

## Myriad Section 230 Bills Show Agreement Still Out Of Reach

By Kelcee Griffis

*Law360 (October 16, 2020, 9:18 PM EDT)* -- Lawmakers in both parties have recently shown interest in narrowing a federal internet liability shield now protecting social media platforms from lawsuits over user-posted content, but experts say they are still far from a clear-cut compromise.

If legislators truly want to pass a bill to crack down on website moderation practices, legal experts say they'll first have to agree on a common set of issues to target, as current options range from limiting the spread of disinformation to eradicating supposed political bias in moderation decisions. The current disparity of views indicates lawmakers will be debating what changes should be made well into the next Congress.

"Both sides want to change the law, but they're coming at it from very different angles," said Christian Fjeld, a former staff member of the House and Senate Commerce committees who is now a vice president at Mintz Levin Cohn Ferris Glovsky and Popeo PC. "Because of that, it's tricky to handicap as to whether or not Congress can find that sweet spot of bipartisan compromise."

By Law360's count, there are at least seven active bills in Congress that would amend Section 230 of the 1996 Communications Decency Act, which was meant to ensure websites wouldn't be sued into oblivion over user-posted content. Under the statute, websites like Twitter, Yelp and Reddit enjoy broad legal immunity as long as they take down clearly illegal content and employ "reasonable" moderation practices.

A few of the current proposals seek to further define moderation best practices — a major sticking point for the right — including the bipartisan Pact Act. Introduced in June by Sens. Brian Schatz, D-Hawaii, and John Thune, R-S.D., the bill would require online platforms such as Facebook, Twitter and YouTube to clearly explain their content moderation practices to consumers and set up a complaint system for when people think a moderation decision was unfair.

According to Michael de Leeuw, vice chair of business litigation at Cozen O'Connor, a politically neutral proposal such as the Pact Act will likely get more traction than other bills that seek to impose stricter oversight of social media platforms.

"Clear posting of moderation policies is going to be very important," he said. "You can't force companies to do things, but allowing them to remove things that are clearly unlawful and to adopt policies where broadly misleading content can be removed — I think those are fine goals."

On the Republican side, the Online Freedom and Viewpoint Diversity Act, introduced by Sens. Roger Wicker, R-Miss., Lindsey Graham, R-S.C., and Marsha Blackburn, R-Tenn., would amend Section 230 to allow exemptions only to companies whose content moderation meets a standard of "objective reasonableness."

Their bill would significantly roll back the Section 230 protections, including declaring that the shield doesn't apply when a platform "editorializes or affirmatively and substantively modifies" the user-posted content at issue.

De Leeuw said proposals like this are concerning as they conflate the role of the private sector and the role of government in moderating speech. The First Amendment was only meant to protect the private sector from being infringed upon by the government, not to give the government a platform to shape private speech, he said.

"What strikes me as the worst approaches are the ones that want to make online platforms almost quasi-government actors," de Leeuw said.

Another bill that seeks to tighten how websites moderate user-posted content is the Limiting Section 230 Immunity to Good Samaritans Act, from Sen. Josh Hawley, R-Mo. **The bill** would say that website users can rightfully sue platforms "for breaching their contractual duty of good faith," which it defines as inconsistently enforcing online terms of service.

Bills such as Hawley's and the Viewpoint Diversity Act point to growing discontent among right-leaning internet users who feel they're unfairly targeted for censorship by platforms, said Curt Levey, president of the Committee for Justice, a right-leaning group that advocates for changes in the judiciary and administrative agencies.

President Donald Trump has himself fanned the flames for amending Section 230, asking the Commerce Department to task government agencies with policing website moderation practices. Although Trump called attention to the divide, Levey said he's merely voicing long-held sentiments shared by other Americans.

"The fact that the president has focused on it has brought attention to it, but it certainly didn't create the unhappiness," Levey said.

The discontent has spread to other branches of government, as well. The Federal Communications Commission chairman said Thursday that he will launch a rulemaking to craft rules on Section 230 moderation, just days after Justice Clarence Thomas also expressed interest in seeing the law reinterpreted.

In a statement Thursday, three House Energy and Commerce Committee Republicans said they believe the FCC is on the right track and that they hope Congress will follow.

"We're encouraged to see these questions being raised and look forward to working with key stakeholders, including the FCC, to clarify the intent of a law enacted nearly 25 years ago," wrote Reps. Greg Walden, R-Ore., Bob Latta, R-Ohio, and Cathy McMorris Rodgers, R-Wash.

But while the current climate in the Trump administration may be favorable for Section 230

rulemakings, the prospects of getting a bill passed in Congress largely depend on what happens on Nov. 3, said Crowell & Moring LLP partner Christopher Cole.

"I think there is bipartisan support for something — the question is what that something will be," he said. "So close to the end of the legislative cycle, a lot depends on the composition of the next Congress."

Another bucket of proposals would nibble around the edges of Section 230 protections, ensuring that it doesn't shelter criminals. For example, the See Something, Say Something Online Act, introduced by Sens. Joe Manchin, D-W.Va., and John Cornyn, R-Texas, would require web platforms to report activity like illegal drug transactions in order to benefit from Section 230's legal liability shield.

And the Senate Judiciary Committee has already approved the bipartisan Earn It **Act**, which would strip social media platforms and other tech companies of their liability protection when it comes to child sexual abuse material.

While curbing illegal activity online is obviously desirable, Gardner Brewer Martinez-Monfort partner Richard Lawson said that baking too many nuances into the statute risks crafting regimes that only benefit the current, large platforms.

"It becomes like a bespoke, tailored regulatory regime that will favor the incumbents," said Lawson, who was director of the Florida attorney general's Consumer Protection Division. "I think all of these proposals are kind of missing the bigger picture."

Instead, he said, legislators should focus their energy on reshaping the core of Section 230 and giving the same responsibility to web platforms that physical publications must shoulder.

"All of those [proposals] are circling around that premier issue: Why do zeroes and ones get to avoid the editorial burdens that paper and ink have?" he said.

While these various proposals are up in the air, Mintz's Fjeld suggested an Oct. 28 Senate hearing could offer insight into the direction in which Congress is most likely to go. The Senate Commerce Committee unanimously voted earlier this month to force the heads of Facebook, Twitter and Google to testify on their content moderation practices under Section 230.

Fjeld noted that Wicker's Viewpoint Diversity Act will probably be the starting point for his committee, but that members' discussions could signal a willingness to work together.

"Often, they'll telegraph where they want to go on this," Fjeld said. If members on both sides of the aisle say they want to compromise, "they will genuinely try and do so."

--Editing by Brian Baresch.