NATIONAL TAXPAYERS UNION

September 2, 2020

Federal Communications Commission
Consumer and Governmental Affairs Bureau
445 12th Street SW
Washington, D.C. 20554

RE: RM-11862, "Section 230 of the Communications Act of 1934"

Introduction

On behalf of National Taxpayers Union (NTU), I write in response to the Federal Communications Commission's invitation for public input on the Department of Commerce's Petition for Rulemaking regarding Section 230 of the Communications Decency Act of 1996.[1] NTU urges the Commission to reject the Department's recommendations for changes to Section 230, which we believe would improperly substitute regulatory overreach for Congressional action and do substantial harm to the numerous platforms that millions of Americans rely on every day. We urge the Commission to take no further action on the Department's petition, thereby leaving most of the debate over Section 230 to Congress - the proper venue for such discussions.

NTU's Stake in Technology and Telecommunications Policy

NTU has been the leading advocate for America's taxpayers since 1969, predating most of the platforms discussed below. Technology and telecommunications policy broadly - and more recently, Section 230 specifically - have long been a core part of our goals and priorities:

- Light-touch regulatory policy at the federal and state levels enables companies, workers, and entrepreneurs to grow and thrive, and this is true of the technology and information services sectors more than most. Section 230 is properly called 'the twenty-six words that created the Internet,'[2] and represents a rare area of federal policymaking restraint that has brought immeasurable growth to the American economy and innumerable benefits to society.
- Heavy-handed regulation, especially when handed down by federal bureaucrats, creates deadweight loss in the affected sectors and erects barriers to entry for would-be entrants to a new and/or thriving market. This adversely impacts competition, raising costs for consumers and taxpayers.

[1] NTU uses "Federal Communications Commission," "FCC," and "the Commission" interchangeably throughout this comment. NTU also uses "Department of Commerce" and "the Department" interchangeably throughout this comment.
[2] "The Twenty-Six Words That Created the Internet." Jeff Kosseff. Retrieved from: https://www.jeffkosseff.com/home (Accessed August 31, 2020.)

- Technological advancement has saved government agencies time and money, notwithstanding the challenges many bloated bureaucracies face in modernizing and updating their digital infrastructure. Policymaking that chokes off or slows innovation and growth, in turn, impacts taxpayers when the public sector cannot provide similar speed, reliability, and efficiency in goods or services as the private sector - and history has shown the public sector almost never can.

Therefore, NTU is invested in policies that support robust private technology and information services sectors, which benefit tens of millions of consumers and taxpayers across the country every single day. Threats to Section 230 are threats to all of the progress made in the Internet age, just one major reason why NTU is deeply concerned with the Department of Commerce's petition for rulemaking recently submitted to the FCC.[3]

The Department's Recommendations Would Represent an Improper Use of Regulatory Authority

Though NTU will argue against the Department's recommendations on the merits below, we believe that the Commission should reject the Department's petition out of hand because the Department's recommendations would represent an improper use of regulatory authority by the Commission.

Most of the recommendations made by the Department appear to substitute hasty but significant regulatory overreach for deliberative and measured policymaking in Congress, the venue where debates over Section 230 belong. At one point in the petition, the Department argues:

> "Neither section 230's text, nor any speck of legislative history, suggests any congressional intent to preclude the Commission's implementation [of the law]."[4]

Section 230's text does not permit the Commission's wholesale *re*implementation or reinterpretation of the statute, though, and 24 years after its passage at that. The Department is correct that the Internet has changed dramatically since the Communications Decency Act of 1996 became law.[5] The expansion of the Internet in that time, though, does not automatically expand either the Commission's regulatory authorities or the Department's authorities.

The Department argues at another point:

> "Congress did not intend a vehicle to absolve internet and social media platforms—which, in the age of dial-up internet bulletin boards, such as Prodigy, did not exist—from all liability for their editorial decisions."[6]

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[3] National Telecommunications and Information Administration. (July 27, 2020). "Petition for Rulemaking of the National Telecommunications and Information Administration." Retrieved from: https://www.ntia.gov/files/ntia/publications/ntia_petition_for_rulemaking_7.27.20.pdf (Accessed August 31, 2020.)
[4] *Ibid*., page 17.
[5] *Ibid*., page 9.
[6] *Ibid*., page 21.

This reading of Congressional intent may or may not be correct. Even if the Department is correct in its interpretation here, though, that does not give the Department or the Commission the ability to create or assemble a *separate* "vehicle" - one that would, in the Department's estimation, *not* "absolve internet and social media platforms … from all liability for their editorial decisions." Such a vehicle, if desired, would have to be assembled by Congress.

Lastly, the Department writes that:

> "The Commission's expertise makes it well equipped to address and remedy section 230's ambiguities and provider greater clarity for courts, platforms, and users."[7]

The Commission certainly has plenty of expertise on telecommunications matters, and NTU has worked productively with the Commission on several initiatives recently. However, that still does not allow the Commission (or the Department) the license to wholesale reinterpret or reimplement portions of the law that were enacted a quarter-century ago. If Congress wanted the Commission's rulemaking assistance here, and we assume they would, then lawmakers could write a bill that gives the Commission a role in modifying or reinterpreting Section 230. The Department cannot compel the Commission to do so just because the Department would like to see the law treated in a different manner.

The Department's Recommendations Would Do Substantial Harm to the Digital Economy and the Free Movement of Ideas on Digital Platforms

Notwithstanding NTU's belief that neither the Commission nor the Department has the authority to completely reinterpret Section 230 of the Communications Decency Act, we must challenge some of the assumptions and recommendations the Department makes throughout their petition.

Many of the Department's Statements Are Contradictory

The Department states near the beginning of their petition:

> "Since its inception in 1978, NTIA has consistently supported pro-competitive, proconsumer telecommunications and internet policies."[8]

Unfortunately, none of the Department's proposed remedies would be pro-competitive or pro-consumer. By proposing to enact new and significant regulatory burdens on digital companies, the Department erects barriers to entry for would-be competitors to existing technology companies. By raising the cost of regulatory compliance for new and existing companies, the Department's recommendations also risk raising the cost of goods and services for consumers and taxpayers.

In defending the burdensome standards the Department proposes for assessing platforms' content moderation, they complain that the courts have:

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[7] *Ibid*., page 28.
[8] *Ibid*., page 3.

> "...extend[ed] to platforms a privilege to ignore laws that every other communications medium and business must follow and that are no more costly or difficult for internet platforms to follow than any other business."[9]

In dismissing any added burdens the Department proposes for technology companies, though, they contradict a plain fact acknowledged by the Department earlier in their petition: that both manual and automated content moderation require "immense resources."

> "Online platforms like Twitter, Facebook, and YouTube have content moderation at the heart of their business models. Unlike the early internet platforms, they have invested immense resources into both professional manual moderation and automated content screening for promotion, demotion, monetization, and removal."[10]

Either content moderation is a low and easy standard for any company to meet, even if it requires reviewing millions of pieces of content per day, or it is a tremendous financial and logistical burden that requires significant resources. NTU would argue it is the latter, but at minimum it cannot be both. Therefore, the Department's argument that their proposed standards for technology companies are easy to meet - an argument it makes throughout the petition - makes little sense.

Elsewhere in the petition, the Department's proposed remedy of more "transparency" from technology platforms seems to contradict their proposed definition for what makes a platform "responsible, in whole or in part, for the creation or development of information."[11] The Department argues that defining a "[g]ood faith effort" from technology companies moderating their platforms "requires transparency about content moderation disputes processes." However, the Department also proposes a far more rigorous standard for when "an interactive computer service becomes an information content provider" and loses Section 230 immunity, a standard in which any service "commenting upon, or editorializing about content provided by another information content provider" becomes responsible for the information. This could create a scenario where a platform, such as Facebook or Twitter, providing the public with *transparent* information about why they moderated a piece of content from a public figure, could be seen as "commenting upon" the content and, therefore, becoming an "information service provider" partially or fully responsible for the content. It seems the Department is asking for more transparency, but also warning technology platforms that more transparency could strip them of Section 230 liability protections.

The Department's Proposed Remedies Would Harm the Digital Economy and the Free Movement of Ideas

More important than the contradictions above are the proposed changes to the Commission's interpretation of Section 230 that would significantly expand platform liability and kneecap the digital economy in the middle of America's economic recovery.

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[9] *Ibid*., page 25.
[10] *Ibid*., page 13.
[11] *Ibid*., page 42.

The Department proposes, among other items, 1) narrowing Section 230(c)(1) protections, so that they only "[apply] to liability directly stemming from the information provided by third-party users," 2) limiting the definition of "otherwise objectionable" content that platforms can moderate in the law to, essentially, "obscene, violent, or otherwise disturbing matters," 3) making Section 230 protections conditional on all sorts of "transparency" measures not otherwise prescribed by law, and 4) narrowing the law's definition of what makes a content platform a "speaker or publisher."[12] The Department is requesting a significant distortion of a quarter-century old law, and asking the Commission to do so by regulatory fiat. This is contradictory to this Administration's deregulatory agenda, and - as mentioned above - the Commission is an improper venue for such changes.

NTU has also written before about how changes like those mentioned above are counterproductive even if proposed through proper channels like legislation:

> "[Sen. Josh] Hawley's legislation [S. 1914] would hold Section 230 liability protections for internet services hostage to a cumbersome and vague regulatory process, which is deeply troubling. While details of what the Trump administration would do are not exactly clear, moving in the same policy direction of the Hawley bill would be extremely ill-advised. Such proposals undermine a prudent legal provision that has helped the internet flourish and grow in the last several decades. A thriving internet, in turn, has brought countless benefits to American consumers, workers, and taxpayers."[13]

NTU wrote this roughly a year ago. Now that details of what the Administration would do are clear, we are even more concerned than we were when efforts to change Section 230 through regulation were merely theoretical.

More broadly, as a coalition of civil society organizations, including NTU, wrote in July 2019:

> "Section 230 encourages innovation in Internet services, especially by smaller services and start-ups who most need protection from potentially crushing liability. The law must continue to protect intermediaries not merely from liability, but from having to defend against excessive, often-meritless suits—what one court called 'death by ten thousand duck-bites.' Without such protection, compliance, implementation, and litigation costs could strangle smaller companies even before they emerge, while larger, incumbent technology companies would be much better positioned to absorb these costs. Any amendment to Section 230 that is calibrated to what might be possible for the Internet giants will necessarily mis-calibrate the law for smaller services."[14]

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[12] *Ibid*.
[13] Lautz, Andrew. "The Trump Administration Should Do No Harm to Section 230." National Taxpayers Union, August 23, 2019. Retrieved from: https://www.ntu.org/publications/detail/the-trump-administration-should-do-no-harm-to-section-230
[14] "Liability for User-Generated Content Online: Principles for Lawmakers." National Taxpayers Union, July 11, 2019. Retrieved from: https://www.ntu.org/publications/detail/liability-for-user-generated-content-online-principles-for-lawmakers

The Department's proposed changes to Section 230 would be a miscalibration for both larger and smaller services, but the impacts of these regulatory changes might be most harmful to small, up-and-coming technology platforms. By choking off opportunities to grow and thrive in the Internet era, the Department's proposed changes would do significant harm to the digital economy, consumers who benefit from digital platforms, and taxpayers who benefit from more efficient and effective technology in government.

Conclusion

NTU urges the FCC to reject the Department of Commerce's recommendations. Gutting Section 230 is a counterproductive and harmful move in any venue, but it is particularly misplaced for the Department to suggest doing so through regulation rather than in legislation. Both process and substance matter here, and the Department's proposed changes would violate prudent policymaking in both. Section 230 has been vital to the growth of innovative and often free services provided by America's digital economy, and significant changes to this bedrock law could have multibillion-dollar impacts on companies, workers, consumers, and taxpayers. We urge the Commission to avoid major adjustments to the law.

Sincerely,

Andrew Lautz
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