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# The Federal Communications Commission in the Incoming Biden Administration: Issues and New Directions

## Introduction

The Federal Communications Commission (FCC) in the incoming Biden Administration may take different positions on several key topics than the FCC under the Trump Administration, including Section 230 of the Communications Act of 1934, as amended (Section 230), net neutrality, and 5G. The recent confirmation of President Donald Trump's nominee to join the FCC, Nathan Simington, and Chairman Ajit Pai's resignation on Inauguration Day will leave the agency with a 2-2 split between Democratic and Republican commissioners. The FCC typically has five members, with two commissioners and chairperson from the president's party. With the balance of the Senate dependent on the outcome of the Georgia runoff on January 5, 2021, it is unclear how the Senate might proceed on confirming a Biden nominee. Current commissioner Jessica Rosenworcel has been mentioned as a strong contender to be named chairperson by President-elect Joseph Biden.

## Topics for Likely FCC Action

Although there are numerous issues that the new FCC may consider, some issues that are currently under consideration can be expected to remain active, either to reverse current FCC initiatives or to build on existing work.

### Section 230

Section 230 broadly protects operators of "interactive computer services" and their users from liability for publishing, removing, or restricting access to another person's content. Criticism of Section 230 has come from both Democrats and Republicans over content moderation decisions; both parties introduced legislation to amend Section 230 in the 116<sup>th</sup> Congress.

On May 28, 2020, President Trump issued an "Executive Order on Preventing Online Censorship." The order required the Secretary of Commerce to ask the FCC to initiate a rulemaking to clarify the provisions of Section 230. On August 3, 2020, FCC Chairman Pai announced that the agency would be asking for public comment on the petition for rulemaking. The public comment period on this proceeding closed on September 17, 2020, and on October 15, 2020, Chairman Pai announced that the FCC would move forward with the rulemaking proceeding.

It is unlikely that a final FCC order would be promulgated prior to President-elect Biden's inauguration and, while he has expressed interest in seeing changes to Section 230 to curb misinformation, he has stated that he would prefer doing so through legislation rather than through the FCC.

For additional information about Section 230, see CRS Legal Sidebar LSB10484, *UPDATE: Section 230 and the Executive Order on Preventing Online Censorship*.

### Net Neutrality

Net neutrality, the policy that required internet service providers to offer equal and non-discriminatory access to online content, was adopted by the FCC under then-President Obama in 2015 and repealed by the FCC under President Trump in 2017. The issue may again be an active issue for the FCC under the incoming Biden Administration, specifically, repealing the 2017 Restoring Internet Freedom Order (RIFO). The RIFO reversed the requirement for net neutrality required by the 2015 order.

President-elect Biden's net neutrality policy statement, issued prior to the Democratic National Convention, states that his administration would "take strong enforcement action against broadband providers who violate net neutrality principles through blocking, throttling, paid prioritization, or other measures that create artificial scarcity and raise consumer prices." The current Democratic commissioners support this position. What action the FCC takes may depend on who is confirmed by the Senate to fill the final seat on the Commission.

Opening the door for a reinstatement of the 2015 rules is a 2019 ruling by the D.C. Circuit Court that stated it would defer in this case to agency expertise regarding the interpretation of the Communications Act of 1934 (see CRS Report R44954, *Chevron Deference: A Primer*). This would appear to provide a path for the FCC to reinterpret the law. If so, it could pass a declaratory ruling to reverse the 2017 RIFO and reinstate the 2015 Order to reclassify broadband providers from Title I to Title II services. Title I information services are subject to fewer regulations than Title II common carrier telecommunications services.

Some experts have cited the heightened dependency on the internet during the pandemic as a driver for the FCC to move beyond a simple reinstatement to also include a prohibition on data caps, interconnection fees, and special rates through a new net neutrality rulemaking. Any action by the FCC could be expected to draw legal challenges.

Congress could preempt any FCC action by permanently classifying broadband as a Title II service or impose net neutrality requirements under Section 706 of the 1996 Telecommunications Act. It could also undertake a larger update to the act.

For additional information about net neutrality, see CRS Report R40616, *The Net Neutrality Debate: Access to Broadband Networks*.

### 5G Spectrum Availability, Service Deployment, and Security

Promoting 5G spectrum availability and service deployment has been largely noncontroversial and enjoys bipartisan support, which is likely to continue at the FCC under the incoming Biden Administration. Planned increases in the availability of spectrum for 5G services through spectrum auctions and reallocations are generally expected to continue, along with reducing barriers to 5G infrastructure deployment to provide expanded coverage throughout the country.

However, some observers believe that the FCC under the incoming Biden Administration may focus more attention on potential adverse environmental and health impacts of 5G, and may not be inclined to issue broad preemptions of state and local governments' authority to impose aesthetic requirements on network facilities.

The FCC under the incoming Biden Administration may continue an emphasis on 5G network security and protection against cyberattacks, as well as maintaining a strong posture towards China. It may continue to work with the interagency "Team Telecom" and the Committee on Foreign Investment in the United States (CFIUS) on the security of the domestic telecommunications sector. Team Telecom evaluates foreign investment or participation in U.S. telecommunications companies, while CFIUS may review foreign investment in and acquisition of U.S. companies in any industry, including telecommunications.

For additional information about 5G, see CRS Report R45485, *Fifth-Generation (5G) Telecommunications Technologies: Issues for Congress*.

### Digital Divide

As part of his rural economic development strategy, President-elect Biden has proposed an investment of \$20 billion to deploy broadband access to communities where it is currently unavailable. He has also called for partnering with municipal utilities to deploy broadband to rural America. His development strategy states:

High-speed broadband is essential in the 21<sup>st</sup> century economy. At a time when so many jobs and businesses could be located anywhere, high-speed internet access should be a great economic equalizer for rural America, not another economic disadvantage.

The incoming Biden Administration may build on the Trump Administration's work in this area. Addressing the digital divide is an issue that both parties have recognized as an important goal. For example, during the Trump Administration, the White House worked with the FCC to develop the Rural Digital Opportunity Fund (RDOF), which allocates \$20.4 billion to subsidize broadband infrastructure in underserved rural areas.

The FCC under the incoming Biden Administration may work to broaden the recipients of broadband assistance to

urban and suburban areas. Commissioner Geoffrey Starks has stated that over 18 million households lack broadband simply because it's too expensive. The FCC under the incoming Biden Administration may focus additional attention on issues of affordability affecting the digital divide.

The FCC under the incoming Biden Administration may look to update some other programs that assist the disadvantaged, such as the E-Rate program that provides broadband access to schools and libraries at a discount, and the Lifeline program that provides telecommunications services to certain low-income populations.

For additional information about the digital divide, broadband deployment, and the Universal Service Fund, including the E-Rate, Lifeline, and RDOF, see CRS Report R46613, *The Digital Divide: What Is It, Where Is It, and Federal Assistance Programs*; CRS Report R46501, *Rural Digital Opportunity Fund: Requirements and Selected Policy Issues*; and CRS In Focus IF11520, *The Universal Service Fund and COVID-19: The FCC and Industry Response*.

### Other Topics

Additional topics, for which President-elect Biden has not yet provided specific plans, may also be addressed by the FCC under the incoming Administration.

### Broadband Privacy

In early 2017, Congress and the Trump Administration used the Congressional Review Act to overturn strict privacy rules for broadband internet access providers promulgated by the FCC under then-President Obama. Without congressional action, the FCC is prohibited from adopting any new rules on the issue.

### Agency Transparency and Process Reform

Chairman Pai implemented process reforms intended to increase transparency of agency actions. For example, one reform resulted in more votes being taken on rulemakings rather than being decided at the bureau or office level. These reforms are widely expected to continue at the FCC under the incoming Biden Administration.

### Media Mergers, Acquisitions, and Ownership

How the FCC under the incoming Biden Administration may scrutinize media mergers, acquisitions, and ownership has been a topic of debate. While some observers believe it may engage in closer examination of public interest issues than under the Trump Administration, others have stated that the change of administration is unlikely, on its own, to affect such activity.

### Enforcement

The FCC under incoming President Biden may provide its Enforcement Bureau with the operational autonomy it had during the Obama era. During the Trump administration, the FCC required a vote by the full Commission to approve penalties such as forfeitures.

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