

FOSTA Signed into Law, Amends CDA Section 230 to Allow Enforcement against Online Providers for Knowingly Facilitating Sex Trafficking

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Today, the President signed [H.R. 1865](#), the “Allow States and Victims to Fight Online Sex Trafficking Act of 2017” (commonly known as “FOSTA”). The law is intended to limit the immunity provided under Section 230 of the Communications Decency Act (“CDA Section 230”) for online services that knowingly host third-party content that promotes or facilitates sex trafficking. As drafted, the law has retroactive effect and applies even with respect to activities occurring prior to its enactment.

The aim of Congress in passing FOSTA was to encourage internet companies to exercise greater responsibility over sex-trafficking related content and to give law enforcement additional tools to go after the worst offenders – entities that had previously sought refuge behind CDA Section 230. The law was initially drafted following reports that online “classifieds” site Backpage.com had become a haven for promoters of the illicit sex trade, and that the site had [successfully pled a CDA Section 230 defense](#) in a number of civil suits brought by sex trafficking victims related to Backpage’s hosting of third party postings. Interestingly, on April 6, 2018, [Backpage.com and its affiliated sites were seized by the Department of Justice and other federal agencies](#) as part of a widespread criminal enforcement action reportedly involving 93 criminal counts asserted against seven individuals.

Generally speaking, the law creates a new federal criminal offense that prohibits the use or operation of a website or interactive computer service to intentionally promote or facilitate prostitution, along with providing for civil remedies for victims. The law also provides for additional remedies to allow federal and state officials to fight sex trafficking.

Most notably for online providers, the bill carves out an exception to CDA immunity for certain forms of state criminal liability. According to the law's preamble: "[CDA Section 230] was never intended to provide legal protection to websites that unlawfully promote and facilitate prostitution and websites that facilitate traffickers in advertising the sale of unlawful sex acts with sex-trafficking victims." While an exception to the immunity for federal criminal violations is already part of CDA Section 230, FOSTA now removes CDA immunity for online platforms with respect to state criminal charges if the conduct underlying the state violation would constitute a violation of the anti sex-trafficking statutes outlined under FOSTA. The law also removes immunity for FOSTA-related civil suits brought by victims against online services for knowingly promoting or facilitating sex trafficking through such activities as hosting third-party posts, listings and advertisements.

While the vast majority of websites, apps and online services that host user content steer far away from promoting sex trafficking, platforms are often not aware of everything users post, particularly large social media or similar sites that have thousands or millions of users. Thus, without the protection of CDA immunity, providers may seek to avoid liability under FOSTA by simply deciding to shutter online message boards, "personals" pages, or similar offerings where the content of user posts might potentially trigger FOSTA liability. For example, following FOSTA's passage in Congress, [craigslist shuttered its personal sections](#), citing the fact that "any tool or service can be misused." Other online services might employ automated tools to screen out objectionable postings. Of course, no tool is perfect and critics of FOSTA (such as the [Electronic Frontier Foundation](#)) have argued that compliance efforts will necessarily censor lawful opinions or content posted by advocates that are seeking to help or improve the condition of sex workers. Some major services may also choose to employ more human moderators to remove objectionable content, a cost that might be prohibitive for smaller websites.

On the other hand, given that FOSTA's scienter requirements penalize knowing promotion or facilitation of sex trafficking, some sites may choose not to moderate content at all to avoid acquiring any requisite knowledge of covered content (hence, the so-called "moderator's dilemma") (a [proposed amendment](#) to FOSTA by Sen. Ron Wyden that would have removed the potential for liability for filtering activities was rejected).

There has been an outcry from some internet companies and a number of open internet advocacy groups over the potential effects of FOSTA (and even a [letter from the Department of Justice](#) suggesting that a provision of the law that states that changes to the CDA apply retroactively may be unconstitutional). Still, without a doubt the law represents a small crack in the CDA legal shield that had been undisturbed by Congress since it was passed in 1996. Ultimately, FOSTA's intention is to give law enforcement and others more legal options to fight illegal online sex trafficking, and it is everyone's hope that the law assists with this goal. For providers, it remains to be seen how this law will affect the diversity of online content, compliance costs, , or the ability of new entrants to compete against incumbent platforms, not to mention how broadly it will be used by litigants and interpreted by courts.

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