



Antitrust, Privacy, and Technology

What to Watch For

Online Platforms

Both the House and Senate Judiciary Committees reported versions of the American Innovation and Choice Online Act earlier this year. The legislation would prohibit large online platforms from giving preference to their own products. The Open App Markets Act was also introduced in both chambers and would limit the ability of mobile app stores to require developers to use in-app payment systems and would provide pricing transparency. None of these proposals have advanced beyond the committee stage. There will be efforts to advance them in the next Congress.

Antitrust Enforcement

- **Enforcement Legislation.** Senate Democrats will likely try to revisit the comprehensive Competition and Antitrust Law Enforcement Reform Act. The bill applies a stricter standard for permissible mergers by prohibiting mergers that (1) create an appreciable risk of materially lessening competition, or (2) unfairly lower the prices of goods or wages because of a lack of competition among buyers or employers (i.e., a monopsony). Under current law, mergers that substantially lessen competition are prohibited.
- **Increased criminal trials.** Assistant Attorney General Kanter has stressed that the Department of Justice (DOJ) will begin to take cases to trial as opposed to trying to either settle them or accept plea deals. He wants to put the teeth back into the antitrust laws. So far, only won one of a number of cases across several industries. The Republican gains could impact the enthusiasm with which the regulators pursue their activist roles.

Cybersecurity

The first two years of the Biden administration have put a spotlight on cybersecurity policy, with an uptick in ransomware attacks and major incidents such as the Colonial Pipeline hack. With billions allocated to cybersecurity in the Bipartisan Infrastructure Bill and bipartisan support in both chambers for heightened cybersecurity legislation, growing cybersecurity policy is sure to advance in the 118th congress.

Sens. Gary Peters (D-MI) and Rob Portman (R-OH), as chairman and ranking Republican on the Senate Homeland Security and Government Affairs Committee, have worked closely together to advance significant cybersecurity legislation. Sen. Portman and Rep. John Katko (R-NY), the ranking Republican on the House Homeland Security Committee, are both retiring, which means significant turnover in Congressional cybersecurity leadership. In 2022 these legislators and House Chairman Bennie Thompson (D-MS) played key roles in advancing the Cyber Incident Reporting for Critical Infrastructure Act (CIRCA), which requires breach reporting to CISA within 72 hours of a substantial cyber incident and within 24 hours of paying a ransom. Congress also increased cyber partnership funding and established an intragovernmental cybersecurity information sharing safeguards and a Civilian Cybersecurity Reserve. The next Congress is expected to continue bipartisan efforts to advance legislation such as the Federal Information Security Modernization Act of 2021, and the Federal Secure Cloud Improvement and Jobs Act, which would update cybersecurity posture in the government, and authorize the FedRAMP program to provide improved cloud-based technologies that are secure.

The Biden Administration can also be expected to advance cybersecurity priorities through executive action. The trend of small, defined windows in which disclosures of cybersecurity incidents must be made will continue, including with banking organizations and service providers, publicly traded companies, and registered investment advisers and registered investment companies.

Data Privacy

In July the House Energy and Commerce Committee reported the American Data Privacy and Protection Act by a 53-2 vote. The legislation regulates how companies handle personal data and establishes consumer data protections. It imposes new security practice requirements, including the appointment of a Data Security Officer, but does not authorize a private right of action as under state laws like the California Consumer Privacy Act. The legislation preempts state laws that conflict with certain portions of the bill, and this language likely kept the bill from moving further in the process. However, there will be increasing pressure on Congress to act as other countries and individual states enact their own data privacy standards.

Congressional Leadership Changes

Rep. Jim Jordan (R-OH) will likely become the new Chairman of the House Judiciary Committee, which could have significant implications for antitrust enforcement. In late September Rep. Jordan led the opposition on the House floor to a package of bills that would reform the merger filing fee structure to provide greater resources to the Federal Trade Commission and Department Of Justice to review mergers, require greater disclosure of foreign adversary subsidies relating to mergers, and allow state attorneys general greater flexibility in selecting the venue for enforcing antitrust laws. Rep. Jerry Nadler (D-NY) can be expected to remain in Democratic leadership on the House Judiciary Committee as the Ranking Member.

In a Democrat-controlled Senate, Sen. Dick Durbin (D-IL) is likely to remain in his post as Chairman of the Senate Judiciary Committee. Sen. Chuck Grassley (R-IA) is expected to remain the Republican leader.

Rep. Jim Comer (R-KY) is likely to hold the Chair position on the House Oversight Committee. With Rep. Carolyn Maloney (D-NY) not returning after losing her primary, there will be a campaign for the Ranking Member position. Active candidates for the leadership role include Reps. Jamie Raskin (D-MD), Gerry Connolly (D-VA), and Stephen Lynch (D-MA).

As referenced above, in the Senate, Sen. Maria Cantwell (D-WA) will likely hold her post as Democratic leader of the Commerce, Science and Transportation Committee. Sen. Thune (R-SD) is the likely Republican leader.

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