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Action Items on Technology and Communication Policies in front of the Senate Commerce Committee

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With the Senate set to flip to Democratic control in the 117th Congress, albeit by a razor thin margin, the policy priorities for the upper chamber are likely to significantly change. In so doing, the various Senate committees will have new chairs, and their agendas will likely vary at least in part on the partisan make-up of the committees.

The Senate Committee on Commerce, Science and Transportation has a long tradition of bipartisan cooperation. Executive Sessions are usually not contentious; the final language of bills and amendments are usually thoroughly negotiated and eventually accepted by voice vote. That tradition of bipartisanship is unlikely to change with Senator Maria Cantwell (D-WA) and Senator Roger Wicker (R-MS) swapping roles: Senator Cantwell will now chair the Commerce Committee, while Senator Wicker will be the Ranking Member.

The Commerce Committee's agenda for technology and communications policy might not be terribly different under the Chair of Senator Cantwell than under Chairman Wicker. To be sure, Senator Cantwell will have her priorities – as will the chairs of the Consumer Protection and Communications Subcommittees, likely Senators Richard Blumenthal (D-CT) and Brian Schatz (D-HI) respectively – and will likely emphasize issue areas and conduct oversight differently than Senator Wicker. But the big ticket legislative items for technology and communications – such as a data privacy bill and section 230 reform – will likely remain priorities under Senator Cantwell's chair as they would have under Senator Wicker's, though the substance and priorities of those efforts will be different. And given the thin margin of the Democratic majority and the Commerce Committee's historical adherence to bipartisanship, the need to compromise and forge common ground will remain critical to pass such laws.

Privacy

Comprehensive federal privacy legislation will likely remain a top priority for the committee. California's passage of the California Consumer Privacy Act and the European Union's General Data Practice Regulations spurned renewed interest in passing a federal law in the 116th Congress. Further actions at the state level will only increase a sense of urgency – at least within certain sectors. Last Congress in late 2019, Senators Cantwell and Wicker introduced their versions of a privacy bill. Senators Schatz, Klobuchar and Markey joined Senator Cantwell in introducing the **Consumer Online Privacy Rights Act (COPRA)** at almost the same time as Senator Wicker circulated a staff discussion draft of the **United States Consumer Data Privacy Act (USCDPA)**, which was later supplanted by the formal introduction of his privacy bill in September 2020. These two bills will likely serve as the starting point for negotiations on a privacy bill in the 117th Congress.

The biggest sticking points, by far, as reflected in the two bills, are preemption of state law and a federal private right of action. COPRA explicitly does not preempt state law and has a federal private right of action, while USCDPA takes the opposite approach. Finding compromise on these opposing world-views, while difficult, will greatly improve the chances of passing a federal privacy law. Other issues areas on which Members will have to negotiate include the scope of the bill's coverage, prescriptiveness and flexibility for compliance, duty of care on the use of data, and algorithmic decision-making. While not easy, these issue areas should be relatively amenable to bipartisan compromise.

Section 230

In communications, the appetite for section 230 (of the Communications Act) reform displayed at the end of the 116th Congress will likely carry over into the 117th. In a **November hearing** at which the heads of Google, Facebook, and Twitter testified, Members on both sides of the dais expressed interest in reforming the law. However, Democratic and Republican Members want to amend section 230 for different reasons. Democrats largely assert that social media platforms have been slow to crack down on misinformation and hate speech. Many Republicans claim that social media platforms are biased against conservative viewpoints and stifle legitimate political speech. Amending section 230's liability protections

afforded to online platforms that host third-party generated digital content would alter the incentives on how such platforms treat posted content. Both sides of the debate will likely validate their narratives by pointing to the contentious 2020 election and the subsequent actions taken by President Trump's campaign and his Administration, Members of Congress (on vote certification), and rioters at the United States Capitol, as well as Facebook's and Twitter's decision to ban President Trump from using their services.

Broadband

Broadband access will likely remain a priority in the 117th Congress. Any infrastructure bill Congress considers almost certainly will have broadband buildout provisions. President-elect Biden's plan for rural America includes $20 billion for rural broadband buildout. Provisions for better broadband access in underserved communities – both rural and urban – are likely to be priorities for Democrats. If such broadband provisions are included in a legislative infrastructure package under budget reconciliation rules (in order to avoid Senate procedures requiring 60 votes for cloture), the Senate will not be able to contemplate broadband access policy, only spending levels. However, the Commerce Committee could consider regulatory matters in separate proceedings. For instance, given the recent events in Nashville, in which a bomb badly damaged an AT&T facility, the Commerce Committee may explore the resiliency and redundancy of the nation's communications system.

Spectrum and Wireless

Furthermore, spectrum policy, as was the case in previous Congresses, will likely be a hot topic in the Commerce Committee in the 117th. Senator Cantwell has **expressed concerns** with the Federal Communications Commission's (FCC's) decision to auction spectrum (24 GHz) for commercial use over the objections of the National Oceanic and Atmospheric Administration (NOAA) and the National Aeronautics and Space Administration (NASA). Both agencies voiced strong concerns over possible interference with weather forecasting. Senator Cantwell expressed similar concerns over the **FCC's decision** to re-allocate a slice of spectrum (5.9 GHz) dedicated to vehicle-to-vehicle and vehicle-to-infrastructure transportation safety for shared unlicensed purposes, such as WiFi services. In general, Senate Democrats may be more inclined to reorient the FCC's tilt towards the commercial use of spectrum and will be more receptive to the concerns expressed by government agencies and public interest groups.

The incoming Biden Administration's consolidated federal policy on the development and deployment of 5th generation mobile networks will likely shape the Commerce's Committee oversight and policy activities on 5G. In the past, Senator Cantwell and committee Democrats have expressed concerns over the security of 5G networks and the lack of a national strategy. The Commerce Committee may explore ways to maximize 5G network and supply-chain security, such as the adoption of an interoperable, software-driven open radio access network (ORAN) architecture as opposed to a more traditional cellular architecture.

Network Neutrality

Lastly, the 800 pound gorilla: network neutrality. How the Senate and the Commerce Committee will proceed on net neutrality will largely depend on what a newly constituted FCC will or won't do. In December 2017, the FCC voted to **repeal** the **Commission's 2015 Open Internet order** which reclassified broadband Internet access as "telecommunications services" under Title II of the Communications Act, thus allowing the FCC to impose restrictions on network practices such as throttling, blocking and paid prioritization. Both the 2015 and 2017 Commission votes were 3-2 and along party lines. Last March, Senator John Thune (R-SD), then chair of the Communications subcommittee, announced that he still intended to work on bipartisan net neutrality legislation, an effort that extends back to 2015, when he chaired the full Commerce Committee and pushed for legislation codifying principles of net neutrality that was unable to gain bipartisan traction. Whether the Commerce Committee will seek to pass similar legislation in the 117th Congress, bringing certainty to the marketplace notwithstanding the vicissitudes of the political make-up of the FCC, is unclear. The Department of Justice's (DOJ's) **lawsuit** against the state of California's net neutrality law could also affect Congressional deliberations. While a Biden Administration DOJ may withdraw its complaint, the separate suit filed by industry groups will continue to work its way in federal court in the Eastern District of California.

As the 117th Congress commences and the Senate Commerce Committee kicks off its work on technology and communications policy, ML Strategies will report on such activities and provide insight and analysis.

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Christian Tamotsu Fjeld draws on two decades of Capitol Hill experience to support clients in building relationships, shaping policy, and engaging effectively with the federal government. His experience working with Congress and his insights help clients anticipate federal developments and advance their priorities with clarity and confidence.