

A close-up, high-angle photograph of a microchip or integrated circuit. The chip is rectangular and features a complex pattern of fine lines and structures, including a large central square area. The image is overlaid with a dark blue diagonal gradient that covers the bottom-left portion of the frame.

# Technology 2022 Regulatory Outlook

Underappreciated risks and opportunities  
the industry will face this year

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# Tech Reg: Bigger, Badder, and More Coordinated

Federal agencies—better aligned and staffed up than last year—will be the primary driver of a stricter and more onerous technology regulatory push in 2022, with advancement on antitrust, labor, marketplace platforms, and privacy actions.

- Department of Justice Antitrust Division Chief Jonathan Kanter and Federal Trade Commission Chair Lina Khan will increasingly work together on an aggressive antitrust enforcement agenda.
- The Department of Labor and National Labor Relations Board will broaden worker classification standards, expanding their regulatory reach to firms beyond DoorDash Inc. (DASH) and Uber Technologies Inc. (UBER).

## Major Themes

### *A coordinated regulatory focus on anti-competitive conduct in online display advertising*

Winners	Companies along the adtech stack, publishers
Losers	Alphabet Inc. (GOOGL), Meta Platforms Inc. (FB)

Google's dominance of the online advertising market, specifically the display segment, starts the year under greater scrutiny as a multistate coalition of attorneys general led by Texas AG Ken Paxton (R) filed a lawsuit against the company in 2020 moves forward. The state AGs allege that Google violated federal and state antitrust and consumer protection laws.

This underappreciated case and its potential ramifications remain poorly understood. We believe the state AGs' case has strengthened as the coalition has amended its complaints and homed in on its primary arguments. Despite the early setbacks— such as the transfer of the pretrial proceedings from the US District Court for the Eastern District of Texas to the Southern District of New York

with other private litigants—the case has gained momentum and represents potential headline risk for Google in 2022.

The DOJ has a longstanding investigation into these matters and is expected to move forward in the coming months with a formal complaint against Google over its market power in online display advertising, a move that would revitalize and reinforce the state AGs' case.

Congress also looks ready to deal with this issue, which has not been directly addressed by the antitrust legislation introduced to date. During a December 2021 Senate Judiciary Antitrust Subcommittee [hearing](#) on the impact of consolidation and monopoly power on American innovation, ranking member Senator Mike Lee (R-UT) said his office is working on digital advertising legislation. Citing Texas' case against Google, Sen. Lee also asked how Congress can address potential conflicts of interest and other anti-competitive behaviors for online advertising. He said it's "hard to imagine" a firm maintaining all positions in the adtech stack without engaging in anti-competitive conduct.

We believe any measure introduced in 2022 addressing this topic will likely gain

meaningful bipartisan support, especially in light of Senator Elizabeth Warren (D-MA) reaching out to DOJ about this matter.

### **Broader regulatory attention and scrutiny of worker classification for marketplace platforms**

Winners	Companies with true referral marketplace
Losers	DoorDash Inc. (DASH), Lyft Inc. (LYFT), Uber Technologies Inc. (UBER); companies that utilize independent contractor models

Recent worker classification and employment/labor issues have focused on the traditional gig economy platforms, including rideshare and delivery companies. However, regulators are looking into other types of “marketplace” platforms that could affect worker classification and employment issues, including last-mile delivery companies and even pet-sitting services that are loosely framed as referral registries.

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## State lawmakers and regulators will likely continue leading the way in 2022 to address potential worker misclassification.

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State lawmakers and regulators will likely continue leading the way in 2022 to address potential worker misclassification, even in states that do not have the ABC test, as federal officials attempt to outline a new analysis that favors determination of employee status using the current “economic realities” test but with a different interpretation of the factors used. In California, [Assembly Bill 5](#) is still the

applicable standard for most industries, while rideshare and delivery platforms remain exempt as litigation continues on the constitutionality of Proposition 22 for app-based workers. We believe enforcement agencies such as the DOL are likely to pursue joint-employer status, especially for “vertical” arrangements, for companies that rely on an external provider to manage employees directly.

The NLRB also is stepping up its efforts. In the last week of 2021, the board initiated a [comment period](#) regarding the 2019 [SuperShuttle](#) case and the resulting independent contractor test established as part of the decision for cases related to labor organizing. The invitation for public briefs, which the NLRB approved, is connected to the [Atlanta Opera](#) case where stylists for the company were determined to be employees. Parties must file their public briefs by February 25, 2022. Democratic members of the current board—including Chair Lauren McFerran, who dissented the [SuperShuttle](#) decision, and General Counsel Jennifer Abruzzo—have expressed interest in reversing the [SuperShuttle](#) ruling.

Still, a return to the prior 2014 [FedEx Home Delivery](#) standard that expands employee status, or any new test to that effect, will face uphill challenges given the US District Court for the District of Columbia’s prior rulings that conflicted with the NLRB’s conclusions. In addition, we believe legislation on the Protecting the Right to Organize (PRO) Act, which also would amend the independent contractor test used in the National Labor Relations Act (NLRA), remains unlikely to advance.

Enforcement against marketplace platforms also will include the FTC’s efforts to combat unfair and/or deceptive acts or practices (UDAP). In October 2021, its commissioners unanimously agreed to send [warning letters](#) to 1,100 firms, stating that

misleading income and wage earnings claims constitute UDAP violations. They have reached separate consent settlements with Uber Technologies Inc. (UBER) and Amazon.com Inc. (AMZN) regarding withheld tips along these lines, the latter matter of which received vocal support from both Democratic and Republican commissioners.

### **Initial federal push to promulgate privacy rules**

Winners	Companies in compliance with stringent privacy regulations
Losers	Meta, Amazon, Google, Apple Inc. (AAPL), Twitter Inc. (TWTR)

Lawmakers are pushing harder for federal agencies such as the FTC to engage in privacy rulemaking. Following President Biden's July executive order calling on the FTC to begin an antitrust and privacy rulemaking process, FTC Chair Khan and her fellow commissioners voted to streamline the Magnuson-Moss (Mag-Moss) rulemaking procedure. Based on its regulatory agenda, the FTC is likely to begin its efforts this year.

Despite a streamlined process, however, the FTC faces considerable hurdles to promulgating rules, spanning from industry pushback (US Chamber of Commerce and Big Tech platform dissent) to commissioners disagreeing on their own authority. Furthermore, the Mag-Moss process traditionally takes several years to complete (more than five years on average), well outlasting Khan's remaining time as chair.

However, Chair Khan could find herself with \$500 million in additional funding through 2029 to stand up a new privacy bureau if the Build Back Better (BBB) Act passes this year. Additional funding would allow the FTC to hire more technologists who can anticipate

industry shifts, allowing rulemaking to be more efficient.

We believe Alvaro Bedoya will be confirmed as FTC commissioner in the coming months to fill the opening left by former commissioner Rohit Chopra (D). Adding Bedoya as a commissioner would raise the FTC voting line up to 3-2 in favor of Democrats. Both Chair Khan and Bedoya are outspoken critics of Big Tech platforms and will likely invigorate the FTC to act faster to promulgate rules.

Furthermore, FTC privacy rulemaking will inspire lawmakers to make greater efforts to pass federal regulation updating privacy laws, as we have largely seen states, including California, Virginia, and Colorado, create privacy agencies. If substantial privacy rules were promulgated, Big Tech platforms will face considerable compliance and enforcement risk.

## **Tech Opportunities**

### **Big Tech concessions in mobile stores and Right to Repair create opportunities for smaller developers**

Apple Inc.'s (AAPL) early victories in the *Epic Games v. Apple* case have exacerbated legislative pressures to force changes in the commission structure of mobile application stores via legislation. Apple and Google have taken proactive measures to ease these policies, though they are largely constructed in a way that maintains commissions from large third-party developers. Apple received a stay from the US Court of Appeals for the Ninth Circuit on the injunction order issued by the US District Court for the Northern District of California in December 2021. Throughout the litigation, likely to last at least a year, Apple will not have to implement any of the changes required from that order, including allowing developers to add links or

metadata buttons directing users to external payment methods.

However, we expect California Attorney General Robert Bonta (D) to jump into the fight after indicating interest in filing an amicus brief in the appeals process early this year because of the case's interaction with California's Unfair Competition Law. Congress is actively considering the Open App Markets Act ([S. 2710](#)), in addition to the American Innovation and Choice Online Act, two proposals that would impose requirements on mobile application stores. Furthermore, DOJ is expected to file a legal complaint against Apple and has been closely watching the private litigation to establish its arguments. The challenge is likely forthcoming and to happen before the Ninth Circuit issues a ruling in the case brought by Epic Games. Finally, state legislatures and other international governments (from South Korea and the Netherlands to India) have continued pursuing their own legal challenges and proposed reforms to Apple's App Store's structure.

Because of these broader efforts, Apple and Google are both likely to find ways to compromise to a marginal degree to retain their control of storefronts that will benefit third-party developers and firms that rely on mobile distribution. Larger developers, especially outside the gaming sector, are still likely to experience relatively smaller beneficial impacts from these changes but would be able to retain more of their revenue.

Apple also may further relax policies on independent repairs or be forced to do so. President Biden asked the FTC to consider restrictions that manufacturers such as Apple could place on self- and third-party repairs. Apple has continued expanding its Independent Repair Provider program since the program's inception in 2019, and, in November 2021, Apple announced the rollout of its Self Service Repair program in 2022,

where it will sell parts and repair guides to consumers.

### **Sizable funding for cybersecurity and identity systems procurement**

The Infrastructure Investment and Jobs Act (IIJA) passed in November 2021 provides sizable funding for the federal government's cybersecurity efforts. The Federal Emergency Management Agency (FEMA) together with the Cybersecurity and Infrastructure Security Agency (CISA) are tasked with distributing corresponding grants for cybersecurity efforts. Following the SolarWinds data breach and the Kaseya ransomware attack, lawmakers have sought to bolster the security of both private and government data. Although previous cybersecurity bills, such as the Energy Cybersecurity Act of 2019, failed to pass, IIJA will provide Big Tech firms with roughly \$1.35 billion in funding from 2022 through 2026 to prevent cybersecurity breaches and reduce the economic impact to public and private stakeholder firms.

It is often not feasible for federal agencies to bolster their own cybersecurity measures as many are not currently able to fund or build safeguards or expand staff and have to rely private firms to make up for these technological shortfalls. The government requires its employees to use FedRAMP certified software, which creates barriers to entry for small firms and increases the likelihood that companies with previous federal contracts will be selected to receive grants. There are several provisions in the IIJA that provide funding to encourage public-private partnerships to further enhance the US cybersecurity capabilities, particularly focusing on electric grid security and utility operators. Additionally, a \$20 million allocation will establish the Cyber Response and Recovery Fund to create additional safeguards. We believe private firms with current FedRAMP capabilities will stand the

benefit the most from additional funding in 2022.

## Tech Risks

### **Department of Justice and Federal Trade Commission alignment double their firepower; Will Slow M&A Review**

Assistant Attorney General for the DOJ Antitrust Division Jonathan Kanter and FTC Chair Khan have expressed alignment on the major issues that antitrust enforcement faces. During a December workshop involving the two agencies and their European counterparts, Kanter said there was “no daylight” between their respective philosophies. Though we expect DOJ to maintain a steadier enforcement program—in part because of its structure under one director compared to the FTC’s five commissioner setup—it will still likely become more aggressive and robust in pursuing merger and conduct challenges. Merger review processes are likely to require more time to complete and come with far more uncertainty, regardless of whether DOJ or the FTC reviews them.

The latest joint report from both agencies shows rising enforcement activity during 2020, and the trend is likely to have continued into 2021. That said, unless Congress successfully passes legislation, agency litigation will still face a more conservative judiciary that will likely oppose an overly aggressive interpretation of current antitrust law. Both agencies will still deal with constraints in the coming year, especially if proposed funding for antitrust programs are removed from the Build Back Better (BBB) Act, that would require them to choose which cases to pursue carefully.

### **Department of Labor leadership change creates uncertainty**

If DOL Secretary Marty Walsh decides to run for governor of Massachusetts, it would leave open his current position as secretary of labor. The current deputy secretary, Julie Su, will likely assume the leadership role, at least on an interim basis. Her background and prior experiences indicate an even more robust enforcement regime, even under the department’s “economic realities” test. Prior to her appointment to the federal agency by President Biden, Su served as the secretary of the California Labor and Workforce Development Agency at a time when A.B. 5 was the applicable law governing worker classification.

DOL has withdrawn President Trump’s independent contractor rule but has not indicated any replacement. However, David Weil’s nomination to lead the DOL Wage and Hour Division remains stalled, and more leadership changes could delay progress on President Biden’s priorities. Despite a [late-December letter](#) from six Republican members asking President Biden to not renominate Weil for the position in light of the heavy opposition in Congress, the White House again sent his nomination to the Senate on [January 4<sup>th</sup>](#). We expect the Senate Health, Education, Labor, and Pensions (HELP) committee to hold a hearing on the appointment on January 12<sup>th</sup>, but any vote will likely remain tied. If Weil is advanced to the Senate floor through additional procedural steps, he would need the approval of all Democratic members and a tie-breaking vote from Vice President Kamala Harris to gain successful confirmation. Finally, in multiple instances, both parties have acknowledged that the DOL is unable to unilaterally promulgate a new worker classification test and overly expansive interpretation may face court challenges.

## Potential for further California and federal privacy rulemaking looms

Capstone believes the potential for further privacy rulemaking emanating from California or the federal level present risks and additional compliance costs companies may not be prepared for. The California Privacy Rights Act (CPRA) is slated to take effect January 1, 2023, and the new California Privacy Protection Agency (CPPA) created to oversee enforcement will begin its activities July 1, 2023. The CPPA board and its executive director, Ashkan Soltani, have several items to consider this year to promulgate implementing regulations. As the CPPA drafts these rules and works through comments collected last year, public meetings will offer previews to how the agency will interpret the CPRA. The rise of the CPPA also may agitate the FTC to move faster in addressing consumer protection harms.

Following President Biden's executive order on antitrust and privacy concerns, the FTC updated its rulemaking procedure in July 2021, eliminating many administrative steps (appeal process reduced, no public report, etc.). Mag-Moss rulemaking takes considerable time to complete, muddying the timeline with political risk. However, as part of the regulatory agenda, the FTC released an advanced notice of proposed rulemaking (ANPRM), considered to be the first step of the rulemaking process. We believe that the FTC will begin rulemaking via Mag-Moss later in 2022. However, the likelihood of rules taking full effect remains unclear.

## Major Questions

### **Will the Supreme Court review California Trucking Association v. Bonta and, if so, how will the justices rule?**

The US Supreme Court is considering whether to review an appeal brought by the California Trucking Association (CTA) regarding whether the Federal Aviation Administration Authorization Act (FAAAA) preempts California's A.B. 5. In mid-November 2021, the Supreme Court asked US Solicitor General Elizabeth Prelogar to weigh in on the matter before deciding whether to take up the case. The request seeking the federal government's position on FAAAA preemption indicates initial interest in the topic by the Supreme Court's justices and Capstone believes the composition of the current Supreme Court bench favors a review of the case and a favorable decision for industry.

The ruling will hold significance for the trucking industry at large and other sectors that are interested in finding an exemption from A.B. 5. The FAAAA prohibits states from adopting statutes that regulate interstate commerce (e.g., prices, routes, and services) by motor carriers and a finding that favors the CTA would eliminate the applicability of A.B. 5 for trucking companies that use owner-operator independent contractors. The decision also could influence how other states approach the topic. Following the passage of A.B. 5, jurisdictions have waited to see how California's experience will play out. The contentious back-and-forth regarding exemptions has slowed down several states, including Illinois and New York, that were keen on advancing similar legislation.

A Supreme Court decision that supports the trucking industry would cause more states to be hesitant about adopting broad statutes governing worker classification across a

variety of industries, instead of just narrowly addressing worker classification of rideshare and delivery platform drivers. The injunction against enforcement will remain in place for the time being and through the duration of the Supreme Court process.

### ***How will the November 2022 midterms change antitrust legislative efforts?***

Curbing Big Tech and reforming existing antitrust laws have galvanized bipartisan support. However, legislation introduced have all but stalled as other priorities emerged and moderate lawmakers question the wisdom of advancing bills that are potentially disruptive to the current status quo. We believe Congress is likely to remain keen on antitrust reform regardless of whether Democrats maintain their majority or Republicans regain control. However, both parties will likely pursue different approaches to address these concerns. While Representative Ken Buck (R-CO) has worked closely with House Antitrust Committee Chair David Cicilline (D-RI) to advance bipartisan legislation, Senate Republicans have been

hesitant to support expansive measures that stray from the consumer welfare standard.

Republicans also are leery of FTC Chair Khan's antitrust agenda and priorities, which were undermined by administrative blunders and misfires during her first year on the job that created animosity with her Republican counterparts. For example, a group of conservative lawmakers introduced legislation to prohibit "zombie" votes, in which the FTC counts the votes of departed commissioners. While Chair Khan downplayed the issue, the effort speaks to broader calls to curb the FTC's authorities. Groups such as the US Chamber of Commerce will likely offer additional support in these goals. Sen. Lee and other Republican colleagues in the Senate also have proposed measures that would consolidate the enforcement capabilities of DOJ's Antitrust Division.



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