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## New Drivers, Same Bumpy Ride

### Congressional Tech Focus Will Continue This Term, Fueled by Bipartisan Scrutiny on Multiple Fronts

With the Democratic party now in control of both the House and the Senate, we anticipate increased congressional oversight of the private sector and far greater legislative momentum for Democratic proposals in the 117th Congress. The tech sector, in particular, faces unique challenges due to: (a) sustained criticism from *both* the right and the left (for different reasons and objectives) on content moderation and Section 230 of the Communications Decency Act; (b) continued *bipartisan* congressional interest and scrutiny related to antitrust and competition issues, alongside parallel federal and state enforcement actions; and (c) a new Democratic president who also has called for revoking Section 230 and expressed concerns about the size and influence of “Big Tech.”

Following extensive testimony and related investigations during the 116th Congress, lawmakers in both chambers continue to call for additional oversight of leading tech and social media companies on a wide variety of issues, including [Section 230](#),<sup>1</sup> [content moderation](#),<sup>2</sup> [mis/disinformation](#),<sup>3</sup> [competition](#),<sup>4</sup> [privacy](#),<sup>5</sup> [employee rights](#),<sup>6</sup> and [diversity and inclusion](#).<sup>7</sup> While all of these issues will be front and center for the tech sector, we expect particular congressional interest and continued focus from investigative and policy-making angles in two key areas:

- ❖ **Section 230 / Content Moderation**
- ❖ **Antitrust / Competition**

#### SECTION 230 / CONTENT MODERATION

While the two sides have very different motivations, both Democrats and Republicans in Congress continue to call for revamping Section 230 of the Communications Decency Act (47 U.S.C. § 230) — a law that protects internet companies from liability for user-created content that is hosted on their platforms. Rep. Ro Khanna (D-CA), whose district includes parts of Silicon Valley, [summarized](#)<sup>8</sup> the dilemma that these companies face: “You have literally two different camps on moderation. One camp is telling tech companies to remove more content, and the other camp is saying remove

less content.” While former President Trump and Republicans on the Hill have cried foul and called for removal or reform of Section 230 protections when tech platforms have taken down posts or content that were in violation of their policies, claiming that it allows tech companies to censor conservative views, President Biden told the New York Times last year that Section 230 “[should be revoked](#)”<sup>9</sup> due to rampant misinformation online and insufficient action by tech companies to take it down. While there are some [moderating](#)<sup>10</sup> voices, including one of the original co-authors of 230, Senator Ron Wyden (D-OR), the fact that the parties are far from aligned on the reasoning behind any particular change indicates that a complete repeal is unlikely and impractical. But one thing is clear: Attempts at Section 230 reform are coming, with support on both sides of the aisle.

In addition, the widespread interest in how Section 230 shapes online discourse has only grown since the January 6 insurrection at the Capitol, which was amplified by users online and impacted members regardless of party. In the words of one recent [report](#),<sup>11</sup> “The recent violence at the Capitol and its aftermath is adding fresh urgency, as tech platforms’ role in amplifying violent rhetoric highlights the industry’s broad power and influence over American democracy.” We expect significant oversight related to the events at the Capitol, which will spur even greater focus on Section 230 as members push for reform.

### *Senate*

We expect the Senate Commerce Committee will continue to take a lead role on this issue following a pre-election hearing last fall with the CEOs of several major tech companies. Incoming committee chair Sen. Maria Cantwell (D-WA) raised concerns about mis/disinformation during that October 2020 hearing, but did not introduce legislation or join a Republican-sponsored bill ([S. 4534](#)) to change Section 230. (That bill, introduced by then committee chair Sen. Roger Wicker (R-MS), would have limited the types of content that could be removed and would have replaced a subjective standard for content removal with an objective standard.) Other Democratic members of the committee indicated at that time that they were open to holding a follow-up hearing in the 117th Congress. As committee member Sen. Richard Blumenthal (D-CT) stated in a recent interview, the industry has “done enduring damage to their own credibility, and these events will renew and refocus the need for Congress to reform big tech.” Toward that end, we anticipate increased momentum and reintroduction of two bills with bipartisan backing, the EARN IT Act ([S. 3398](#)) and the PACT Act ([S. 4066](#)). (Sen. Blumenthal is also a member of the Senate Judiciary Committee, which itself held a hearing on Section 230 last Congress and also could drive the conversation this term.)

On the other side of the spectrum, Sen. Roger Wicker (R-MS), the top Republican on the Commerce Committee, has been a frequent critic of Section 230, recently [commenting](#),<sup>12</sup> “An elite handful of giant tech companies now dominate the marketplace beyond anyone’s wildest imagination. . . . This monopolistic behavior, coupled with the worsening restrictions on free speech, calls for congressional action.” And other vocal conservative members, such as Sen. Lindsey Graham (R-SC) (Senate Judiciary Committee), recently [called on Congress](#)<sup>13</sup> to “strip Section 230 protections from Big Tech,” adding that they are “the only companies in America that virtually have absolute immunity from being sued for their actions, and it’s only because Congress gave them that protection.”

### *House*

There also have been vocal proponents for Section 230 reform in both parties in the House. The Democratic Chairman of the powerful House Committee on Energy and Commerce, Rep. Frank Pallone (D-NJ), recently [tweeted](#),<sup>14</sup> “Twitter and Facebook gave Trump a platform to spread disinformation that ultimately resulted in incitement of the mob that attacked the Capitol. My Committee will examine how these platforms are addressing disinformation and extremism on their platforms.” And long-time critic of leading tech companies Rep. David Cicilline (D-RI) [stated](#)<sup>15</sup> after the violence at the Capitol, “[We] have to be very concerned about the use of social-media

platforms to disseminate false information that invokes and incites violence. These platforms have to do a much better job of preventing people from using their platforms to organize and execute violence and other harms."

While the reasoning for Democrats' and Republicans' criticisms of Section 230 may differ, both sides are actively considering and open to reform. We believe it is a matter of "when," not "if," and related bipartisan (at least in name) oversight is sure to continue in the meantime, as members use hearings, investigations, and public reports to build the case for legislation.

## ANTITRUST AND COMPETITION

With wide-ranging investigations and litigation underway, including active matters brought by the Department of Justice, the Federal Trade Commission, and state attorneys general, we have seen a rare, bipartisan push in favor of more active regulation of the tech industry. Several powerful committees and members of Congress continue to drive attention toward what they view as anticompetitive conduct by the largest and most successful tech companies. With the majority in both chambers, we anticipate that Democrats in the House will pick up where they left off last fall, with continued oversight and efforts to update U.S. antitrust laws. They will now be joined by Senate Democrats controlling committee gavels and legislative priorities in the Senate, already the source of several recent proposals. In addition, while President Biden has not weighed in since taking office, his campaign clearly signaled<sup>16</sup> their position last fall: "Many technology giants and their executives have not only abused their power, but misled the American people, damaged our democracy and evaded any form of responsibility. That ends with a President Biden."

### House

The House Committee on the Judiciary's antitrust subcommittee, led by Rep. Cicilline (D-RI), wrapped up a wide-ranging, 16-month investigation into allegations of anticompetitive conduct by the leading tech companies in the fall of 2020. The investigation culminated in a 450-page majority staff report<sup>17</sup> accusing "Big Tech" of alleged abuses of monopoly power and Rep. Cicilline reiterating<sup>18</sup> a conclusion he seemed to have reached at the start of the investigation: "[T]hese companies as they exist today have monopoly power. Some need to be broken up; all need to be properly regulated and held accountable. We need to ensure the antitrust laws first written more than a century ago work in the digital economy. Our founders would not bow before a king. Nor should we bow before the emperors of the online economy."

While driven by the Democrats, several Republican members of the subcommittee, led by Rep. Ken Buck (R-CO), also voiced concerns and endorsed<sup>19</sup> some of the Democrats' reform proposals. Rep. Buck has noted publicly that he and Rep. Cicilline have discussed *bipartisan* antitrust bills, and he has personally vowed<sup>20</sup> to "crackdown on Big Tech." Another Republican member of the Judiciary Committee (now also on the House Committee on Energy and Commerce), Rep. Kelly Armstrong (R-ND), also supports<sup>21</sup> "tweaks" to U.S. antitrust law and has expressed concerns about competition in the digital marketplace. With momentum on both sides of the aisle, we expect continued scrutiny as this committee moves forward with a package of antitrust reforms this Congress aimed at addressing many of the conclusions and recommendations cited in the majority staff report.

### Senate

The Senate Committee on the Judiciary's antitrust subcommittee has long operated in a bipartisan manner under the leadership of incoming chair and former ranking member Sen. Amy Klobuchar (D-MN), along with former chair and now ranking member, Sen. Mike Lee (R-UT). Both Senators have repeatedly voiced concerns about alleged anticompetitive conduct by tech companies.

As she now takes the helm of the subcommittee, Sen. Klobuchar has indicated this term will include increased oversight and hearings focused on leading tech companies.

- Vowing to make the “outsized power”<sup>22</sup> of tech a top priority in the 117th Congress (including legislative efforts to tighten up antitrust laws and increase federal enforcement authority), and “urging the incoming administration to push for strong remedies, including an end to anticompetitive and exclusionary conduct and divesting assets, as well as expanded and additional investigations.”<sup>23</sup>
- Referring to the House Judiciary Committee’s majority staff report: “If I had the gavel I would have done such a report. While Sen. Lee and I have done a lot of good work together and that’s important because you want this to be bipartisan, I would really focus on all these issues we’re talking about [with tech] and monopolization.”<sup>24</sup>

We expect those moves are unlikely to draw objection from Sen. Lee.

- In response to recent federal actions, he stated: “I hope the Department will follow the evidence to end monopolistic behavior wherever it finds it.”<sup>25</sup>
- And later reiterated: “I am glad to see that our antitrust enforcers are finally taking the threats posed by Big Tech seriously . . . This is one more reason that antitrust enforcement should be consolidated at the Department of Justice, as I’ve proposed in the One Agency Act . . . [I] look forward to continuing to exercise oversight in this area.”<sup>26</sup>

Notably, Senator Richard Durbin (D-IL), the Democratic Whip and incoming chair of the full Senate Committee on the Judiciary, also wants to reinvigorate<sup>27</sup> the committee by focusing on issues—including antitrust and competition—indicating powerful support for Sen. Klobuchar’s efforts. In her view, “It’s time to get out of the rhetoric and into the real policymaking.” In the 116th Congress, Sen. Klobuchar introduced five bills<sup>28</sup> that would strengthen federal enforcement and overhaul antitrust laws, significantly impacting tech and other industries. We expect her to use oversight to push legislation<sup>29</sup> in the 117th—perhaps with more co-sponsors—and to consider additional bills designed at strengthening U.S. antitrust laws and enforcement.

While Congress’ searchlight remains trained on the tech industry, “Big Tech” companies—and others that rise to prominence in the industry—can expect that their moves in a wide range of areas will be scrutinized. Section 230 and competition-related issues carry over notable momentum from the 116th Congress, but now that criticizing the tech industry is en vogue for both Democrats and Republicans, we anticipate the industry will also be top-of-mind when members tackle other issues, particularly where consumer protection principles can be invoked. As a result, tech companies also may find themselves pulled into conversations about a range of topics, from privacy, to employee rights, to diversity and inclusion. In the meantime, companies in the industry should continue grappling with issues of broad public concern and monitoring the horizon for Congressional focus on the wide variety of issues touching the tech sector.



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