A variety of laws and policies influence U.S. communications. Some laws, such as the Communications Act of 1934 and Telecommunications Act of 1996, have a direct effect. However, many others that play a role in shaping U.S. communications are not immediately obvious. This chapter provides an overview of many of these laws, some of the policy goals behind them, and their effect on U.S. communications. This chapter is not intended to provide a comprehensive guide to all laws affecting U.S. communications or the Communications Act, but rather offers an introductory, representative overview of significant issues.

* The author would like to thank Laura K. Layton and former colleague Alisa R. Lahey for their contributions to this chapter.
Regulated Industries and Practices

Q 1.1 Which types of industries/practices does U.S. communications law affect/regulate?

The Federal Communications Commission (FCC) is charged with regulating “interstate and foreign commerce in communication by wire and radio.”1 Its objective in doing so is to:

make available . . . to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communications. . . .2

In certain cases, courts have found that the FCC may exert “ancillary” jurisdiction over items “necessary to the exercise of its functions,” even when doing so is not specifically articulated in its governing statutes.3

The scope of the FCC’s regulatory powers is discussed in more detail in chapter 2.
Q 1.2 Which types of industries/practices does U.S. communications law not affect/regulate?

The FCC does not generally regulate intrastate wire or radio communications. However, because the nature of communications is increasingly interstate or even international, this exception has become less relevant over time. The FCC does not regulate all or in some cases many aspects of radio licensees’ business practices apart from regulating the terms and conditions of their licenses.

Principal U.S. Communications Laws

Q 1.3 What are the principal laws that affect communications in the United States?

The Communications Act of 1934, as amended, the Telecommunications Act of 1996, and the regulations implementing those statutes are among the most prominent laws affecting and governing U.S. communications law and policy. Many other laws have important, if indirect, effects on U.S. communications law, but these two statutes are of primary importance. Other laws related to telecommunications are discussed below. See Q 1.4.

Communications Act of 1934

Q 1.3.1 What is the Communications Act of 1934?

The Communications Act of 1934 (the “1934 Act” or the “Communications Act”) was enacted to regulate interstate and foreign commerce in communication by wire and radio. Its objectives included making adequate facilities available to all citizens at reasonable charges for the purposes of the national defense and promoting safety of life and property through the use of wire and radio communications. To centralize authority for regulation of these items, the 1934 Act also provided for creation of the FCC as an independent government agency.

The predecessor agency to the FCC, the Federal Radio Commission, had authority to regulate radio communications, but not telephone communications. Interstate telephone companies at the
time were regulated by the Interstate Commerce Commission. Regulation of these services through different agencies had become increasingly difficult and inefficient. The Communications Act of 1934 consolidated authority over all communications “by wire or radio” in the FCC.

**Telecommunications Act of 1996**

**Q 1.3.2 What is the Telecommunications Act of 1996?**

The Telecommunications Act of 1996 (the “1996 Act”) represents the most comprehensive overhaul of U.S. communications law since the 1934 Act. Much had changed in the sixty-two years since the 1934 Act was enacted, and the law as it existed prior to the 1996 Act no longer provided a framework responsive to the realities of the current communications marketplace. Some commentators make the case that the 1996 Act itself is now in need of substantial updates. The Energy and Commerce Committee of the House of Representatives has begun taking the first steps in this process, including issuing a series of white papers on the topic.

In addition to updating U.S. communications law to address new technologies, one of the major goals of the Telecommunications Act of 1996 was to remove barriers to entry in the local telecommunications marketplace in order to increase competition. In the FCC’s words, the 1996 Act was intended to “let anyone enter any communications business—to let any communications business compete in any market against any other.”

The 1996 Act is perhaps best known for its significant reforms of the law as it relates to telecommunications carriers. It provided mechanisms for increased competition in local telephone markets by decreasing barriers to entry and by mandating certain aspects of competitors’ mutual cooperation in the local telecommunications market. These changes included requiring incumbent local exchange carriers to allow competitive local exchange carriers to interconnect with their networks and establishing the terms for negotiating and entering into such arrangements. The 1996 Act also provided other avenues for entry into the telecommunications market, such as resale of telecommunications services. (For more details on these items, see chapter 4.) The 1996 Act also reduced restraints on
competition in other areas of communications law, including relaxing restrictions on broadcast ownership and on telephone companies’ ownership of cable systems.\textsuperscript{16} (The current state of broadcast and cable ownership is discussed in further detail in chapter 8.)

**Other Laws Affecting U.S. Communications**

**Q 1.4 What other laws affect U.S. communications law and policy?**

A number of different laws from various areas have important—though in some cases indirect—effects on U.S. communications law and policy. These include:

- election laws;
- copyright laws;
- environmental laws;
- advertising laws;
- the Anti-Drug Abuse Act of 1998;
- public safety laws;
- privacy laws; and
- the Omnibus Budget Reconciliation Act of 1993.

Finally, a number of other laws, such as the Administrative Procedure Act, have important effects on how agencies like the FCC operate, make rules and policies, and apply those rules and policies.

**Q 1.4.1 What is the effect on U.S. communications of election laws?**

Political broadcasting is an area of the law regulated by both the FCC and Federal Election Commission and those agencies’ governing statutes and regulations.

The Bipartisan Campaign Reform Act of 2002, the most recent sweeping change to the law in this area, amended the Federal Election Campaign Act of 1971.\textsuperscript{17} It was sponsored primarily by Senators Russ Feingold and John McCain and sought to bring more transparency to federal campaign finances. BCRA affected many of the requirements for political broadcasting and cablecasting, which are discussed further in chapter 17.
Q 1.4.2 … copyright laws?

As discussed in greater detail in chapter 15, copyright law and communications law intersect in many ways. To name just a few, broadcasters must make regular payments to performance rights organizations such as ASCAP, BMI, and SESAC for the rights to play artists’ songs. Cable operators must make semi-annual copyright payments for the copyrighted material they re-transmit. Also, both copyright and trademark law apply in other ways, such as to material included on FCC licensees’ websites, which may implicate laws such as the Digital Millennium Copyright Act, and their use of trade names in their business practices.

Q 1.4.3 … environmental laws?

Before communications facilities may be constructed, they must comply with applicable environmental laws. These laws may include the National Environmental Protection Act and the National Historic Preservation Act. State or local laws and zoning requirements may also be implicated. To obtain authorization to use new or modified facilities for communications equipment, applicants are required to certify, and in some cases demonstrate, compliance with applicable environmental requirements. The FCC’s rules specify which types of actions do and do not require an environmental assessment. FCC rules also set guidelines for permissible human radiofrequency, or “RF” exposure, and various FCC forms and certifications require compliance with these limits.

Q 1.4.4 … advertising laws?

Due to their reliance on advertising revenue, licensees of broadcast stations in particular must have a general awareness of advertising law. For instance, the Federal Cigarette Labeling and Advertising Act bans the advertisement of cigarettes or little cigars “on any medium of electronic communication subject to the jurisdiction of the Federal Communications Commission.”

In addition, broadcast content may implicate Federal Trade Commission deceptive advertising standards, as well as any state or local laws affecting advertising and contests. The FCC’s broadcast contest rules are addressed in further detail in chapter 8.
Q 1.4.5 ... the Anti-Drug Abuse Act of 1998?

In order to be eligible for any new, modified, or renewed authorization, applicants must certify that “neither the applicant nor any party to the application is subject to a denial of federal benefits that includes FCC benefits pursuant to” the Anti-Drug Abuse Act of 1998. A failure to certify is grounds for dismissal of an application, and a false certification is punishable under penalty of perjury.

Q 1.4.6 ... public safety laws?

Public safety laws and issues are integrated with U.S. communications in a variety of ways. The FCC, usually through its Public Safety and Homeland Security Bureau, interacts often with other agencies in its implementation and execution of public safety priorities. For instance, the Federal Emergency Management Agency (FEMA) is responsible for implementing the next-generation Emergency Alert System, called the Integrated Public Alert Warning System. FEMA developed the standards for this next-generation EAS system, and the FCC has taken steps to require all EAS participants to become compliant with those standards as well.

Another important public safety law is the Communications Assistance for Law Enforcement Act. It was enacted to “preserve the ability of law enforcement agencies to conduct electronic surveillance by requiring that telecommunications carriers and manufacturers of telecommunications equipment modify and design their equipment, facilities, and services to ensure that they have the necessary surveillance capabilities.” It operates under industry-derived (as opposed to FCC-derived) standards and has been interpreted to apply to new technologies such as Voice over Internet Protocol.

Q 1.4.7 ... privacy laws?

U.S. communications law and privacy issues intersect in a number of ways. The Electronic Communications Privacy Act of 1986, for example, sets forth protections for private electronic communications from government surveillance. In addition, extensive FCC rules govern the protection of customer proprietary network information (or “CPNI”) obtained by telecommunications providers.
These issues, as well as the rapidly changing environment in which they exist, are discussed in further detail in chapter 11.

**Q 1.4.8 ... Omnibus Budget Reconciliation Act of 1993?**

The Omnibus Budget Reconciliation Act of 1993 amended the Communications Act of 1934 to allow the FCC to award certain commercial spectrum licenses through the use of competitive bidding.\(^{35}\) The Balanced Budget Act of 1997 went a step further, requiring the FCC to use spectrum auctions to award additional types of licenses to qualified bidders.\(^{36}\) This was significant because, prior to the FCC receiving auction authorization, mutually exclusive commercial licenses were distributed through comparative hearings or lotteries. Auctions were intended both to streamline the process and to provide additional revenue for the government.

Spectrum auctions are discussed in further detail in chapters 7, 8, 12, and 13.

**Administrative Procedure Act**

**Q 1.5 Why is the Administrative Procedure Act important to U.S. communications law?**

As a non–executive branch, independent administrative agency, the FCC is bound by the Administrative Procedure Act (APA) in how it operates, makes rules and policies, and applies those rules and policies. The APA gives independent agencies such as the FCC the ability to make rules in accordance with their governing statutes.\(^{37}\) The FCC exercises this power on a regular basis through its various notice-and-comment rulemaking proceedings, using its statutory authority to develop new rules as well as to amend or repeal existing rules.

The APA also provides for independent agencies such as the FCC to adjudicate controversies under certain circumstances.\(^{38}\) FCC administrative law judges (ALJs) conduct hearings ordered by the FCC, which include “acting on interlocutory requests filed in the proceedings such as petitions to intervene, petitions to enlarge issues, and contested discovery requests.”\(^{39}\)
Q 1.5.1 Which other laws have an important effect on administrative agencies such as the FCC?

Pursuant to the Paperwork Reduction Act, before issuing a new rule or taking an action that would require “collection of information” from ten or more “persons,” administrative agencies such as the FCC must seek approval from the Office of Information and Regulatory Affairs of the Office of Management and Budget (OMB). Therefore, FCC rules requiring the completion of forms, submission of reports, or similar activities require OMB approval. See Q 2.5 for a more detailed discussion of the FCC’s rulemaking procedures.

The Regulatory Flexibility Act requires agencies such as the FCC to consider the effect their rules may have on small businesses. Many FCC licensees qualify as small businesses, so this requirement applies to many FCC rules.

The Freedom of Information Act requires federal agencies to make records available to the public, either automatically or upon request, unless those records fall into one of a few enumerated exceptions. Therefore, in addition to the records the FCC makes public in the normal course of its business, it also may be subject to requests for additional disclosure.

Q 1.6 Do any foreign or international sources of regulation play a role in U.S. telecommunications?

The FCC, often through its International Bureau, interacts with foreign governments and agencies in a number of ways. For instance, the FCC licenses satellite systems and equipment, including satellite space stations and satellite earth stations. However, because satellites’ service areas are not naturally confined by countries’ geographic borders, this is one area of the law where the FCC must coordinate with international organizations, such as the International Telecommunications Union, a specialized agency of the United Nations governing international communications. See Q 2.15.
Guiding Policies

Q 1.7 Which important policies guide and influence U.S. communications law?

Chief among the FCC’s priorities are competition, public access, and spectrum efficiency.

Competition

Q 1.7.1 What is the importance of competition?

Competition has long been an important goal of U.S. communications law and policy. Whether encouraging new entrants in a given industry or preventing undue market control by one party, promoting and enhancing competition has been a driving force behind many of the FCC’s actions and initiatives for the last several decades.

Q 1.7.2 How does the FCC encourage competition?

The FCC has long regarded competition as an engine for economic growth, improvement of service and consumer protection in the telecommunications market. As discussed in Q 1.3.2, the Telecommunications Act of 1996 worked to break down barriers to competition and allow more entrants into telecommunications markets.\(^{46}\) FCC auction rules allow for bidding credits that favor new entrants.\(^{47}\) Many existing rules, such as broadcast ownership limits, prevent parties from obtaining more than a given level of market control.\(^{48}\) The National Broadband Plan cited competition as a potential driving force of broadband deployment in the United States and sought to promote broadband competition for that purpose.\(^{49}\)

Public Access

Q 1.7.3 What is the importance of public access to various communications platforms?

Ensuring public access to the services the FCC regulates has consistently been another one of the agency’s major priorities.
This priority can present itself in many different forms, including policies for improving geographic access for those in remote areas, the financial ability to obtain communications services, and rules on disability access.\textsuperscript{50} Enhanced access to communications capability increasingly is seen as critical for individuals to participate in society in a meaningful way.

\textbf{Q 1.7.4} How does the FCC increase public access to communications platforms?

An important component of the 1996 Act was the concept of “universal service,” which includes providing communications services at fair and reasonable rates to all consumers and increasing access to communications services for schools, hospitals, and citizens in rural areas.\textsuperscript{51} The FCC has implemented various programs to further this objective, including the E-Rate program, which strives to offset some costs so as to permit affordable service to schools and libraries, especially in rural and underserved areas, and the Lifeline program, which provides discounted telecommunications service to low-income individuals.\textsuperscript{52} Universal service is discussed in greater detail in chapter 4.

The American Reinvestment and Recovery Act of 2009 (ARRA)\textsuperscript{53} appropriated $7.2 billion for the National Telecommunications and Information Administration and Department of Agriculture’s Rural Utilities Service broadband loan and grant programs.\textsuperscript{54} These grants were intended to promote the deployment of broadband to underserved and rural areas.

The ARRA also required the FCC to develop a National Broadband Plan that would seek “to ensure that all people of the United States have access to broadband capability and shall establish benchmarks for meeting that goal.”\textsuperscript{55} The FCC released its National Broadband Plan on March 16, 2010. As required, the plan included many strategic goals and benchmarks for broadband development and deployment, many of which have become important components of the FCC’s policy goals and objectives.\textsuperscript{56} The plan, its purposes, and objectives are discussed in further detail in chapter 6.
In addition to geographic or physical access, the FCC has made disability access an important priority through a variety of initiatives, including requirements for closed-captioning of certain programming and access to telecommunications by persons with disabilities.\(^5\) The Twenty-First Century Communications and Video Accessibility Act of 2010\(^5\) added new disability access requirements applicable to the FCC, including restoring and expanding the “video description” requirements for programming, requiring an FCC clearinghouse on accessible communications services and equipment, and requiring advanced communications services (such as Voice over Internet Protocol) to be accessible by those with disabilities.\(^5\) These issues are discussed in further detail in chapter 10.

**Spectrum Efficiency**

**Q 1.7.5 What is the importance of spectrum efficiency?**

The Communications Act and FCC rules reflect the FCC’s concern with licensees “warehousing” or “stockpiling” spectrum, meaning holding the spectrum without putting it to productive use while preventing competitors from accessing it.\(^6\) Build-out rules and construction-period benchmarks and deadlines were implemented in part to address these concerns.\(^6\) In addition, the Communications Act provides for automatic cancellation of a radio station’s license if the station does not transmit broadcast signals for a consecutive twelve-month period.\(^6\)

As the FCC looks to the future, its major spectrum concerns include ensuring that sufficient spectrum will exist to support the growth, development, and competition that it hopes to foster. The goal of spectrum efficiency has become increasingly important as the FCC strives to address concerns about spectrum scarcity, often called a “spectrum crunch.”\(^6\) Now, instead of concerns limited to non-use of spectrum, the FCC has begun to look at the efficiencies of various uses of spectrum including spectrum sharing and spectrum incentive auctions, and whether some complimentary uses can be consolidated or combined.\(^6\) In addition, through efforts such as the FCC’s planned incentive auction, which are discussed in greater depth in subsequent chapters, the FCC is exploring new ways to make additional spectrum available.
Notes

2. Id.
25. See, e.g., 16 C.F.R. § 255.0 et seq.


32. See id. at 14,989–90.


34. See 47 C.F.R. § 64.2001 et seq.


40. See 44 U.S.C. §§ 3502(3), 3502(10), 3506(c), 3507.


42. See 13 C.F.R. § 121.101 et seq.

43. See 5 U.S.C. § 552.

44. See 47 C.F.R. § 25.102.

45. See Report and Order, In re Policies and Rules for Direct Direct Broadcast Satellite Service, 17 FCC Rcd. 11,331, 11,334–35 (2002). The FCC also coordinates with the ITU on other issues, including those relating to other licenses and authorizations near the Canadian and Mexican borders.


47. See, e.g., 47 C.F.R. § 73.5007.

48. See, e.g., 47 C.F.R. § 73.3555.


50. As just one example, viewing over-the-air television as a lifeline for many citizens, the FCC implemented strict requirements for consumer notification of analog termination during the DTV transition. See, e.g., Public Notice, FCC Announces Procedures Regarding Termination of Analog Television Service on or After February 17, 2009, 24 FCC Rcd. 1586 (Feb. 5, 2009).


56. See, e.g., FED. COMM’NS COMM’N, NATIONAL BROADBAND PLAN: CONNECTING AMERICA, ch. 8, Availability (2010) (“Everyone in the United States today should have access to broadband services supporting a basic set of applications that include sending and receiving e-mail, downloading Web pages, photos and video, and using simple video conferencing.”), available at www.broadband.gov/plan/8-availability/.


60. See 47 U.S.C. § 309(j)(4)(B); see also 47 U.S.C. § 319(b) (providing for automatic forfeiture of a construction permit if “station is not ready for operation within the time specified or within such further time as the Commission may allow, unless prevented by causes not under the control of the grantee.”).


62. 47 U.S.C. § 312(g). The FCC may prevent this outcome “if the holder of the station license prevails in an administrative or judicial appeal, the applicable law changes, or for any other reason to promote equity and fairness.” Id.

