

Current Status of Section 230 Activity – June 9, 2020

1. DOJ Legislative Proposal Status

- a. OMB packet is ready for to go pending your approval (could send early next week)
- b. Legislation is a set of measured, but concrete reforms that address a range of harms (including both the growing amount of illicit online content and censorship)

2. Public DOJ Section 230 Report and Related Materials

- a. Set of public documents ready to release after bill sent to OMB, including summary of Workshop and a report of DOJ’s findings, which describes at a high level (and with more reasoning) our legislative proposal, and identifies a few topics for further consideration
- b. The goal is provide a read-out of our Workshop and to document our hard work over the past 10 months to show that DOJ’s proposal is a thoughtful and credible contribution to the debate.

3. Executive Order

- a. The May 28 Section 230 EO has 4 main asks of DOJ (all are in progress):
 - i. Report DOJ spending on online platforms and review viewpoint-based restrictions of platforms that receive government spending
 - ii. Coordinate with NTIA on petition for rulemaking to FCC on Section 230
 - iii. Establish working group to develop model state legislation
 - iv. Develop federal legislation on Section 230
- b. Nonprofit filed a lawsuit last week in DDC alleging that May 28 Executive Order was unconstitutional. Case assigned to Judge Trevor McFadden.
- c. FCC rulemaking:
 - i. Coordinating our rulemaking and legislative efforts to be reinforcing, not conflicting.
 - ii. Rulemaking limited by statutory text and limited to political bias concerns:
 - 1. Clarifying meaning of “otherwise objectionable” in (c)(2)
 - 2. Clarifying meaning of “in good faith” in (c)(2)
 - 3. Clarifying what it means to “be responsible, in whole or in part, for creation of information” in (f)(3) to include labeling content and similar actions.
 - iii. Legislation can go farther and addresses broader concerns, including addressing illicit activity, civil enforcement and competition.

4. Hill Activity

- a. **Hawley** (b) (5)
A proposal they recently floated would amend Section 230 to exclude firms that use behavioral advertising (b) (5)
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- b. **EARN IT Act.** Graham and Blumenthal introduced the EARN IT Act in March. Would create an expert committee to create standards for addressing child exploitation that companies would have to abide by in order to get immunity. Has been criticized by industry as creating “backdoor” to ban encryption. Has been criticized by others as being a “pig-in-a-poke.”
(b) (5)
- c. **Other Hill conversations** (b) (5)

Current Status of Section 230 Activity – June 15, 2020

1. DOJ Legislative Proposal Status

- a. OMB packet is ready for to go pending your approval (ideally send tomorrow to OMB)
- b. Legislation is a set of measured, but concrete reforms that address a range of harms (including both the growing amount of illicit content online and platforms engaging in censorship)

2. Public DOJ Section 230 Report and Related Public Materials

- a. Set of public documents ready to release after bill sent to OMB, including summary of Workshop and a report of DOJ's findings, which describes at a high level (and with more reasoning) our legislative proposal, and identifies a few topics for further consideration
- b. The goal is provide a read-out of our Workshop and to document our hard work over the past 10 months to show that DOJ's proposal is a thoughtful and credible contribution to the debate.

3. Hill Activity

- a. **Hawley** [REDACTED] (b) (5) [REDACTED]
[REDACTED]
[REDACTED].
 - i. Intel suggests Hawley may move forward shortly on narrower 230 bill that requires platforms that are "edge providers" to have clear terms of service, and abide by terms of service (similar to DOJ's "good faith" definition)
 - ii. Hawley may also be considering a proposal to exclude firms that use behavioral advertising [REDACTED] (b) (5) [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED].
- b. **Shatz/Thune.** Sent a draft bill to DOJ. Bill requires platforms to have clear terms of service, semi-annual reporting requirements, have a complaint mechanism, and to take down illegal content within 24 hours. Includes DOJ's proposal to carve out federal civil enforcement. Also allows state AGs to enforce state laws with federal equivalent [REDACTED] (b) (5) [REDACTED]
[REDACTED]
- c. **EARN IT Act.** Graham and Blumenthal introduced the EARN IT Act in March. Would create an expert committee to create standards for addressing child exploitation that companies would have to abide by in order to get immunity. Has been criticized by industry as creating "backdoor" to ban encryption. Has been criticized by others as being a "pig-in-a-poke."
[REDACTED] (b) (5) [REDACTED]
[REDACTED]
- d. **Other Hill conversations** [REDACTED] (b) (5) [REDACTED]
[REDACTED]
[REDACTED]

4. Executive Order

- a. The four main asks to DOJ in May 28 Section 230 EO are all in progress
 - i. Actively coordinating with NTIA on FCC rulemaking petition to ensure that rulemaking petition is consistent and complementary to legislative efforts.
 - ii. Had call with Texas State AG staff last week to discuss ideas on working group.
- b. Nonprofit filed a lawsuit last week in DDC alleging that May 28 Executive Order was unconstitutional. Case assigned to Judge Trevor McFadden

Section 230 Talking Points

Section 230 and public rollout of DOJ Key Takeaways.

- Section 230 of the Communications Decency Act was enacted almost 25 years ago, when online platforms were in their infancy. Section 230 sought to ensure that websites acting in “good faith” to take down content harmful to children would not be considered “publishers” for *all* other third-party content on their services.
- Over time, however, online platforms evolved significantly from simple bulletin boards to actively curated forums. Several have transformed into the nation’s largest and most powerful companies, serving as primary conduits for how we receive and share information.
- Responding to widespread and bipartisan concerns about Section 230, the Department took a close look at the statute over the past year. This review has involved other federal agencies and every component within the Department. It also included a large public workshop and numerous listening sessions with experts and industry, and victims’ rights advocates.
- The Department of Justice recently issued a set of recommendations to update the outdated Section 230 immunity. We have identified a set of concrete reforms to provide stronger incentives for online platforms to address illicit material on their services while continuing to foster innovation and free speech
- We recommend reshaping incentives for online platforms under Section 230 in two important respects.
 - First, we need platforms to be better about addressing egregious criminal content on their platforms (such as child sex abuse, terrorism, and drug trafficking).
 - Second, platforms should be more transparent and accountable when taking down *lawful* speech.

- These are consistent objectives. The Constitution treats criminal content and lawful speech differently, so too should platforms.
- When it comes to issues of public safety and consumer protection, the government must act on behalf of society at large. Law enforcement cannot delegate its obligations to protect the safety of its citizens to the judgment of profit-seeking private firms. We must shape incentives for companies to create a safer environment, which is what Section 230 was originally intended to do.

- The courts' expansive interpretation of Section 230 immunity became unmoored from the statutory language from the start and has been stretched well beyond the statute's original purpose, which was to protect and encourage "Good Samaritan" behavior.
- Technological change has exacerbated the problems that came with the judiciary's misinterpretation of the law. This combination of misinterpretation and technological change has left online platforms both immune for a wide array of harms caused by third-party content and free to moderate lawful speech with little transparency or accountability.
- To return Section 230 immunity to its original purpose – to encourage and reward the "Good Samaritan" – the Department identified several scenarios in which platforms are not "Good Samaritans" and therefore should not be entitled to invoke the immunity
 - For example, Section 230's "Good Samaritan" immunity should *not* extend to platforms that purposefully solicit, promote, or facilitate criminal activity on their services or that fail to take down federal criminal content once they become aware of it.
 - Nor should Section 230's "Good Samaritan" immunity extend to the removal of lawful speech by platforms acting in bad faith or inconsistent with their own terms of service.

- We also identified types of claims that are clearly outside the core objective of Section 230 to protect against defamation and speech torts. These proposed carve-outs include civil claims for child sex abuse, terrorism, cyberstalking, and antitrust.
- The need for reform is important now more than ever as citizens rely on the internet for daily activities. At the same time, criminals and wrongdoers are increasingly turning to the internet to engage in illicit schemes. It is therefore imperative that we maintain the internet as both an open and safe space for our society, especially our children who are more reliant than ever on the internet for social interactions and education.

Executive Order 13925, Preventing Online Censorship, May 28, 2020

- The purpose of the EO is to foster free and open debate on the internet by, among other things, clarifying the scope of immunity under 47 U.S.C. § 230 to make it consistent with the original purpose of the law.
- The Department was given five tasks under the EO. The Department was to –
 - First, consult with the National Telecommunications and Information Administration (NTIA), during the NTIA’s preparation of a petition for rulemaking to be filed within 60 days with the Federal Communications Commission. Sec. 2(b).
 - Second, as with all other federal agencies, review its federal spending on advertising and marketing paid to online platforms and report its findings to OMB within 30 days. Sec. 3(a).
 - Third, review any viewpoint-based speech restrictions imposed by any of the platforms used by federal agencies for advertising and assess whether any of those platforms “are problematic vehicles for government speech due to viewpoint discrimination, deception to consumers, or other bad practices.” Sec. 3(c).
 - Fourth, form a working group to examine the potential enforcement of state statutes that prohibit platforms from engaging in unfair or deceptive acts or practices and develop model legislation for consideration by states that do not have adequate protection against such acts or practices. Sec. 5.

- Fifth, develop a federal legislative proposal aimed at promoting the policy objectives of the EO. Sec. 6.

- **EO Tasking Status:**

- **FCC petition.** The NTIA worked in consultation with the Department and filed its petition for regulations to the FCC on [REDACTED]. That petition advocates for regulations consistent with the EO, which seeks to clarify ambiguities within the law that have been misinterpreted by the courts. Sec. 2(b). The petition seeks –
 - regulations to clarify when providers that restrict access to content for reasons outside of those set forth in subparagraph (c)(2)(A) lose the immunity protections provided under (c)(1).
 - clarification for when decisions to take down material are done in bad faith and outside the protections of subparagraph (c)(2)(A) – for example if restrictions are done deceptively, pretextually, or inconsistent with a provider’s terms of service.
- **Review of federal spending.** The Department reviewed its federal spending on advertising and marketing paid to online platforms and reported its findings to OMB on [REDACTED]. Sec. 3(a).
- **Review of speech restrictions.** The Department is in the process of assessing whether any of the platforms used by federal agencies for advertising “are problematic vehicles for government speech due to viewpoint discrimination, deception to consumers, or other bad practices.” Sec. 3(c). [WHO IS DOING THIS? THE WORKING GROUP?]
- **Working group on state law.** The Department has formed a working group to examine the potential enforcement of state statutes that prohibit platforms from engaging in unfair or deceptive acts or practices. The working group is also developing model legislation for states that do not have adequate protection against such acts or practices. Sec. 5.

- **Federal legislative proposal.** The Department has developed a federal legislative proposal aimed at promoting the policy objectives of the EO and has submitted that legislation for interagency review, which it expects to be completed by [REDACTED].
Sec. 6.

Legislative Proposals

- [We defer to OLA on updating the background sections to reference the recent Hill activity on Section 230 – Schatz/Thune, EARN IT (including Leahy Amendment), etc. Also welcome OLA’s thoughts on what the AG can say publicly on any of the proposals if asked

[REDACTED]
(b) (5)

Section 230 Q&A

- Q: [REDACTED] (b) (5)
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- Q [REDACTED] (b) (5)
[REDACTED]
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- [REDACTED] (b) (5)
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- [REDACTED]
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- Q [REDACTED] (b) (5)
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- Q [REDACTED] (b) (5)
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○ [REDACTED] (b) (5)
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• Q [REDACTED] (b) (5)
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■ [REDACTED]
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(b) (5)

[Redacted]

- [Redacted]

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- Q (b) (5)

- [Redacted]

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- Q (b) (5)

- [Redacted]

- [Redacted] (b) (5)

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- [Redacted]

- Q: [Redacted] (b) (5)

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- Q [Redacted] (b) (5)

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- Q: (b) (5)
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CDA 230 AND TECH INDUSTRY RIGHTS / RESPONSIBILITIES

SAFE HARBOR: The Department recognizes Section 230 as an important part of today’s digital landscape and is working to understand its role in promoting internet innovation, while also exploring solutions for victims of crime and civil wrongs, law enforcement and civil discourse.

BACKGROUND

- Passed in 1996, Section 230 of the Communications Decency Act limits certain civil liabilities for interactive computer service providers for third-party content on their platforms. It was enacted primarily for two purposes:
 - (1) To encourage the growth of online forums by immunizing platforms against liability for third party speech.
 - (2) To encourage platforms to self-regulate by granting immunity for blocking or filtering offensive material
- However, the immunity granted by Section 230 has been too broadly construed and have caused harm. For instance, it has contributed to the distribution of CSAM and those problems have been exacerbated by the pandemic. Sarah E. Needleman, *As Children Spend More Time Online, Predators Follow*, WSJ, May 31, 2020, (child predators are revealing on dark web “that pandemic is providing them with greater access to potential victims” according to NCMEC) <https://www.wsj.com/articles/as-children-spend-more-time-online-predators-follow-11590926401>
- Responding to widespread and bipartisan concerns about Section 230, the Department took a close look at the statute over the past year. This review has involved other federal agencies and every component within the Department. It also included a large public workshop and numerous listening sessions with experts and industry, and victims’ rights advocates
- The Department of Justice recently issued a set of recommendations to update the outdated Section 230 immunity. We recommend reshaping incentives for online platforms under Section 230 with two important objectives:
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QUESTION

- [REDACTED] (b) (5) [REDACTED]
[REDACTED]
- [REDACTED]

RECOMMENDED RESPONSE

- [REDACTED] (b) (5) [REDACTED]
[REDACTED]
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QUESTION

- [REDACTED] (b) (5) [REDACTED]
[REDACTED]
[REDACTED]

RECOMMENDED RESPONSE

- [REDACTED] (b) (5) [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Executive Order 13925, Preventing Online Censorship, May 28, 2020

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- The Department was given five tasks under the EO (1) **consult with the National Telecommunications and Information Administration (NTIA)**, during the NTIA’s preparation of a petition for rulemaking to be filed within 60 days with the Federal Communications Commission; (2) along with other federal agencies, **review its federal spending on advertising and marketing paid to online platforms** and report its findings to OMB within 30 days; (3) **review any viewpoint-based speech restrictions imposed by any of the platforms** used by federal agencies for advertising and assess whether those platforms “are problematic vehicles for government speech due to viewpoint discrimination, deception to consumers, or other bad practices;” (4) **form a working group** to examine the potential enforcement of state statutes that prohibit platforms from engaging in unfair or deceptive acts or practices and develop model legislation for consideration by states that do not have adequate protection against such acts or practices; and (5) **develop a federal legislative proposal** to promote the policy objectives of the EO.

QUESTION:

- [REDACTED] (b) (5) [REDACTED]
[REDACTED]

RECOMMENDED RESPONSE:

- [REDACTED] (b) (5) [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
- [REDACTED]
[REDACTED]
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EXECUTIVE ORDER 13925 (May 28, 2020) – PREVENTING ONLINE CENSORSHIP,

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QUESTION:

- [REDACTED] (b) (5) [REDACTED]
[REDACTED]

RECOMMENDED RESPONSE:

- [REDACTED] (b) (5) [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
- [REDACTED]
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[REDACTED]