

Biden-Harris Administration's Next Steps on Tech

March 25, 2021

Joe Biden took office in the middle of a pandemic and focused his administration's attention on the response to COVID-19. However, other policy priorities are likely to come onto policymakers' agendas as the pandemic (hopefully) recedes. As we look ahead to the next several months, we believe that close attention should be paid to the possibility that tech policy could become an area of focus for lawmakers and regulators alike.

Political Landscape

By Patti Solis Doyle and Lanhee Chen

Broadly, the American Rescue Plan (ARP) and other COVID-19 response efforts have put technology issues (other than cybersecurity) on the back burner. Biden's approach to fiscal recovery post-COVID-19 will continue to shape the policy landscape. The fiscal recovery package was an opportunity to start off the year in a bipartisan fashion. But the administration's decision to use a partisan process to pass the bill— budget reconciliation—suggests we may be headed for a period of continuing polarization. And the events around the Capitol riots on January 6 have made bipartisan collaboration even less likely.

Both Republicans and Democrats agree that the existing framework for the regulation of Big Tech, particularly social media companies, is outdated. However, they come from different perspectives.

Conservatives fear that social media companies are trying to control the flow of information and manipulate the content that people see, while progressives believe that they foster an environment that is too friendly to far-right groups. These divergent views suggest that the path ahead on policy action in this area is likely to be increasingly contentious.

This begs the question, then, if there are any tech-related issues that could generate bipartisan agreement. A few possibilities include:

- **Stricter enforcement of antitrust laws**, including by increasing funding to the Department of Justice's Antitrust Division.
- **Additional attention paid to the intersection between technology and U.S.-China relations.** China's so-called "military-civil fusion" (MCF) efforts, which were put under scrutiny during the Trump administration, are likely to be an ongoing target of U.S. attention.
- **A focus on cybersecurity issues**, which have garnered significant attention in light of the recent SolarWinds attack.

Overall, however, we do not anticipate a high level of lawmaking activity during the next two years. What we will see is increased regulatory activity from progressive appointees and an ongoing conversation about the role of tech in society. This includes possible Congressional hearings that will shape the public perception of technology companies regardless of political affiliation.

The Biden-Harris Approach

We believe there are five overarching factors that will shape the Biden administration’s approach to tech policy:

- 1. Administration ramping up:** As the administration staffs up, key positions still remain unfilled (note, for example, the delays at the FCC and FTC relative to other agencies). Current appointees are focused on the response to COVID-19 and implementation of the ARP.
- 2. Biden’s centrist approach...** Biden is likely to take a more centrist approach to tech-related issues. This, combined with Biden’s selection of so many former Obama administration officials, suggests a more pragmatic view of issues like net neutrality and data privacy. Expect administration officials to moderate progressive legislation from the House.
- 3. ... but antitrust?** One exception to the President’s centrist approach may be antitrust, where the appointment process points to a number of prominent progressives with Big Tech in their sights taking prominent positions. Antitrust is also a rare area for some bipartisan alignment.
- 4. The pandemic’s spotlight:** The pandemic has drawn attention to some issues and away from others. For example, the digital divide has become more urgent, because it is being experienced by families during the pandemic as a “homework gap.” By comparison, concern over data privacy issues has fallen.
- 5. A return to broader engagement:** The first four factors reflect “inside-the-Beltway” influences, but this administration is also committed to engagement around the country and the world. Actions in the EU could influence the administration’s approach, or even force the administration’s hand. On some issues, a progressive state could have significant influence, such as actions by California on data privacy.

Key Issues & People

This section offers a deeper dive into several pressing tech policy issues authored by Brunswick advisors in their respective field. Each section includes a short list of people to watch.

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Anitrust

By Terry Calvani

The course of tech antitrust enforcement during the Biden administration will be guided by two factors:

1. The President's appointment of the Assistant Attorney General (AAG) for Antitrust and the Chair and Commissioners of the FTC; and in the longer term: 2. Proposed legislation to amend the federal antitrust laws.

The new appointees will be important since the Biden administration, unlike that of his predecessor, was committed to leaving prosecutorial decisions in the hands of his enforcement officials with little or no White House interference. The talk about a Competition Tsar within the White House may suggest a change in course.

One thing is certain: Tech will be front and center of this administration's antitrust enforcement agenda, and is a rare area of potential bipartisan alignment.

No DOJ antitrust lead yet. President Biden has not yet nominated the Assistant Attorney General, who will oversee the Department's Antitrust Division. The appointment process may prove lengthy, as the president tries to reconcile different priorities. Some are calling for the appointee to be a woman and a person of color, while others want to make sure the chosen candidate is a progressive and not too close to Big Tech.

One appointment to note is that of Gene Kimmelman as Senior Counselor for the future AAG for the Antitrust Division. He is a well-known tech critic and a proponent of the progressive agenda.

Deadlocked commission. At the FTC, President Biden has nominated Columbia Law School Professor Lina Khan to the Commission. Khan has been a vocal critic of the consumer welfare paradigm that has characterized antitrust enforcement for the past forty years and is one of the principal spokespersons for a more populist approach to competition law. She was also instrumental in the House's investigation and subsequent report into competition in digital markets.

Previously, Biden designated FTC Commissioner Rebecca Slaughter to serve as the Acting Chair. She is widely thought to be one of the frontrunners to head the agency. (Chairs serve at the pleasure of the president, but must be one of the confirmed Commissioners). If selected, Slaughter would be the first person to make the transition from Acting Chair to Chair within recent memory.

With FTC Commissioner Rohit Chopra's nomination to the Consumer Financial Protection Bureau, Khan's confirmation would still leave a vacancy on the Commission. With two members from each party and the requirement that enforcement actions be authorized by a majority of voting Commissioners, it is possible that the Commission could be deadlocked and unable to take action on some matters.

Policy and legislative changes. In any event, the direction of the enforcement is bounded by the statutes and case law. Unlike many jurisdictions, the U.S. agencies must win their cases in the federal courts.

Recognizing that a “progressive” agenda will be limited by the case law, legislators—most prominently, Senator Klobuchar—have introduced legislation to expand the powers of the agencies. Although Democrats hold effective majorities in both Houses of Congress, their margins are razor thin.

The Klobuchar bill addresses several important issues.

1. Increased agencies’ enforcement budgets. This will pass; the precise amounts are open to speculation. At the margin, the enforcement agenda will be more robust without regard to changes in the law. This is motivated in part by the costs associated with bringing cases against Big Tech. Klobuchar may choose to pursue this as standalone legislation to secure rapid progress.

2. Increased sanctions for antitrust violations. Aspects of this provision enjoy bipartisan support, e.g., confirmation of FTC ability to secure equitable relief. The novel move to monetary fines will be more controversial.

3. Permission for vigorous enforcement. Change the requirement from requiring proof that a transaction “would substantially lessen competition” to “create an appreciable risk of materially lessening” competition. “Materially” is defined as “more than a de minimis amount.” If enacted, this would simply express the will of the Congress to lower the bar a bit. There is a reasonable likelihood of passage. It is not tech-focused but obviously would impact tech transactions.

4. Burden of proof. Change the burden of proof in certain types of mergers, including all very large transactions, such that the merging parties would have to prove that the merger was not anticompetitive. Included are so-called “killer” acquisitions of start-ups and disruptive firms. Bipartisan support can be expected for aspects. But the provision to include very large deals without reference to competitive impact may be another matter. Again, this section poses issues for tech.

5. Increased scrutiny for “dominant firms.” Outside of mergers, the draft legislation proposes the creation of a rebuttable presumption of illegality for exclusionary conduct undertaken by firms with a “dominant position.” This would mark a significant departure from the current U.S. approach and will likely be controversial. Here too tech is in the sights of the legislation, but this is true for many other sectors.

On the state side, several states, including Massachusetts, North Dakota, Arizona and New York are introducing anti-monopoly legislation aimed at Big Tech. North Dakota, the first to take on anti-competitive app store policies, was prompted to take action by the nonprofit the Coalition For App Fairness formed by Epic Games, Spotify, Match Group, and smaller startups. North Dakota’s effort failed; however, Arizona’s legislation is steadily advancing through the process.

KEY PEOPLE TO WATCH:



Merrick Garland, President Biden’s Attorney General, may play a very important role in the selection of the Assistant Attorney General for Antitrust and its deputies. Garland brings more antitrust experience to the job than many of his predecessors.



Professor Lina Khan is one of President Biden's picks for a Commissioner role at the FTC. She is known for her critical scholarship on Big Tech companies and is a proponent of more active antitrust enforcement. Her age and professional background make her an unusual pick. As a first-time nominee, she will have to undergo extensive vetting before she can be confirmed by the Senate.



Karl Racine, the District of Columbia attorney general, is getting more attention as a candidate for chair of the FTC. In 2016, Racine had teamed up with the Utah AG, a Republican, to urge the FTC to reopen investigations into Google, a move that is seen today as a precursor of recent State action against Big Tech. Racine was also one of the AGs who sued Facebook in the wake of the Cambridge Analytica scandal.



Senator Amy Klobuchar (D-MN), Chairwoman of the Judiciary Subcommittee on Competition Policy, Antitrust, and Consumer Rights and **Representative David Cicilline** (D-RI), Chairman of the House Antitrust Subcommittee, will play important roles in guiding proposed antitrust legislation through the Congress.



Gene Kimmelman for a limited time as Senior Counselor for the AAG for the Antitrust Division. Kimmelman is a well-known Big Tech critic and a proponent of the progressive antitrust agenda. In recent years, he has advocated for antitrust cases against Big Tech and backed the creation of a digital regulatory agency.



Tim Wu, a Columbia Law professor and a vocal proponent of more active antitrust enforcement against Big Tech, is joining the National Economic Council to work on technology and competition policy. While the NEC doesn't have a formal mandate for antitrust, he may play a de facto role of antitrust advisor to President Biden.

By Lanhee Chen

The Biden administration's approach toward China may differ in tone, but not in substance. As such, we don't expect to see too many short-term changes in U.S. policy toward Beijing.

The four years of the Trump administration coincided with a hardening of attitudes towards China within the U.S. Congress and national security community that is bipartisan in nature and unlikely to change anytime soon.

Confirmation hearings preview U.S.-China policy. We've gotten a preview of the president's approach to China in the answers given by his nominees during recent Senate confirmation hearings. They have outlined a policy that retains the Trump administration's goal of confronting the challenges presented by a rising China, but seeks to accomplish the goal of "out-competing" China through coordination across government agencies and with key allies and international organizations. Secretary of State Antony Blinken said that although he disagreed with the way former President Trump went about implementing his policy towards China, "the basic principle was the right one." This points to an abandonment by the Democrats of the preTrump status quo of trying to accommodate China

Different rhetoric, same approach. Some of the outgoing administration's harshest edges will be tamed, particularly in terms of public rhetoric, with the new administration expected to be more careful and measured. So although it will continue to signal a willingness to cooperate with China on global

challenges such as COVID-19 and climate change, the Biden administration has said it will not offer to ease restrictions on Chinese businesses or reduce tariffs on imports of Chinese goods. In addition, lawmakers in Congress (particularly Republicans) are expected to remain out in front of the administration to push for a hard stance towards China.

Global tech supply chains. For tech, this means a continued focus on policies aiming to maintain American leadership in industries of the future as China implements a focused state-run program, including by limiting the ability of Chinese companies to play in global supply chains.

Entity lists. With respect to restrictions placed on Chinese companies through the Commerce Department’s Entity List and similar lists maintained by other departments, Secretary of State Blinken and Secretary of Commerce Gina Raimondo both indicated in their testimonies that they intend to carefully study the issue before initiating processes to remove any companies.

Huawei. The Biden administration has clearly signaled that it intends to maintain the current restrictions on Huawei. After Raimondo gave an ambiguous answer regarding the policy towards Huawei in her confirmation hearing and was criticized by a number of senators, the White House press secretary clarified that it is the position of the administration that “telecommunications equipment made by untrusted vendors, including Huawei, is a threat to the security of the U.S. and our allies.” The administration indicated its intention to bar equipment from “untrusted vendors” and a desire to work with allies to secure both their networks and to expand their use of equipment made by U.S. and allied companies.

Increased transparency. On the other hand, we can expect at least an attempt at rationalizing the administration’s policies towards Chinese companies, making the decision-making process more transparent and the companies implicated by government action seem less arbitrary. This may, in particular, be to the benefit of companies whose nexus with national security concerns is arguably less direct.

Human rights. One area where the incoming administration is expected to be at least as strict as the outgoing one is the issue of alleged human rights violations by the Chinese government, particularly in Xinjiang. This will result in much closer scrutiny of American companies’ activities in the region.

As noted above, the Biden administration’s ability to foster alignment with key allies in the Indo-Pacific region and the European Union will be key to its ability to develop a credible and effective China policy that goes beyond the Trump administration’s tough rhetoric against Beijing.

KEY PEOPLE TO WATCH:



Kurt Campbell, who was selected as Deputy Assistant to the President and Coordinator for Indo-Pacific Affairs on the National Security Council, signals a potential focus on relationship-building in the region. He recently suggested the creation of ad hoc bodies to address urgent concerns regarding international trade and technology in lieu of large, multilateral trade deals.



Katherine Tai is the U.S. Trade Representative. She was confirmed unanimously, strengthening her position assuming the role. She previously served as chief trade counsel for the House Committee on Ways and Means and has found support on both sides of the aisle for her tough stance on addressing challenges posed by China.

For more insights on U.S.-China relations in the Biden administration, please consult our longer [policy paper](#) dedicated to this topic.

U.S.-EU Relations in Tech

By Tony Gardner

After four years of a U.S. administration that disdained the EU and frequently clashed with key European allies, European officials are eager for greater cooperation with the Biden administration, particularly on the digital economy. For years, the EU has acted as the de facto regulator of Silicon Valley, but it recognizes the need for alignment and collaboration with the U.S. given the nationality of the vast majority of tech companies.

EU and U.S. citizens share similar [concerns](#) around the need for greater transparency and accountability of online platforms, spread of illegal and harmful content, impact of tech on their democracies, and ethical use of artificial intelligence. Legislators in Europe and the U.S. are increasingly questioning whether antitrust tools are sufficient to deal with the specific challenges of online platforms that play a strategically important role.

Transatlantic agenda. In December 2020, the European Commission published a transatlantic agenda to foster U.S.-EU relations under the BidenHarris administration—encouraging [global cooperation](#) based on shared values of human dignity, individuals rights, and democratic principles and calling for the creation of an EU-U.S. Trade and Technology Council which will serve as a forum to “reduce trade barriers, develop compatible standards and regulatory approaches for new technologies, ensure critical supply chain security, deepen research collaboration, and promote innovation and fair competition.”

Risk of splintering against China. Both sides recognize the need for transatlantic alignment to craft common approaches, or at least minimize divergences and avoid the risk of a further splintering of the digital space, which would cede more ground to China’s vision.

Both (but especially Europe) face the challenge of maintaining global leadership in industries of the future as China implements a focused state-run program to dominate many of them, including artificial intelligence and big data analytics, super-computing, genomics, 3-D printing, industrial batteries, electric vehicles, the industrial internet, nanotechnology, and robotics.

The EU and the U.S. also both face the challenge of a China increasingly intent on controlling key international standard setting bodies and enshrining standards that will give an advantage to Chinese exporters and values. They share concerns about allowing China to set standards regarding facial recognition and 5G to lock in their values and exporters’ advantages.

At the same time, there remain areas where the EU and the U.S. maintain different approaches to key issues, particularly regarding the transfer of personal data and digital taxes. These will create major obstacles in the development of true EU-U.S. cooperation on tech policy.

Privacy Shield. One of the most serious and intractable differences stems from the EU Court's 2020 decision to invalidate the Privacy Shield agreement that has enabled thousands of companies in Europe to transfer personal data to the United States. This decision came just five years after a similar decision invalidating the Privacy Shield's predecessor, the Safe Harbor agreement, pointing to the difficulty for the EU and the U.S. to define a legal framework that will satisfy the court's core objection that U.S. law does not afford EU citizens sufficient rights of legal redress before U.S. courts, especially with regard to improper government surveillance. While encryption and data localization would address the problem, this approach would be economically destructive, would complicate law enforcement, and might not improve data security. The Biden administration will face the challenge of how to address this challenge, which may necessitate U.S. Congress updating national security laws.

No swift resolution. The Biden administration has given few signs of wanting a swift resolution on this issue. The Biden administration is unlikely to propose a national security reform that would pass muster with the European Court of Justice. But the early appointment of privacy expert Christopher Hoff to deputy assistant secretary for services at the U.S. Department of Commerce, who will be the European Commission's primary interlocutor on EU-U.S. data transfers, has widely been interpreted as the Biden administration's intention to prioritize transatlantic policy. But many more appointments in a range of agencies will also be key in shaping this debate.

Digital tax. Global taxation of the digital economy is another area of potential tension between the two blocs. The EU is poised to go ahead with a bloc-wide tax on digital services offered by tech companies, which are largely U.S.-based, if a global consensus fails to be reached at OECD level by mid-2021. Global negotiations have stalled in 2020 with the Trump administration's reluctance to enter a global agreement so close to the election. EU heads of state and government are due to take a look at the situation in March and decide what course of action the bloc should take. France in particular is pushing for decisive action by the EU to force the U.S.'s hand. Paris has its own national digital tax, but has pledged to scrap it as soon as there is an international deal. Spain and the U.K. are also ready to go ahead with a national tax if OECD negotiations fail. Unilateral taxes have been seen by the U.S. as discriminatory against U.S. companies and have led to threats of retaliatory tariffs against those governments.

Breaking the deadlock. Janet Yellen, the new U.S. Treasury Secretary, gave an early signal at a G20 meeting in late February of the new administration's willingness to work with its European allies on digital taxation. She said the U.S. would drop the so-called "safe harbor provision", which would have given tech companies the possibility to abide by any agreement on a voluntary basis only, and was a major stumbling block for international negotiations. Yet she had also reaffirmed in written responses to questions from the U.S. Senate Finance Committee that retaliatory tariffs could still be on the table if other countries moved ahead with unilateral efforts.

State action. At the same time, U.S. state legislatures are pursuing similar efforts to tax the digital economy. This year, Maryland lawmakers overrode a veto from the governor to pass the nation's first tax on digital revenue, leading the way for several state legislatures proposing similar tax bills including Connecticut, Indiana, Massachusetts, Montana, Nebraska, and New York, with more expected to follow. For many states, levying a tax on digital advertising is a practical solution to fill budget deficits exasperated by the current economic downturn. However, states are expected to face legal battles, as evidenced by the recent tech industry-led lawsuit aiming to halt Maryland's landmark bill.

KEY PEOPLE TO WATCH:



Christopher Hoff directs the U.S. Department of Commerce's efforts to create digital policy, including cross-border data flows. As a new deputy assistant secretary, Hoff assumes responsibility for managing EU-U.S. data transfers following the CJEU's decision to invalidate the Privacy Shield adequacy framework.



Cam Kerry, currently a senior fellow at the Brookings Institution, previously served as General Counsel at the Commerce Department. He played a key role in Safe Harbor and wrote an exhaustive defense of the Privacy Shield. If Kerry returns to government service, he may play a key role on U.S.-EU technology issues.

Cybersecurity

By Siobhan Gorman and George Little

The global supply chain attack on SolarWinds, which was uncovered by the American cybersecurity company FireEye in December 2020, and the attacks on Microsoft Exchange Server products, announced in March, are undeniably shaping the U.S. cyber policy landscape for 2021. As the investigations into these cyber incidents continue, we're watching a number of key issues, including:

Threat intelligence sharing. In recent years, there have been periodic attempts to address gaps in cyber intelligence sharing between the private sector and government. While companies involved in the SolarWinds response agree on the need for information sharing mechanisms, and many shared information on an ad hoc basis during the immediate response, they offered different visions for what this could look like in practice during a series of congressional hearings in February 2021. Microsoft's Brad Smith pushed for mandatory disclosure in ways that the industry has resisted in the past, whereas FireEye's Kevin Mandia called for elevating the status of cybersecurity "first responders" in the private sector and protecting cyber threat intelligence as confidential information shared with the government.

National cyber resilience. In the absence of a clear legislative response to the SolarWinds incident and the Microsoft Exchange Server hack, we may see the Cyberspace Solarium Commission's March 2020 report resurface as a way to facilitate action, including on strengthening cyber resilience. The report, which draws from more than 300 interviews, offers a new cyber strategy and more than 80 policy recommendations. The CSC also used the report to draft more than 50 legislative proposals that could support the implementation process.

Cyber diplomacy. We also expect the Biden administration will return to international cyber diplomacy, engaging in multilateral discussions about cyber norms and behaviors that should be offlimits for all actors. As noted in its Interim National Security Strategic Guidance document, the Biden administration will explore proportional responses to cyberattacks through "cyber and noncyber means," which could include offensive cyber capabilities as well as more traditional tools like economic sanctions.

The Biden administration is likely to use momentum around the SolarWinds and Microsoft hacks to address a wider set of cybersecurity issues, including some that have the potential to cause even more harm to companies and consumers. For example:

Ransomware and extortion. Until SolarWinds, cyber incidents involving ransom and extortion were the leading cyber threats of 2020. Addressing the dangers posed by ransomware attacks, which have surged during the pandemic, is a pressing priority. Agencies like the Federal Bureau of Investigation, the Department of Justice, the Department of Homeland Security, and the Treasury Department issued ransomware advisories during 2020, but looking ahead, we may see more aggressive action on this issue and other tech policy agenda items from the Federal Trade Commission and the Consumer Financial Protection Bureau, particularly given the potential impact of cyber incidents on consumers.

Semiconductor shortages. The global shortage of semiconductor chips, which was accelerated by supply chain disruptions during the pandemic, is another pressing issue given their broad use across sectors. In the U.S., this challenge falls at the intersection of national security and economic security—and the broader conversation about tech relations with China. Although the Biden administration and members of Congress have expressed their intention to make federal investments in U.S. semiconductor manufacturing a priority, building out this capacity will be time- and resource-intensive.

Disinformation and hybrid threats. Conspiracies surrounding the 2020 presidential election and violent events at the U.S. Capitol in January 2021 demonstrated how disinformation and other hybrid threats like deep fakes are destabilizing public trust and national security. While these issues intersect with several others on the tech policy agenda, including Section 230 and content moderation, they have generated more political division than unity in recent years. These issues also have geopolitical ramifications, potentially intensifying adversarial relationships with Russia, China, and Iran while drawing out regulatory tensions with the EU.

The Biden administration has an opportunity to distinguish itself in these and other areas by turning near-term attention on cyber incidents into long-term relationship building with the wider cybersecurity and IT community. The administration will also need to assemble a strong interagency team to advance this work across government.

KEY PEOPLE TO WATCH:



Anne Neuberger was appointed to a newly created position in the National Security Council, Deputy National Security Advisor for Cyber and Emerging Technology. She comes to the White House with a background working at the National Security Agency where she served as Director of Cybersecurity and Assistant Deputy Director of NSA's Operations Directorate, among other roles.



Rob Silvers is reportedly under consideration to serve as director of the Cybersecurity and Infrastructure Security Agency— a role that was previously held by Chris Krebs. Silvers worked at DHS during the Obama administration and would come to CISA with broad cyber policy experience.



Senator Angus King (I-ME) serves as co-chair of the Cyberspace Solarium Commission along with Representative Mike Gallagher (R-WI). The policy recommendations set out in their March 2020 report may gain renewed attention as Congress and federal agencies learn more about the full extent of the SolarWinds intrusion and the Microsoft Exchange Server compromise.



Senator Mark Warner (D-VA) co-founded the bipartisan Senate Cybersecurity Caucus and chairs the Senate Intelligence Committee. Warner is a former entrepreneur and has been a longtime leader on a range of tech policy issues, including cyber policy



Representative Jim Langevin (D-RI) chairs the House Armed Services Committee's Cybersecurity Subcommittee, which was recently established with a focus on cybersecurity operations, information systems, and emerging tech.

Privacy & Encryption

By Mike Rogers and Mark Seifert

Look for the Biden administration and a Democratic Congress to be more aggressive than their predecessors around privacy. Concerns with privacy, data collection, data protection, and Big Tech overreach often tend to cross the political aisle, making the probability of some form of action in these areas even greater in the near-term. We expect to see activity in the following areas:

National privacy legislation has long been an area where the U.S. has been lagging at the federal level compared to Europe, other nations, and several U.S. states. The devil will be in details on this issue and aspects of contention include concerns around data collection, data sharing, and the use of data as a basis of discrimination. There will also be concerns around preemption of state laws in this area. But look for federal legislation here late in 2021 or early in 2022.

In the U.S. it's important to focus on the activity in specific states. In the absence of federal law, states are taking action to improve privacy protections. After a sweeping majority, Virginia has joined California as the second state to enact comprehensive data privacy law. Virginia's Customer Data Protection Act (CDPA) resembles the EU's General Data Protection Regulation by implementing a "long-arm" approach by applying to any business, regardless of location, "targeting" residents. The growing nationwide patchwork of privacy proposals includes over 15 bills currently introduced or in committee in states such as Minnesota, New York, Washington, and many others.

Net neutrality (the concept that all data on the internet should be treated equally regardless of content, use, platform, application, or device) was an area of high activity during the Obama administration, but did not receive much attention during the Trump administration. It will likely once again come to the fore in 2021.

A replacement of the EU-U.S. Privacy Shield agreement will need to be addressed. In July 2020, the EU Court of Justice invalidated the existing agreement which provided a methodology for the transfer of data between the EU and the U.S. so as to comply with European data privacy laws. A replacement agreement has been a topic of discussion for almost 18 months, but the challenge has been trying to generate a replacement that complies with both EU law and U.S. national security laws. This will not be an immediate priority for the Biden administration, but it will have to be addressed—likely by 2022.

Data discrimination/data usage concerns could turn into legislation and policy initiatives that address the use of algorithmic-driven discrimination. This would include areas like employment, education,

housing, access to credit, eligibility for government benefits, as well as data discrimination against those with disabilities, which are of high interest to Democratic leadership in both the Congress and White House.

The effects of SolarWinds will extend into privacy issues, in particular the **government's use of and protection of data**. This has long been an area of concern that crosses party lines and one that will continue to be an area of focus in the coming year— especially in the aftermath of the Solar Winds cyber event.

KEY PEOPLE TO WATCH:



Rebecca Kelly Slaughter was named as Acting Chair of the Federal Trade Commission in January 2021. Prior to joining the FTC, she served as Chief Counsel to Senator Charles Schumer (D-NY), who she advised on privacy and other tech policy issues. In addition to strengthening general consumer privacy protections, she has laid out two overlapping priority areas, namely: COVID-19- related privacy issues and racial equity.



Daniel Kaufman is Acting Director of the Federal Trade Commission's Bureau of Consumer Protection. Kaufman, who has spent more than 20 years working at the FTC on matters related to privacy and data security, has been vocal on issuing financial penalties following data breaches.



Representative Jay Obernolte (R-CA) comes to Congress with experience working in the technology industry and serving as an assemblyman for California's 33rd district. During his time as an assemblyman, Obernolte had strong views on aspects of the California Consumer Privacy Act, including concerns about shifting too much authority to consumers at the expense of industry, which may shape debates about data privacy legislation at the federal

level.

Section 230 & Content Moderation

By Claire Thomas-Daoulas

The issue of content moderation by tech platforms has arguably been the highest profile tech policy issue of the last four years. Tech companies are grappling with finding a balance between keeping their services safe from misinformation, hate speech, or violent content, and being accused of overreaching and censoring certain political opinions.

In this context, both then-President Trump and Democratic nominee Joe Biden called in 2020 for a repeal of Section 230 of the Communications Decency Act, the legislative statute that governs the protections afforded to tech companies from the content posted by users on their sites. Section 230 is hailed as one of the most important laws in shaping what the internet is today—without it, user-generated content could never have developed in the way it has. It is often described as the “sword and the shield” of the law - the sword lets tech companies moderate content as they see fit, while the shield protects them from liability for content posted by their users. But its critics argue today that it is no longer appropriate to govern today's internet and that it affords tech companies too much leeway in making content moderation decisions.

For years, conservative activists and politicians have claimed that Silicon Valley’s content moderation policies disproportionately limit conservative speech. While there has been no data supporting such claims of bias, recent content moderation decisions towards President Trump have reinforced that belief in conservative policy and political circles.

Among Democrats and progressives on the other hand, tech platforms are criticized for not doing enough to address misinformation, promoting fake news through their algorithms, and even threatening our democratic foundations.

So, while criticism of Section 230 is widely shared by both sides of the political spectrum, Republicans and Democrats come at it from very different perspectives. Potential areas for bipartisan alignment around content moderation may include the following:

- **Increased transparency requirements** for tech companies’ moderation decisions. While this would not resolve the debate of what type of content should be taken down, it would help the public and regulators understand the motivations behind those decisions and increase trust in them.
- **Specific carve-outs from the blanket liability shield** afforded by Section 230 for particularly harmful content. One such example is the bipartisan EARN IT Act, introduced in March 2020 by Sens. Lindsey Graham (R-SC) and Richard Blumenthal (D-CT) to strengthen the requirements for tech companies to tackle the spread of child sexual abuse material.

Since his declaration in January 2020 that “Section 230 should be revoked immediately,” President Biden has not advanced any specific proposals to address the issue.

SAFE TECH Act. In the Senate, senior Democrats are also advocating for changes to Section 230, introducing the SAFE TECH Act in early February 2021. The bill lays out recommendations to make tech companies liable for enabling cyber-stalking, targeted harassment, and discrimination on their platforms. The law focuses on reducing immunity for content that platforms profit from through advertising and removes the broad shield provided by the current legislation in case of lawsuits. This bill indicates the tone of Democrats’ efforts to reform Section 230—leaving all mentions of censorship or conservative bias behind and focusing on civil rights instead.

KEY PEOPLE TO WATCH:



services.

Senator Amy Klobuchar (D-MN) has become a leading voice in the Democratic party across a range of technology policy issues, including content moderation. She is coauthor of the SAFE TECH Act with Senator Mark Warner (D-VA) and Senator Mazie Hirono (D-HI). This legislation offers ideas for reforming Section 230, including honing in on advertising and other paid



FCC Commissioner Nathan Simington (R) was appointed by former President Trump after serving as an advisor to the National Telecommunications and Information Administration (NTIA). He made notable contributions to the NTIA’s 2020 petition to the FCC to reinterpret Section 230.

Looking Ahead

By Morgan Gress Johnson

Broadly, 2021 will be a foundational year as the new administration builds its team and congressional leaders establish the legislative issues they will prioritize. Antitrust enforcement actions and the signals the administration's progressive appointments make will be top of mind for all of big tech. While there will be more focus initially on the issues outlined above, we also cannot lose sight of emerging technologies, especially as they become more prevalent in traditional business and industry operations.

Federal and state policymakers have caught up to the technology sector more so than in the past, and so we cannot expect emerging tech to escape regulation. For example, as companies incorporate more AI and automated decision-making, policymakers will raise questions around workforce development and STEM education to ensure worker skills are meeting these new demands. Corporate leaders are expected to address these types of issues head-on.

Finally, we cannot ignore the spotlight that the pandemic has put on broadband access and 5G development. It is largely expected to be a part of any infrastructure effort put forth by the Biden administration, and we will highlight this and other critical issues in future Brunswick technology notes

Upcoming International Dates

In addition to the U.S. activity considered in the sections included earlier, we can expect tech policy issues to come to the forefront in the context of significant international government-focused events. Throughout 2021, these include:

Confirmed

- **World Economic Forum, Global Technology Governance Summit** (April 6-7, Tokyo)
- **G7 Summit** (June 11-13, United Kingdom)
- **World Economic Forum, Special Annual Meeting** (August 17–20, Singapore)
- **UN General Assembly** (September 14-30, New York)
- **G20 Summit** (October 30-31, Rome)

Pending

- **NATO Summit** (Brussels)
- **Summit for Democracy** (Washington, D.C.)
- **EU-U.S. Summit**

U.S. Legislative Activity (Federal and State)

January

- **Jan. 22:** [S.24](#) Protecting Personal Health Data Act (Data Privacy/Protection)

February

- **Feb. 4:** [S.224](#) Promoting Digital Privacy Technologies Act (Data Privacy/Protection)
- **Feb. 4:** [S.225](#) Competition and Antitrust Law Enforcement Reform Act (CALERA) (Antitrust)

- **Feb. 8:** [S.299](#) SAFE TECH Act (Platform Liability/Content Moderation)
- **Feb. 10:** [HB2005](#) Arizona Anti-Monopoly Bill (App Store) (Antitrust) **PASSED**
 - Similar bills: Minnesota ([HF1184](#)), Georgia ([HB229](#)), Illinois ([SB2311](#)), Hawaii ([SB780](#))
 - Failed bills: North Dakota ([SB2333](#))
- **Feb. 12:** [HB732](#) Maryland Digital Ad Tax (Digital Tax) **PASSED**
 - Similar bills: New York ([S08056/A10706](#)), Connecticut ([HB6187](#)), Indiana ([HB1312](#)), Massachusetts ([HD3210](#) and [HD3601](#)), Montana ([LC3237](#)), Nebraska ([LB989](#))
- **Feb. 22:** [SB228](#) Utah Social Media Content Moderation (Platform Liability/Content Moderation) **PASSED**

March

- **Mar. 2:** [SB1392](#) Virginia Consumer Data Protection Act (Data Privacy/Protection) **PASSED**
 - Similar bills: New York ([S567](#) and [A680](#)), Washington ([SB5062](#)), Minnesota ([HF36](#)), Utah ([SB200](#)), Oklahoma ([HB1602](#)), Florida ([HB969](#)), Alabama ([HB216](#)), Illinois ([HB3910](#) and [HB2404](#)), Kentucky ([HB408](#)), South Carolina ([H3063](#))
 - Failed bills: Mississippi ([SB2612](#)), North Dakota ([HB1330](#))

Contributors

Terry Calvani, Senior Advisor, Washington, DC

Antitrust, competition, and regulatory expert; Calvani also previously served as Commissioner of the U.S. Federal Trade Commission.

Lanhee Chen, Senior Counselor, San Francisco

Served as chief policy adviser to Mitt Romney during his 2012 presidential bid. Now a member of the public policy faculty at Stanford University and fellow at the Hoover Institution, Chen advises Brunswick clients on public affairs and geopolitical challenges with a particular focus on health care issues.

Patti Solis Doyle, Partner, U.S. Public Affairs Lead, Washington, DC

Veteran political advisor and commentator, with more than 30 years of experience in politics, presidential campaigns, and public service.

Anthony Gardner, Senior Advisor, London

U.S.-European affairs advisor; Gardner also previously served as U.S. Ambassador to the European Union.

Siobhan Gorman, Partner, Washington, DC

Crisis, cybersecurity, public affairs, and media relations advisor; 17-year career as a reporter, most recently at The Wall Street Journal.

Morgan Gress Johnson, Associate, Washington, DC

Public affairs and corporate communications advisor; Experience working across the technology sector and advising clients on their reputation, regulatory, and crisis strategies.

George Little, Partner, Head of Office, Washington, DC

Crisis communications, cybersecurity, reputational, and public affairs advisor; Little was previously head of Marketing and Communications at Booz Allen Hamilton, Assistant to the U.S. Secretary of Defense for Public Affairs, and Pentagon Press Secretary

Katarina Rebello, Account Director, Washington D.C.

Cyber specialist; data and tech policy background working in Washington, D.C. with federal agencies and the World Bank.

Adm. Mike Rogers, USN (Ret.), Senior Advisor, Washington, DC

Cybersecurity, technology, geopolitical, and crisis expert; Rogers joined Brunswick following a 37- year career in the U.S. Navy, where he served as Commander of U.S. Cyber Command and Director of the National Security Agency.

Mark Seifert, Partner, Washington, DC

Cybersecurity and privacy expert, corporate communications advisor; has extensive experience within the U.S. government, including 16 years with the Federal Communications Commission.

Claire Thomas-Daoulas, Director, San Francisco

Tech policy, competition and antitrust advisor; extensive experience in policy comms and public affairs for tech companies in Brussels and San Francisco.

About Brunswick

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For more information contact: PublicAffairsUS@brunswickgroup.com