

What to Expect From the Biden FCC

What can we expect from the Federal Communications Commission from the incoming administration of President-elect Biden? While we don't have a crystal ball, we know that the president-elect has pledged to "build back better," and recent reports suggest he plans to reverse several actions taken during the Trump administration. Following this approach at the FCC, the new agency leadership may seek to revisit some of the more contentious actions by current Chairman Ajit Pai, such as the repeal of net neutrality and overturning of broadband privacy. But President-elect Biden has also spoken about a desire to unify the country, and several issues appear ripe for broad support, including the promotion of 5G spectrum and bridging the digital divide. While the policy priorities will ultimately be driven by the new chair of the FCC, below we discuss key areas to watch in the coming years.

CDA Section 230

The issue of whether social media networks should be responsible for user-generated content has animated political discourse since the 2016 presidential election. For the last several years, members of Congress from both parties have sponsored legislative amendments to Section 230 of the 1996 Communications Decency Act, which provides internet publishers that host third-party content a liability shield against potentially defamatory or otherwise harmful end user content. [Some critics from the ideological left](#) allege that Section 230 has fostered an environment that permits some social media companies to inadequately police end user misinformation affecting elections and social movements (including organized disinformation campaigns from foreign actors). Alternatively some critics from the right have alleged that the social networks' content enforcement practices are biased against conservatives, despite [the absence of any empirical evidence](#) in support of such allegations. In May 2020, President Trump signed an [executive order](#) addressing Section 230 that was predicated on the unproven bias allegations. The executive order directed the National Telecommunications and Information Administration to file a petition with the FCC requesting a binding declaratory ruling that Section 230 should not limit the liability of social networks who enforce their terms of service in a way that restricts conservative end user content.

[A surprisingly broad ideological swath](#) of parties filed comments with the FCC arguing that this effort by President Trump to enlist the FCC in his fight against social media companies is not serious or credible because Section 230 falls outside the FCC's jurisdiction and, on the merits, the proposed changes would violate the First Amendment. President-elect Biden has publicly [disagreed](#) with President Trump's executive order, but has stated that he would be in favor of replacing Section 230 with legislation that would promote accountability for and vigilance of content moderation practices. Specifically, the Biden administration's proposed legislation, which would not involve the FCC, [would require greater moderation by social media companies](#) to prevent the spread of misinformation, unlike President Trump's executive order designed to curtail content moderation. But the near-term success of any such legislation within the first two years of the Biden administration may depend on which political party gains a majority in the U.S. Senate following two run-off elections in Georgia in early January 2021.

5G Spectrum and Deployment Initiatives

The promotion of advancements in wireless technology and service quality has enjoyed bipartisan support for decades, and we can expect continued support for the rapid development of robust 5G networks under the Biden administration's FCC, as well as efforts to kickstart the next generation, 6G. With the ability to transmit data at high capacity and high speeds, 5G has the power to transform the way Americans live and work in the digital age, including by supporting telehealth solutions, videoconferencing, wirelessly connected devices, and other technologies that have become critical during the COVID-19 pandemic. At its core, 5G consists of wireless networks achieving advanced levels of broadband speed, capacity, and low latency, which together can help applications and services reach new levels of performance, and likely usher in an era of innovation for consumers and industry. To this end, the Biden administration's FCC will likely continue efforts to [make increasing amounts of spectrum available for 5G use via spectrum auctions and reallocations](#). The FCC will likely largely continue to [reduce barriers for 5G network infrastructure deployment](#) to ensure greater small cell coverage nationwide, although perhaps with an increased willingness to mitigate potentially adverse environmental consequences. A Democrat-led FCC may also be less inclined than the current FCC to broadly preempt state and local governmental authority given local aesthetic concerns regarding the installation of network facilities.

5G network security will also likely remain a key concern for the FCC. With the Biden administration [promising a strong stance on China](#) and other countries that pose national security risks, efforts to protect 5G networks and other critical infrastructure from foreign cyberattacks will likely continue. These efforts may include actions by the FCC working in concert with interagency executive branch working groups, namely "Team Telecom" and the Committee on Foreign Investment in the United States, to restrict foreign telecoms with ties to adversarial government authorities from operating in the United States, particularly where proposed investments in or transactions with U.S. telecom, submarine cable, and broadcast licensees may raise potential national security, law enforcement, foreign policy or trade concerns.

Net Neutrality

Under the Biden administration, the FCC may consider bringing back the 2015 rules on net neutrality, which had been repealed under Chairman Pai in 2018, though the administration's efforts on this issue may instead take the form of legislative action rather than agency rulemaking.

In 2015, the FCC adopted the [Open Internet Order](#), which reclassified ISPs as common carriers under Title II of the Communications Act and made ISPs subject to many (but not all) of the regulations applicable to telecommunications service providers. In 2017, the FCC [repealed the Open Internet Order](#), essentially reclassifying broadband internet access services again, but this time as an unregulated information service. The repeal order also purported to block states from adopting net neutrality rules of their own, although a few states, including California, adopted net neutrality rules anyway.

In October 2019, the U.S. Court of Appeals for the D.C. Circuit [upheld much of the 2017 repeal](#), but vacated the portion of the order that barred states from imposing their own net neutrality rules. It also directed the FCC to give further consideration to the rules' impact on public safety issues, pole attachment rights, and the Lifeline program, which subsidizes communications services for low-income customers. In response, the FCC adopted a [2020 Order on Remand](#), reaffirming the rules in the 2017 order concerning public safety, pole attachment regulation, and the Lifeline program.

Given that American consumers' reliance on broadband service at home has increased exponentially during the COVID-19 pandemic, and not everyone has been satisfied with the practices of their local broadband service provider, the new administration may want to reinstate net neutrality in some form. Indeed, [public interest](#)

[groups](#) are already beginning to urge the new administration to quickly restore the previous net neutrality rules. Yet in light of the whiplash effects of the back and forth at the FCC over net neutrality for over a decade, the Biden administration may find it preferable to seek a legislative solution that would be less vulnerable to FCC leadership changes and court challenges.

As with most things in Washington, D.C., how the debate is framed will be important. Many critics will argue that the absence of many "poster child" cases of egregious conduct by broadband service providers since net neutrality was repealed is proof that it is a "solution in search of a problem." On the other hand, the FCC under the Trump administration promised that the repeal of net neutrality would unleash a torrent of new investment and innovation by broadband service providers. But because many consumers working from home during the pandemic have had poor experiences with their broadband service, the failure of this promise may generate consumer support for restoring net neutrality in some form. In light of the contentious history of the FCC's past efforts to adopt net neutrality, the most sustainable solution would be to enact federal legislation.

Broadband Privacy

Shortly before the 2016 election, the FCC adopted strict [privacy rules](#) for broadband internet access providers. In early 2017, Congress and the Trump administration [relied on the Congressional Review Act to overturn the broadband privacy rules](#). As a result, the FCC is currently prohibited from adopting new broadband privacy rules unless Congress restores its authority to do so.

Though there was not any direct signaling from the Biden campaign that they were looking for the FCC to revive the broadband privacy rules, President-elect Biden has [expressed interest in strengthening U.S. privacy law generally](#), emphasizing that the United States should be "setting standards not unlike the Europeans are doing relative to privacy." The success of any legislation to restore broadband privacy in some form will likely depend on which party controls the majority in the Senate as of early January 2021.

Mergers, Acquisitions, and Media Ownership

The FCC under the Biden administration is likely to examine media mergers and acquisitions through a different, and likely less laissez-faire, lens than the Trump FCC. Typically, during Democratic administrations, the FCC is more willing to scrutinize whether a proposed transaction that is subject to its prior consent will serve the public interest. To that end, Democratic leaders of the FCC have been generally perceived as more willing to attach conditions to their approval of mergers and acquisitions to enforce policy objectives, such as mitigating a transaction's risks to consumers, competition, and the diversity of voices in the market. With a few exceptions (the [failed Sinclair-Tribune transaction](#) being the most notable), the FCC under Chairman Pai has been a favorable forum for parties wishing to merge.

A Biden FCC may also have greater interest in retaining and enforcing its broadcast television media ownership policies and rules. On the other hand, it may find that the growing number of successful over-the-top content distributors during the pandemic (e.g., Apple+) has created sufficient competition in the multichannel video programming distributor market that an aggressive regulatory approach is not warranted. A series of broadcast television media ownership decisions issued by the U.S. Court of Appeals for the Third Circuit will likely force the Biden FCC to make a decision on how it wants to proceed. The U.S. Supreme Court is set to hear a case in the 2020 - 2021 term [addressing the FCC's most recent efforts to rollback media ownership requirements](#). Regardless of how it proceeds on broadcast television media ownership rules, a Biden FCC may be more open to treating OTT providers the same as traditional facilities-based MVPDs, a "regulatory parity" position that the FCC [proposed during the Obama administration](#) but declined to adopt during the Trump administration.

Enforcement

During the Obama administration, the FCC's Enforcement Bureau took an aggressive stance on enforcement matters and operated with a relatively high degree of autonomy when it came to resolving enforcement actions and issuing penalties. For example, the Enforcement Bureau during the Obama administration largely stopped the longstanding practice of settling enforcement proceedings without an admission of liability and adopted record-setting penalties. In one of the first acts of the FCC under the Trump administration, however, the FCC [stripped the Enforcement Bureau of the power to settle forfeitures proposed by the commission](#), requiring such settlements to be put to a full commission vote. That decision was widely perceived by industry observers as an effort to rein in the Enforcement Bureau's aggressive approach. Following a transition to Democratic leadership, it is quite possible that the Enforcement Bureau may regain the ability to operate more freely under delegated authority and take on a more aggressive enforcement posture.

Digital Divide

President-elect Biden made [closing the digital divide a key tenet of his presidential campaign platform](#). While underserved communities have always been the focus of FCC efforts to close the digital divide, the FCC under the Trump administration particularly focused on rural America, most recently by establishing the ["5G Fund for Rural America."](#) The FCC under a Biden administration may redirect its focus to include access by minority communities in addition to rural areas. It may also show a renewed focus on supporting Lifeline and E-rate initiatives to increase broadband access for low-income consumers and schools.

Takeaways

The Biden administration's FCC will inherit an agency that has undergone years of deregulation since the Obama years. How the new FCC will respond to these circumstances will be greatly influenced by whomever is nominated to serve as the next chair of the agency. But regardless, we can expect the FCC to shift in a new direction from the path it has been on for the last four years.

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Authors



Marc S. Martin

Partner

MMartin@perkinscoie.com [202.654.6351](tel:202.654.6351)

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