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Election 2020 Snapshot:
Impacts on the technology and telecoms industry sector

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An overhaul of tech antirust policy? Increased telecommunications regulations coupled with expanding telecoms infrastructure? Business as usual for Committee on Foreign Investment in the United States (CFUIS) investigations? We explore these questions and more in our analysis of the Biden administration's potential approach to technology and telecommunications policy.

Increased antitrust scrutiny?

Antitrust enforcement in the technology sector has received significant political and popular press attention over the past several years, and it will likely continue to be a focus for the Biden Administration. The belief that so-called "Big Tech" has gotten too big gained bipartisan support among policymakers and enforcers during the Trump Administration, with many expressing support for closer scrutiny and tougher antitrust enforcement in the sector. Last month, the House Judiciary Committee, following months of hearings, issued an extensive report calling for new antitrust legislation aimed at the largest companies in the digital economy. Since then, the Department of Justice (DOJ) has filed lawsuits against major tech companies. The Biden Administration likely will move forward with pending tech antitrust litigation, particularly actions that are supported by state antitrust enforcers. Further, the Biden administration could pursue new enforcement actions against other tech companies, possibly taking an even more aggressive stance than the prior administration.

President-elect Biden has not provided details regarding his administration's antitrust and tech policy, but leading Democrats and members of his transition team have expressed their support for an overhaul of antitrust policy and enforcement. Representative David Cicilline, Chairman of the House Judiciary Antitrust Subcommittee, has said that he will begin working on new antitrust legislation in the coming weeks. Senator Amy Klobuchar, who is a possible Attorney General under Biden, has also pushed for new antitrust legislation and expressed support for the Google antitrust lawsuit. Gene Kimmelman, a member of Biden's DOJ transition team and former senior official of the DOJ antitrust division during the Obama Administration, testified in the House hearings and has advocated for increased oversight and regulation in the tech industry. As a further indicator that the Biden Administration will take a hardline on enforcement in the tech industry, a spokesman for Biden said that tech giants' alleged abuse of power will "end[] with... President Biden."

In short, technology companies should anticipate increased antitrust scrutiny related to their mergers, including particular attention on acquisitions of nascent competitors, and potential exclusionary conduct related to digital platforms and big data. New antitrust legislation may also be on the horizon; however, the precise aim and scope of such legislation is unclear. The Biden Administration likely will increase funding and resources for the DOJ and Federal Trade Commission (FTC), expanding their capacity for enforcement.

We do not expect that significant change will occur overnight. Despite the administration change, leadership at the FTC, one of the two federal antitrust enforcement agencies, is not likely to change immediately. Although it is likely that FTC Chairman Joe Simons will resign (as is common when the Presidency switches parties), Republicans will hold three of the five FTC commissioner seats until then, and it will take some time for the Biden Administration to name and confirm a successor (although Biden can immediately name one of the current Democratic commissioners as the new chair). The current Republican commissioners have been more reluctant to pursue aggressive enforcement or major policy changes than the Democratic commissioners. At DOJ, Biden will appoint a new U.S. Attorney General who will lead overall DOJ enforcement policy, as well as an Assistant Attorney General to lead the Antitrust Division. Biden's selection of DOJ leadership will have a significant impact on the government's antitrust priorities during his term. The full antitrust overhaul urged by some legislation and policy proposals is unlikely to gain sufficient bipartisan support in the agencies or in Congress. Thus, in the immediate term, antitrust policy in the Biden Administration is unlikely to significantly depart from the status quo. However, more expansive changes could occur if Democrats take control of both houses of Congress, and after Democrats take control of the FTC.

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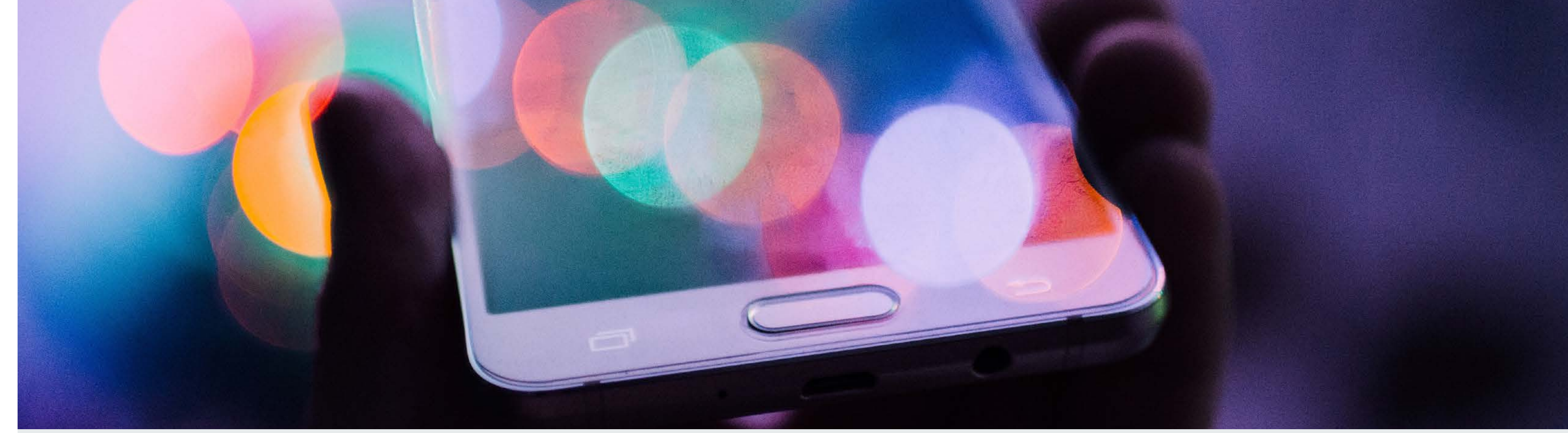

Expanding connectivity, also regulation?

The central role of telecommunications in our personal and commercial lives has only deepened since the COVID-19 pandemic. We expect the Biden administration to pursue significant new investment in telecommunications infrastructure, especially in rural areas, and increased regulation of the telecommunications and information service industries, with a focus on increasing access, expanding consumer protections, and increasing service provider competition.

Efforts to deploy vast amounts of spectrum and expand infrastructure for broadband and 5G will continue under the Biden administration, but shifts in underlying priorities may affect program implementation. The Biden campaign platform included US$20 billion for rural broadband, but if Congress aligns on an infrastructure bill, we could see significantly more funding. In addition to ongoing efforts to deploy rural and tribal broadband infrastructure, the Biden administration will likely seek to address broadband deserts in urban and suburban areas and barriers to broadband adoption. We expect a Democratic-led Federal Communications Commission (FCC) to encourage a collaborative approach between carriers and state and local governments, and potentially pull back on some of the preemption of local zoning laws that occurred under the Trump administration's FCC. Under Democratic leadership, we may see efforts to incorporate social policy goals into spectrum policy and more consideration of ideas such as:

- *Smaller license areas*
- *Higher auction bidding credits*
- *More extensive spectrum sharing of unlicensed spectrum*
- *More promotion of O-RAN technology*
- *Embracing of municipal broadband to spur competition.*

In addition, net neutrality will continue to be hotly contested. A Democratic-led FCC will likely move to reclassify broadband as a Title II telecommunications common carrier service, allowing the FCC to expand its regulatory authority and reestablish Obama-era net neutrality rules. The prospect of re-regulation may create the opportunity for a legislative compromise that could end the pendulum swings and provide market stability.

We also expect to see significant legislative and regulatory activity on data and platform regulation during the Biden administration. Additional efforts to modify tech platform immunity for third party content under Section 230 of the Communications Decency Act seems likely, though a Democratic-led FCC is likely to leave that task to Congress and not seek to interpret Section 230's social media platform immunity shield as the Trump FCC committed to do. Both parties in Congress have shown significant interest in this issue for different reasons. Democratic-proposed legislative reforms will likely emphasize transparency regarding algorithms and moderation procedures. Republican-proposed reforms will likely continue to focus on perceived bias against conservative viewpoints. Consumers and policymakers continue to show a high level of interest in data privacy and security, big data, artificial intelligence, and automated decision-making, and Congressional Democrats have already laid significant policy and legislative groundwork in these areas. We also expect the FCC in a Biden Administration to prioritize consumer protection matters, including accessibility, robocalls, and call blocking issues. While big legislative or regulatory developments do not seem imminent, the possibility of a galvanizing event is always on the horizon.

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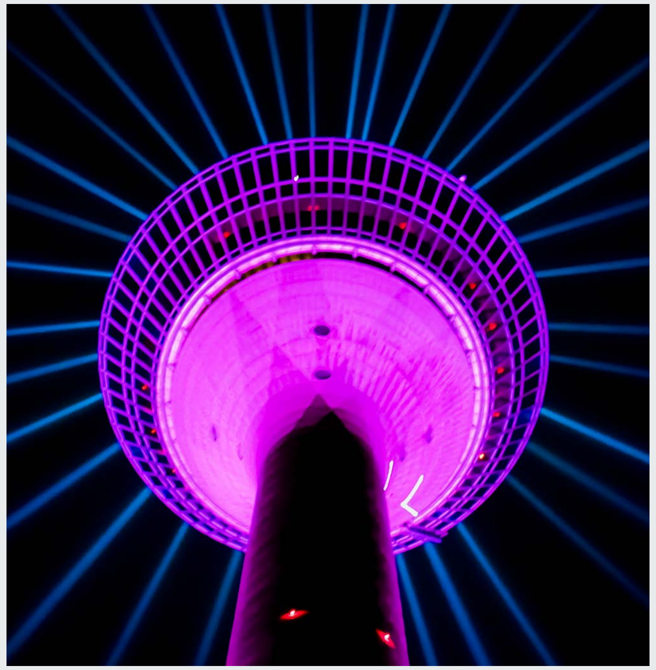

CFIUS: business as usual?

Since the enactment of the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA), every foreign investment in a U.S. business is potentially subject to a mandatory filing with CFIUS, and CFIUS has expanded its jurisdiction to review the national security implications of even non-controlling investments in certain types of U.S. businesses.

In contrast to certain other areas of U.S. trade policy, we anticipate that continuity, not change, will be the hallmark of the Biden administration's approach to CFIUS. We expect such continuity because the concern that national security threats may appear in the guise of foreign investments is a bipartisan one (e.g., FIRRMA was passed by large bipartisan majorities in Congress). Moreover, FIRRMA, in effect, codified much of what we already had been seeing in practice since the Obama administration – namely, CFIUS concerns about foreign investments (particularly Chinese investments) in U.S. businesses involved in critical technologies, critical infrastructure, and sensitive personal data (technology, infrastructure, and data businesses now called "TID U.S. Businesses" in the regulations). Accordingly, we do not expect a significant change in CFIUS trends as we transition from the Trump administration to the Biden administration, although we have highlighted, below, areas to watch.

During the Biden administration, we expect to see a continuation – and in some cases, an acceleration – of the most prominent CFIUS trends that we have observed since the passage of FIRRMA, as described below:

- *Increased importance of CFIUS-export controls intersection* – (i) an increase in the number of TID U.S. Businesses, as the U.S. Department of Commerce identifies additional emerging and foundational technologies (a subset of "critical technologies") in sectors such as biotechnology, artificial intelligence, robotics, data analytics, quantum computing, and advanced materials, and (ii) a greater demand for export controls expertise with the addition of an export licensing criterion to CFIUS's critical technologies mandatory filing program.
- *Non-notified transaction inquiries* – continued inquiries of parties that did not submit a filing to CFIUS for certain completed transactions, even ones that closed years ago and involved relatively small investments.
- *Investment fund exemption* – increased use of the investment fund exemption for certain U.S.-controlled funds with foreign limited partners.
- *Excepted investors exemption* – increased number of Australian, UK, and Canadian investors taking advantage of the excepted investor exemption from the CFIUS mandatory filing programs and potentially more allied countries added to the excepted foreign states list (as such countries develop or enhance their own foreign investment review regimes and cooperate with the U.S. Government on investment security issues).
- *Rise in declarations* – increase in the number of allied country investors that seek to file short-form declarations (a type of CFIUS filing introduced by FIRRMA), as CFIUS's rate of clearance for these 30-day filings continues to rise.

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We can help

As you prepare for 2021, our Technology and Telecommunications industry sector teams can help.

Our Government Relations and Public Affairs team can help you strategize in the face of emerging policy risks and opportunities. With team members having served in prior administrations, the government relations team monitors, advises on, and helps shape legislative and executive branch actions – including appointments to key administrative positions – and can help you prepare for what's on the horizon.

Our Tier 1 ranked Communications practice possesses a deep understanding of the telecommunications sector, working closely with cable, mobile, satellite, and all types of advanced broadband network operators, internet service providers; broadcasters and media companies; and equipment providers. We are equipped to assist you in implementing compliance for current or proposed regulations, drafting comments to proposed regulations, and analyzing potential regulatory risks. We can conduct an audit of your compliance programs, and review and revise your policies to put you in the best position in the face of increased enforcement.

Our International Trade and Investment practice, recently named "International Practice Group of the Year" for 2020 by *Law360*, brings together CFIUS, export control, and sanctions know how to help you navigate all things related to International Trade and Investment. Coupled with a top notch Antitrust and Competition team, we can help you anticipate and deal with competition law risks before they become problems.

With more than 6,000 people globally, across 15 U.S. offices and 35+ other offices around the globe, we are ready to assist.

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