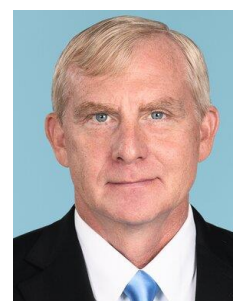


## Internet Regulation Bills Would Bring New Risks To Tech. Cos.

By **Richard Donoghue** (March 9, 2022, 4:06 PM EST)

The U.S. Department of Justice and the U.S. Securities and Exchange Commission have made their priorities clear for the remainder of 2022. Less clear are the steps the 117th Congress may take throughout the remainder of 2022 as we head toward midterm elections based on newly redrawn congressional districts.

This article looks at proposed bipartisan legislation to forecast what additional regulations and risks Congress may impose in the months ahead and how companies should prepare for them.



Richard Donoghue

### Conventional Wisdom and an Unconventional Election Year

Conventional wisdom is that little is accomplished on Capitol Hill in election years. Typically, members are gearing up for reelection bids, and the desire of each party to draw clear distinctions between itself and the opposition discourages bipartisan efforts.

But conventional wisdom does not adequately account for the combination of issues, currents and developments the 117th Congress is navigating as we head toward the 2022 midterm elections. More than 50 incumbents in the U.S. House of Representatives and Senate have announced that they will not run for reelection.

Furthermore, dissatisfaction with government and perceived abuses in the manufacturing and technology industries are combining to give momentum to bills that would have had little chance of becoming law in prior years.

The 2022 congressional calendar is complicated by Russia's invasion of Ukraine, President Joe Biden's U.S. Supreme Court justice nomination, and the ongoing work of the Jan. 6 House Select Committee. Yet even with these competing demands, Congress has already passed legislation that strikes a chord with voters and has bipartisan support,<sup>[1]</sup> and it can be expected to pass more such measures in 2022.

### The State of the Union and a State of Dissatisfaction

In his first State of the Union address, Biden noted the harms of social media to children and vowed to "hold social media platforms accountable for the national experiment they're conducting on our children for profit."<sup>[2]</sup> The president told Congress that "[i]t's time to strengthen privacy protections,

ban targeted advertising to children [and] demand tech companies stop collecting personal data on our children." [3]

The president's comments reflect public and bipartisan concern about the impact of social media and likely foreshadow the passage of bills in the months ahead.

Most of the relevant bipartisan bills relate to internet regulation and reducing liability protections afforded technology companies. While prominent technology companies have long been able to forestall such action, damaging whistleblower disclosures, the use of social media platforms by foreign entities seeking to influence U.S. elections, persistent censorship allegations and antitrust scrutiny have combined to weaken their position.

Should these bills become law, they will have significant ramifications for technology companies and other businesses.

### **Legislation Most Likely To Pass**

The Eliminating Abusive and Rampant Neglect of Interactive Technologies, or Earn It, Act [4] contains provisions designed to combat the sexual exploitation of children, including provisions that would reduce liability protections provided to technology companies by Section 230 of the Communications Decency Act. [5]

The bill would expose technology providers to lawsuits and potentially even prosecutions based on illegal content posted on their platforms by third parties. The act would create a National Commission on Online Child Sexual Exploitation Prevention, chaired by the U.S. attorney general. The commission would develop best practices to prevent, detect and respond to online material related to child exploitation.

Industry and privacy rights groups argue that the commission would become an internet content regulator and that the act would make online environments less safe by discouraging technology companies from providing encryption for fear that encryption used to shield child sexual exploitation material would itself provide a basis for liability. The bill does, however, specify that the provision of full end-to-end encryption does not provide an independent basis for liability. [6]

Despite industry objections, the Earn It Act of 2022, sponsored by Sen. Lindsey Graham, R-S.C., has 11 Republican and 10 Democratic co-sponsors, a number Sen. Richard Blumenthal, D-Conn., called "overwhelming." [7] A bill that has the support of members as diverse as Sens. Ted Cruz, R-Texas, Mazie Hirono, D-Hawaii, Josh Hawley, R-Mo., Diane Feinstein, D-Calif., Chuck Grassley, R-Iowa, and Dick Durbin, D-Ill., has a significant chance of becoming law.

In February, the Senate Judiciary Committee unanimously advanced the bill. The House version of the bill also has bipartisan support. At a time when social media platforms face steady criticism, the Earn It Act has a good chance of making it onto the president's desk even in an election year.

Similarly, Blumenthal and Sen. Marsha Blackburn, R-Tenn., have introduced the Kids Online Safety Act. [8] According to the sponsors, the act would "require social media platforms to put the interests of children first ... [and] give kids and parents tools to help prevent the destructive impact of social media." [9]

The bill would require social media companies to enable parents to supervise minors' use of their platform, including options to control safety settings, track usage time, limit purchases and address addictive behaviors. It would require that defaults trigger the most restrictive settings and limit the use of data relating to minors for marketing purposes.

Independent third-party audit and reporting requirements would be imposed, and social media companies would have to make data available to researchers to gauge whether their platforms pose risks to minors.

Violations of the act would be deemed unfair or deceptive acts or practices prescribed under the Federal Trade Commission Act. Enforcement would be entrusted to the Federal Trade Commission and state attorneys general, and civil actions providing for injunctive relief as well as damages and restitution would be authorized.

A third bipartisan bill addresses antitrust concerns. The Open App Markets Act,[10] introduced by Blumenthal in August, has six Republican and four Democratic cosponsors. It was voted out of the Senate Judiciary Committee in February. Proponents argue that the act would rein in the monopolistic app store market power of companies such as Apple Inc. and Google LLC and prevent them from stifling competition.

The act would prohibit companies from limiting users of their devices to downloading apps only through their app stores. The bill would also preclude companies from restricting app developers to using only their company's in-app payment systems. Violations of the act would be deemed unfair methods of competition under the FTC Act.

In addition to authorizing civil suits by the FTC and state attorneys general, the act allows developers harmed by violations to bring civil suits and seek injunctive relief, treble damages and attorney fees. The House version of the bill also has bipartisan support.

A host of other bills targeting technology companies have been introduced in the 117th Congress.[11] Most of them propose limiting or repealing in its entirety Section 230's liability protection. While these bills are unlikely to become law, they demonstrate an appetite in Congress to subject technology companies to greater regulation and liabilities.

In a March 7 statement respecting a denial of certiorari in *Doe v. Facebook Inc.*, Justice Clarence Thomas signaled that this appetite is not limited to Congress. There, Justice Thomas noted that:

the arguments in favor of broad immunity under §230 rest largely on policy and purpose, not on the statute's plain text ... [a]ssuming Congress does not step in to clarify §230's scope, we should do so in an appropriate case.[12]

Not all pending bipartisan bills focus on technology companies. In February, Sens. Kirsten Gillibrand, D-N.Y., and Hawley introduced the Slave-Free Business Certification Act,[13] which would require mining and manufacturing companies with revenue of at least \$500 million per year to conduct annual audits designed to detect the use of forced labor in their supply chains. The audits would be provided to the U.S. Department of Labor and made public.[14]

Like several of the bills described above, the Slave-Free Business Certification Act would require companies to provide annual third-party audits. The bill would also require chief executive officers to

sign certifications of compliance under penalty of criminal prosecution pursuant to Title 18 of the U.S. Code, Section 1001.

## **Practical Takeaways**

Should any of these bills become law, there will be no shortage of federal and state regulators and private parties seeking to enforce their provisions. To adequately prepare for requirements likely to come, companies and their outside counsel should review and prepare to revise data collection policies, payment mechanisms, records retention practices, supply chain procedures, platform functionality, development agreements and end-user license agreements.

Companies should determine whether they are currently following industrywide best practices. Draft policy and procedure revisions should focus on what changes would have to be made if new laws expand technology companies' liability for contraband material posted by users, restrict their ability to collect data relating to minors or require them to open their platforms to unapproved third-party apps.

Companies should also be asking whether they have the right partnerships in place to provide credible third-party annual audits, thinking through what information would have to be provided for such audits, and planning how any proprietary information could be protected from public disclosure.

The priority for most technology companies should be to look at the provisions of the EARN-IT Act, as that is the bill most likely to pass. In particular, companies should assess to what extent they can continue to provide encryption to safeguard customers' privacy without exposing themselves to civil or criminal liability.

## **Conclusion**

A key factor in a bill's passage potential is whether it can garner unanimous consent. Such bills avoid using valuable floor time, which leaders often prefer to use for nominations. While the bills discussed above would likely require floor votes, congressional leaders heading into elections may decide to dedicate valuable floor time to pass bipartisan bills on issues that voters support.

As we head toward the 2022 midterm elections, incumbents not running for reelection will be looking for final legislative achievements. Those running for reelection may seek to deliver concrete accomplishments for the American people on matters of public concern. These bills provide an opportunity to do just that.

Companies in the technology sector and beyond should expect several of these bills to pass and prepare for the additional scrutiny, regulatory burdens and risks that will accompany the new laws.

---

*Richard Donoghue is a partner at Pillsbury Winthrop Shaw Pittman LLP. He was formerly a U.S. attorney for the Eastern District of New York and the principal associate deputy attorney general in the Office of the Deputy Attorney General.*

*The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.*

[1] For example, the House of Representatives and Senate recently passed and President Biden signed into law the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021.

[2] Joseph R. Biden, State of the Union Address, available at <https://www.whitehouse.gov/state-of-the-union-2022/>.

[3] *Id.*

[4] S. 3538, 117th Cong., 1st Sess. (2022), available at <https://www.congress.gov/bill/117th-congress/senate-bill/3538?q=%7B%22search%22%3A%5B%223538%22%2C%223538%22%5D%7D&s=2&r=3>.

[5] Codified at 47 U.S. Code § 230.

[6] S. 3538, *supra* note 4, at Sect. 5 (7)(A)(i).

[7] Chris Mills Rodrigo, Graham, Blumenthal Reintroduce Controversial Section 230 Bill, *The Hill*, Feb. 1, 2022, <https://thehill.com/policy/technology/592301-graham-blumenthal-reintroduce-controversial-section-230-bill>

[8] S. 3663, 117th Cong., 1st Sess. (2022), available at <https://www.congress.gov/bill/117th-congress/senate-bill/3663?q=%7B%22search%22%3A%5B%22Kids%22%2C%22Kids%22%5D%7D&s=5&r=2>.

[9] Richard Blumenthal. Press Release. Blumenthal & Blackburn Introduce Comprehensive Kids' Online Safety Legislation (Feb. 16, 2022), available at <https://www.blumenthal.senate.gov/newsroom/press/release/blumenthal-and-blackburn-introduce-comprehensive-kids-online-safety-legislation>.

[10] S. 2710, 117th Cong., 1st Sess. (2022), available at <https://www.congress.gov/bill/117th-congress/senate-bill/2710?q=%7B%22search%22%3A%5B%22App%22%2C%22App%22%5D%7D&s=9&r=1>.

[11] See, e.g., A Bill to Repeal Section 230 of the Communications Act of 1934 (S.2972), Abandoning Online Censorship (AOC) Act (H.R.874), Limiting Section 230 Immunity to Good Samaritans Act (H.R.277), Safeguarding Against Fraud, Exploitation, Threats, Extremism, and Consumer Harms (SAFE TECH) Act (S.299), Protecting Americans from Dangerous Algorithms Act (S.3029), Algorithmic Justice and Online Platform Transparency Act (S.1896), Justice Against Malicious Algorithms Act of 2021 (H.R.5596), Stop Shielding Culpable Platforms Act (H.R.2000), Curbing Abuse and Saving Expression in Technology (CASE-IT) Act, Protect Speech Act (H.R.3827), Federal Big Tech Tort Act (S.2917), Don't Push My Buttons Act (S.2335).

[12] *Jane Doe v. Facebook, Inc.*, 595 U. S. \_\_\_\_ (2022), (slip op., at 2-3) (omitting quotations marks and citation).

[13] S. 3578, 117th Cong., 1st Sess. (2022), available at <https://www.congress.gov/bill/117th-congress/senate-bill/3578?q=%7B%22search%22%3A%5B%22Slave%22%2C%22Slave%22%5D%7D&s=10&r=1>.

[14] This bill comes in the wake of the Uyghur Forced Labor Prevention Act (UFLPA), which became law in December 2021. While the importation of goods produced with forced labor was already prohibited, the UFLPA created presumptions that goods produced in the Xinjiang region of China as well as those produced by entities listed pursuant to the UFLPA are the product of forced labor and it puts the onus on companies seeking to import goods to prove otherwise.