should continue to protect speech that is posted on a platform, but that Section 230 should not protect a platform's decision to remove content. Chair Carr also stated that he believes the FCC can require platforms to provide more transparency about their content moderation decisions – for example, what speech will be taken down and why.

- *Andrew Ferguson, FTC Chair.* Chair Ferguson expressed support for the Texas and Florida laws limiting online companies abilities to moderate user speech – and other state level regulatory efforts, generally – at issue in the *Moody* Supreme Court cases, despite the High Court ruling in that case that social media companies enjoy First Amendment protection. And consistent with this, he raised concerns about platforms having the unilateral power to decide who is permitted to speak online.
- *Adam Candeub, FCC General Counsel.* Candeub stated that Section 230 has been a “get out of jail free card” for platforms. He contended that Section 230 does not expressly limit liability where platforms remove content and that he considers this construction of the law judge-made. Candeub stated that “courts have been lazy and sloppy when it comes to Section 230 and it’s a place for the government to step up. This is what the law says and stick to it.” And he urged that, on this topic, the “administration has to move.” Candeub intimated that the FTC may consider rulemaking that impacts the scope of Section 230. Precisely how this would be done was not specified.

ALL WEBSITES HOSTING THIRD-PARTY CONTENT SHOULD TAKE NOTE, FROM MARKETPLACES, E-COMMERCE COMPANIES, VIDEO AND CONTENT PROVIDERS AND SOCIAL MEDIA

Further action from the government is expected now that the public comment period for the FTC RFI has closed. It remains to be seen which agency will take the “lead” in Section 230 reform and under what theory – antitrust, consumer deception/protection, or something different entirely. But, in light of the FTC RFI, and clear policy signals from key government officials, companies would be wise to begin to prepare for possible legislative change or enforcement actions.

WHAT SHOULD ONLINE COMPANIES DO?

Given the foregoing, companies that have user generated content on their sites or rely on user speech (reviews, ratings, comments), should consider taking the following steps:

- *Review Your Policies for Removing Content From the Platform.* FCC Chair Carr and FTC Chair Ferguson both expressed their view that Section 230 should not limit liability where platforms remove content. You should assess whether your website's terms of service and content moderation policy permits you to remove content from the platform and, if so, under what conditions. And if you work with a third-party vendor to monitor or curate reviews/ratings, you should re-assess their role in the funnel and ensure they are up to date on the potential legal changes.
- *Review Your Historical Practices of Removing Content From the Platform.* Are your actual practices in line with your policies? You should assess whether you have removed content from the platform and, if so, under what conditions you have taken these steps. The thrust of the concern with the removal of content is that conservative views are removed and discriminated against. While there are First Amendment issues implicated in the government's decision to control content moderation, if you want or need to defend your decisions, a record will assist.
- *Assess What the Impact Will Be, If Any, on Your Business/Product If You Cannot Remove/Deplatform Speech.* If Section 230 does change, or the scope of the liability protection it affords changes, what will be the effect on your product? While the government's focus is political speech, Section 230 immunizes platforms for all types of user generated content, political and commercial alike. Commercial speech such as reviews, ratings and third-party generated listings will likely be affected by changes to Section 230. For example, if you cannot remove user generated content from reviews, comments or listings, what does that do to your product or business?
- *What Is the Nature of Your Business Relationship With Your Website Service Provider?* Does your site exist because of another entity, such as a website service provider? Changes to Section 230 may affect or impact your relationship with your website service

provider and if they have immunity for *your* moderation choices.

TAKEAWAYS

- Key administration officials have specifically called for Section 230 to be reformed and/or modified.
- Key administration officials intend to enforce a specific interpretation of Section 230 that does not protect platforms from removing speech – which marks a key departure from traditional applications of Section 230 and court rulings to-date.

- It remains unclear which agency – DOJ, FTC or FCC – will be the primary enforcer and also under which theory, with agency officials promulgating theories under antitrust, consumer deception and communications laws.

Notes

1. <https://www.youtube.com/watch?v=RPPgJ-xkjWo>.
2. https://www.ftc.gov/system/files/ftc_gov/pdf/P251203CensorshipRFI.pdf.
3. <https://digitalcommons.law.uw.edu/cgi/viewcontent.cgi?article=1077&context=wlro>.
4. <https://www.eff.org/issues/cda230>.

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