Insight

# Primer: Congressional Tech Priorities After the Midterms

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**Executive Summary**

- Congress has considered a wide range of bills designed to regulate the technology sector, covering topics such as competition policy, privacy, and spectrum management.
- While Congress has made regulation of the technology sector a priority, and many of the bills enjoy bipartisan support, thus far it has failed to pass any major piece of legislation in the area.
- This primer summarizes six key pieces of legislation, and outlines both points of agreement and debate between and among parties.

**Introduction**

Congress has considered a wide range of bills designed to regulate the technology sector, covering topics such as competition policy, privacy, and spectrum management. While many of the bills enjoy bipartisan support, to date, Congress has not passed any major piece of legislation in the area.

This primer provides an update on high-profile tech legislation, the challenges to passage these bills face, and possible areas of agreement on their provisions.

**Telecommunications**

Spectrum Innovation Act

*Why It Matters*

The Federal Communications Commission (FCC) issues spectrum licenses through competitive bidding (known as spectrum auctions), but the agency's authority to do so will expire in December. While both parties support spectrum auctions, there is disagreement about whether Congress should mandate the reallocation of federal spectrum to commercial use as a part of the reauthorization of auction authority. The wireless industry desires more bandwidth and supports Congress developing a "spectrum pipeline" of reallocated frequencies to attach to any reauthorization. To address this issue, the House passed the Spectrum Innovation Act, which would extend auction authority for an additional 18 months and start the process for developing a spectrum pipeline. Senate Democratic leadership, however, supports a clean reauthorization for 10 years without a spectrum pipeline.

*The Details*

The Spectrum Innovation Act would provide a short-term reauthorization of the FCC's spectrum auction authority so that Congress has time to develop a spectrum pipeline to attach to a longer reauthorization. In addition, the bill would reallocate critical mid-band spectrum currently used by the Department of Defense

(DoD) for commercial 5G operations. Congress typically extends the auction authority for 10 years, but without a pipeline, many are concerned that a long-term reauthorization would foreclose the possibility of future reallocations because Congress couldn't use the revenue from a future pipeline bill to offset new spending if the revenue has already been factored into the Congressional Budget Office baseline. Finally, the bill would allocate the revenue from the auctions for next-generation 911 and funding the "rip and replace" of compromised infrastructure, priorities for both parties.

Senate Democratic leadership, on the other hand, supports a clean, long-term extension without a spectrum pipeline. This approach would also grant the FCC authority to assign licenses through auctions, and initially raise more revenue, but could leave the FCC struggling to reallocate spectrum currently occupied by federal incumbents. Proponents of unlicensed spectrum also worry that the bill could foreclose future unlicensed allocations in the bands included in the spectrum pipeline.

**Antitrust**

American Innovation and Choice Online Act

*Why It Matters*

After a bipartisan House Judiciary Committee investigation into competition in digital markets, many in Congress have called for serious regulation of "big tech." The House passed a slew of bills in the wake of the investigation, but the Senate has been much slower to act. Advocates of a more concentration-focused antitrust regime have primarily focused on firms leveraging control of one market to preference their own products in a downstream market, such as an app store operator preferencing its own apps or a search engine prioritizing its own services in the results. The American Innovation and Choice Online Act (AICOA) would address this issue by prohibiting firms from favoring their own products or services in markets where the firm also controls the access to those products and services. The Senate Judiciary Committee advanced the bill with bipartisan support, though many members expressed concerns about the bill despite voting for a favorable report. Even with heavy pressure from the primary sponsor Senator Klobuchar (D-MN), Senate leadership has not brought the bill up for a vote.

*The Details*

AICOA primarily targets Meta, Google, Amazon, Apple, and Microsoft and is designed to protect small businesses in online marketplaces. The bill would require regulators to establish that a covered firm's conduct materially harmed competition, but also includes a variety of other provisions that would require firms to allow rivals to interoperate, limit the use of user data not available to rivals, and allow users to uninstall software applications as they see fit. Critics of the bill worry that its focus on individual competitors could result in consumers losing out on the efficiencies that come with integration and size. Further, the bipartisan coalition supporting the bill stands on shaky foundations: Republicans see the bill as tool to target anti-conservative bias in online retail, and this has led to disagreements with Democrats who want platforms to better tackle what they consider hate speech and disinformation.

Open App Markets Act

*Why It Matters*

The Open App Markets Act (OAMA) is another bill designed to regulate big tech. Unlike AICOA, however, OAMA specifically targets the mobile app marketplace by allowing consumers to sideload applications onto their devices and prohibit app store owners from tying distribution to using the app store's payment processing services, largely to give developers an avenue to avoid the 30 percent fees charged by Apple and Google. In March, OAMA moved out of the Senate Judiciary Committee on a 20–2 margin, and in isolation, OAMA should have more support than AICOA. Yet the bill has largely been tethered to the more controversial AICOA and has thus far been unable to get a vote on the floor.

*The Details*

OAMA is designed to "promote competition and reduce gatekeeper power in the app economy" by prohibiting app store owners from tying distribution in the app store to the use of the app store's payment system. The bill would also require app store owners that also control the operating system to allow for users to install apps outside of the app store.

Critics of the bill have primarily pointed to its potential cybersecurity implications. Android and iOS differ significantly in that iOS is a closed system and consumers can only install applications through, and approved by, the Apple Store. If the bill forces firms to allow third-party apps onto devices, consumers could open their devices to increased risks of cyber-attacks. The bill would also limit consumer choice, as many consumers choose their devices based on the privacy and cybersecurity offered by more restrictive operating systems.

Journalism Competition and Preservation Act

*Why It Matters*

This major competition-focused bill aims to address the loss of local and independent media organizations due to decreased ad revenues in digital markets. To that end, the Journalism Competition and Preservation Act (JCPA) would allow news organizations to form a cartel to set prices that large tech companies must pay to host the content of news organizations. Despite a tumultuous markup period, the bill eventually moved out of the Senate Judiciary Committee by a 15-7 margin.

*The Details*

The JCPA would create an exemption to antitrust law and allow journalistic groups to create "joint negotiation entities" to negotiate collectively with big tech platforms such as Meta and Google for the right to host the news organizations content. Further, the bill would essentially require the platforms to host these news organizations' content, unless the joint negotiation entity withholds content from the platform. Taken together, proponents believe the bill would provide a sustainable revenue base for journalistic enterprises.

By allowing eligible publishers and broadcasters to form these joint negotiation entities, the legislation could cause, not prevent, harm to consumers and journalists, alike. First, the JCPA would allow firms to evade the rules that govern competition and anticompetitive conduct, instead of adapting to changing technology and consumer preferences. What's more, the legislation would limit how services can deliver and tailor content for users, likely infringing upon platforms' First Amendment rights.

**Privacy**

## American Data Privacy and Protection Act

*Bottom Line*

As the patchwork of state privacy laws create a compliance challenge for businesses, Congress has worked for years on a national privacy law. Discussions continue to stall, however, due to disagreements regarding whether a national privacy framework would preempt state laws and whether individual citizens can bring claims against companies under the law. The American Data Privacy Protection Act (ADPPA) is the closest Congress has come to a bipartisan framework agreement, with three of the four corners of the House and Senate Commerce Committee's respective leadership on board.

*The Details*

ADPPA would create a duty of loyalty for any entity or person that collects data that would prohibit the collection of data beyond what is reasonably necessary, proportionate, and limited to provide or maintain a specific product or service requested by an individual or a communication to the individual reasonably anticipated within the context of the relationship. It would also create consumer rights regarding the collection and use of their data.

With any national privacy framework, the viability depends on how the bill handles preemption of existing state laws and whether consumers can sue for violations of the act. The bill preempts state privacy laws to an extent, but would keep California's private right of action for data breaches, Illinois' laws governing biometric and genetic information, and a variety of general state laws. The bill also includes a private right of action, but requires plaintiffs to give the FTC notification and the chance to intervene, as well as a "right to cure" allowing firms to correct the violation.

## Kids Online Safety Act

*Why It Matters*

With difficulty moving on the ADPPA, Congress may focus more narrowly on a specific issue, such as children's privacy. While a few different ideas have been circulating, the most notable is the Kids Online Safety Act (KOSA) which would require platforms to act in the best interest of minors who use the platform and to prevent physical, emotional, developmental, or material harms online. While targeting social media companies including Twitter, Facebook and YouTube, the bill covers a wide swath of entities such as streaming services, broadband providers, and video game developers. KOSA passed unanimously out of Senate Commerce earlier this year, but the wide range of entities covered will drive up additional opposition and could hurt efforts to pass the legislation.

*The Details*

KOSA would implement two key provisions designed to protect children online. First, the bill would create a duty for covered platforms to act in the best interest of a minor who uses a platform's products and services, as well as another duty to prevent and mitigate "heightened risks of physical, emotional, developmental, or material harms." Second, it would create a series of "safeguards for minors," ranging from settings to prevent other individuals from viewing the minor's personal data to default settings for minors that offer the strongest protections available. The bill would also impose some disclosure and transparency requirements on platforms,

as well as grant the FTC the authority to enforce violations of the act.

Critics of the bill have raised a variety of concerns. The bill's broad duty of care approach could essentially require covered entities to verify the age of users, which could result in minors sharing additional information with online services. Further, services may remove valuable content on subjects such as drug addiction or mental health because of concerns that allowing such discussion could breach the duty of care. Moreover, some worry that the bill would particularly harm LGBTQ+ kids because the bill would allow state attorneys general to target services that allow children to see pro-LGBTQ+ content.