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'Awkward Fit'

Attorneys Say FTC Enforcement Unlikely After Trump's Social Media EO

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It's unlikely the FTC has motivation or authority to police social media companies for conduct President Donald Trump cited in his executive order (see [2005290058](#)), compliance attorneys said in interviews this week. Some noted that comments from Commissioners Christine Wilson and Rohit Chopra suggest bipartisan interest in examining social media algorithms.

In response to the EO, Wilson said it's important the FTC examine whether companies protected by Section 230 of the Communications Decency Act are engaging in unfair and deceptive conduct. Wilson cited a joint [statement](#) from her and Chopra asking the agency to study "how content curation and targeted advertising practices impact" data practices and how data monetization affects algorithms that drive content curation and targeted advertising. FCC Commissioner Brendan Carr drew [attention](#) to Wilson's tweets.

In March 2019, Chopra said the agency should consider whether 230 immunity is granted only to companies that are conduits of communication: "For companies that have converged away from neutrality, we need to consider whether they have lost Section 230 immunity unless or until their business is structured to simply serve content rather than select it." Offices for Chopra, Chairman Joe Simons, Commissioner Rebecca Kelly Slaughter and Commissioner Noah Phillips didn't comment.

The agency "is committed to robust enforcement of consumer protection and competition laws, including with respect to social media platforms, and consistent with our jurisdictional authority and constitutional limitations." That's per a spokesperson's email Thursday, citing a previous comment.

Policing online speech is an "awkward fit" for the agency's Section 5 authority to sanction unfair or deceptive acts or practices (UDAP), said Wiley's Duane Pozza: There aren't any "clear parallels" between the EO and current agency enforcement, he said, suggesting the agency could host a workshop or solicit comment to decide how to respond. The Wilson-Chopra statement suggests an opportunity for public feedback, he said.

Policing Section 230-protected companies under UDAP authority isn't something the FTC has historically done, said Kelley Drye's Christie Thompson. It would be surprising for the agency to take significant action, she added. A workshop or comment period is possible, she said.

The FTC doesn't want to touch the EO with a "10-foot pole," said Crowell & Moring's Chris Cole, arguing the agency has no interest in auditing social media platforms for political censorship. It's not an area an apolitical agency is equipped to handle, he continued. Proponents of the EO would be better served in bringing an FTC complaint showing one of these platforms is breaching its terms of service. That wouldn't require clarifying the scope of 230, as the EO envisions, because the agency has UDAP authority, he said.

Pozza noted the agency has been reluctant to police speech since the kidvid controversy of the 1970s. That's when Congress criticized the agency for attempting to regulate children's ads on TV, which resulted in clarification of the commission's UDAP authority.

The agency might be able to investigate and enforce UDAP if a platform represents that "it is neutral, but instead facilitates such a bias," emailed Hinch Newman's Richard Newman. "It is highly unlikely that the FTC is terribly motivated to get involved, let alone whether the agency even possesses the authority to enforce" Section 230 under its FTC Act Section 5 authority.

Proving such a case is a "fairly high legal bar," said ML Strategies Vice President Christian Fjeld. A violation would mean the platform blatantly violated some public representation about political neutrality. Statutes like 230 could potentially work against such a case because it shields companies from content moderation liability, he added. Nothing in there or in any other statute requires private platforms to be politically neutral, he said.

That Wilson is the only commissioner to express some level of sympathy for the EO is important to note, said Fjeld. However, there's bipartisan interest in algorithms, he said, evidenced by the Wilson-Chopra statement and rhetoric on Capitol Hill about content curation. Algorithms are the platforms' secret sauce, said Cole.

The FTC is critical for consumer protection, but the EO doesn't fix the problem, Common Sense CEO Jim Steyer said in a statement. He recommended a Section 230 update and increased FTC enforcement. The EO is a "blatant attempt at political intimidation," but Trump opened the door to a critical conversation about platform responsibility, he said: "On the Hill, there are people who are already taking a far more serious approach to this issue and we should pay attention to what they are saying and act on it."

Slaughter is taking **maternity** time off, a spokesperson emailed. She's "taking a period of time this summer to recover and focus primarily on her family, but she will still be participating in a limited number of matters. Exact timeframe will depend on how she is doing and how her baby is doing."

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