



# WHAT BIDEN MEANS FOR TECH

HERE ARE THE TOP LEGISLATIVE, REGULATORY AND ENFORCEMENT PRIORITIES THAT WILL IMPACT THE TECHNOLOGY SECTOR OVER THE NEXT FOUR YEARS.

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As the Biden administration enters its second month, the White House has its hands full managing the vaccine rollout, negotiating a stimulus package and appointing new leadership in the executive branch. Once the new administration kicks into full gear, what lies in store for the technology industry? Which of the new administration's top priorities will have the greatest impact on tech firms, and which initiatives will continue from the previous administration?

In Congress, Democrats have the majority in the House but razor-thin control of the Senate. That means the new administration will likely push legislation where bipartisan consensus exists. For tech companies, we can anticipate new laws focused on protecting consumers, competition, privacy and data security.

Within the executive branch, shifts in regulatory and enforcement policies will largely depend upon leadership at the working levels, under the Washington adage that "personnel is policy." New priorities require officials to advocate for and implement the change, and many of the senior agency posts are yet to be filled. But judging from commitments made during the presidential campaign, we can make several predictions about how the Biden administration will alter the regulatory and enforcement landscape for tech firms.

## ANTITRUST INITIATIVES

For a president who has indicated a desire to find political consensus where possible, federal antitrust legislation may be fertile ground. Bipartisan support for revitalizing the antitrust laws and regulations – including support for policies targeted at the tech industry – has been increasing and will likely be a focus of the Biden administration.

In Congress, both parties have investigated anticompetitive effects in the tech industry. Last year, Democrats in the House Judiciary Antitrust Subcommittee released a report warning against the high concentration of the digital economy and trends toward monopolization among tech companies. Democrats recommended proposals to address anticompetitive conduct and to strengthen merger and monopolization enforcement. Although Republicans did not join all of the report's recommendations, four Republican members issued their own report indicating a willingness to find compromise on antitrust enforcement and merger reviews.

In the courthouse, the new administration will likely continue to pursue the antitrust suits brought against tech companies filed by the previous administration.

In the two most high-profile examples of 2020, the Department of Justice (DOJ) filed suit against Google for allegedly monopolistic practices, and the Federal Trade Commission sued Facebook for allegedly anticompetitive acquisitions. While the Biden DOJ has already dropped several high-profile suits in other contexts – including a legal challenge to California's net-neutrality statute and a discrimination suit against Yale University – the new administration has given no indication that it will dismiss the actions alleging anticompetitive conduct by major tech companies.

The new Department of Justice will likely also continue to pursue investigations and enforcement actions related to collusion in the labor markets. In 2010, the Obama DOJ filed suit against several major tech firms alleging a conspiracy to not "poach" each other's executives and to stagnate wages. In the wake of that landmark lawsuit, the DOJ and FTC issued guidance in 2016 regarding the illegality of anticompetitive labor agreements.

## **FINANCIAL SERVICES REGULATION**

The regulatory environment for tech-focused financial services companies will continue to evolve under the Biden administration. Fintechs should expect increased protections for consumers and additional guardrails aimed at preventing market manipulation – especially in the wake of the recent GameStop stock swing, led by social media channels.

Although we can anticipate much of the activity to take the form of new regulations, we might also see federal guidance and clarification in key areas that fintech companies might welcome.

For example, the Consumer Financial Protection Bureau has indicated a willingness to develop regulations to implement Section 1033 of the Dodd-Frank Act, which grants consumers rights to access financial records but does not adequately define how that access must be granted. Fintech companies that rely on the financial records held by institutional banks could benefit from federal direction on how that information must be shared across institutions.

Similarly, most observers of the cryptocurrency industry predict that a Biden administration will move away from the hands-off approach of the previous administration and provide some regulatory clarity to the crypto sector. Increased guidance may give comfort to crypto exchanges and other companies seeking predictability from government regulators.

Finally, President Biden's campaign supported initiatives that would increase access to banking products and services for minorities and historically underrepresented groups. Fintech firms that have made commitments to support these same groups would welcome efforts to prioritize equitable banking.

## **WHITE-COLLAR CRIME AND CONGRESSIONAL INVESTIGATIONS**

White-collar prosecutions slowed under the Trump administration, and most analysts predict that trend will change. Tech firms at risk for financial fraud, environmental crimes, false claims, foreign corrupt practices or pandemic- and stimulus-related malfeasance should see increased attention from federal law enforcement and regulators, and they should adjust compliance efforts accordingly.

The change in political control of the White House will also have a collateral effect on congressional investigations. Democrats with oversight responsibilities in Congress will not investigate the new administration with as much vigor as the Democratic House did with the Trump administration. Focus will turn to the private sector, and though tech companies saw more than a fair share of oversight in 2020, investigations into tech will likely continue in the new Congress. Tech firms should pay close attention to the oversight goals on Capitol Hill and prepare for requests for information and interviews by congressional investigators.

## **DATA PRIVACY AND SECURITY**

The Biden administration has made data privacy and cybersecurity a top priority. Expect policymakers to explore growing bipartisan support for federal legislation to protect data privacy, with significant potential impact on companies operating in the digital marketplace.

To date, the states have set the pace in regulating how companies may collect, use and protect consumer data. But in recent years, Democrats and Republicans in Congress have both pushed for comprehensive federal data protection bills. Data privacy would also be a natural arena for leadership from Vice President Kamala Harris, who has deep experience in privacy initiatives from her time as California's attorney general and in the Senate.

Both parties have pushed bills that would provide consumers with the right to access and correct their data, as well as efforts to require developers to take measures to protect data from intrusion. New legislation may also require disclosure of the use and function of proprietary algorithms and require companies to allow consumers to opt out of marketing that uses their data.

As the new administration takes shape, every industry – including tech – will encounter an invigorated executive branch that is more willing to use the tools of government to achieve policy priorities. Tech firms would be well-served to keep a close eye on these priorities, and anticipate changes to internal compliance and regulatory programs.



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