

Executive Order Throws Down the Gauntlet for a New Era of Antitrust Enforcement

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On July 9, President Biden signed an executive order on promoting competition in the American economy, listing broad priorities for antitrust enforcement. In conjunction with this order, the Federal Trade Commission (FTC) and Department of Justice (DOJ) announced plans to review their jointly-issued *Horizontal and Vertical Merger Guidelines*, while new FTC Chair Lina Khan convened public meetings during which the FTC announced plans to broaden enforcement of Section 5 of the Federal Trade Commission Act on “unfair methods of competition.” Kahn also scheduled a meeting in which the FTC will vote on whether to rescind its 1995 policy statement on the reportability of future mergers by settling companies.

In promulgating the executive order, the White House criticized past corporate consolidation across 75% of U.S. industries and argued that consolidation had increased prices for consumers, decreased wages for workers, and hindered growth and innovation by making it more difficult for small and independent businesses. The order establishes what the White House refers to as a “whole-of-government effort to promote competition in the American economy,” encouraging 72 initiatives by more than a dozen agencies.

Significantly, the executive order also creates the White House Competition Council (Council) within the Executive Office of the President as part of the plan to institute the coordinated and aggressive approach to competition-related matters across federal agencies. The Council will be led by the assistant to the president for economic policy and director of the National Economic Council, as chair, and includes the secretaries of the Treasury, Defense, Agriculture, Commerce, Labor, Health and Human Services, Transportation; the attorney general; and the administrator of the Office of Information and Regulatory Affairs. The Council will implement policies and specific initiatives described in the executive order.

While some media outlets have characterized the executive order’s focus to be on large technology companies, that is not the case here, as the executive order addresses issues that touch upon all U.S. business sectors.

A. Labor and Noncompetes

The executive order places particular focus on labor issues and encourages the FTC to *ban or limit employee noncompete arrangements* to increase economic mobility by making it easier for employees to change jobs. This effort builds on the DOJ’s recent efforts to challenge employee no-poach agreements as criminal antitrust violations. Companies considering business noncompetes should continue to ensure that such agreements are narrowly tailored for a legitimate business purpose. Similarly, the executive order encourages the FTC to ban unnecessary occupational licensing requirements.

B. Merger Enforcement

The executive order introduces uncertainty for businesses planning mergers or other actions that may raise competition issues. In fact, the order appears to invite such uncertainty by, among other things, supporting the “challenge [of] prior bad mergers that past administrations did not previously challenge.”

The executive order also urges the FTC and DOJ to review and revise their *Merger Guidelines*, which the FTC and DOJ immediately took up by announcing their plan to review the guidelines “to determine whether they are overly permissive.” The executive order also specifically asks the agencies to scrutinize and reconsider their approach to hospital, banking and consumer finance, and Big Tech mergers.

We anticipate that merger review changes may include lowering the concentration thresholds for presumptively anticompetitive mergers, refining potential competition prohibitions, and eliminating or greatly limiting the efficiencies defense.

The executive order also encourages or directs a number of actions aimed at specific sectors of the economy, even setting short deadlines for some:

Labor Markets

- Use FTC rulemaking authority to limit the use of noncompete clauses.
- Use FTC rulemaking authority to limit unfair occupational licensing restrictions.
- Revise the *Antitrust Guidance for Human Resource Professionals* jointly issued by the DOJ and FTC in October 2016 to limit the ability of employers to collaborate to suppress wages or reduce benefits.

Intellectual Property

- Revise the *Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments* issued by the DOJ and the Department of Commerce on December 19, 2019 to avoid anticompetitive extension of market power beyond the scope of granted patents.

Health Care

- Food and Drug Administration (FDA) to work with states and tribes to import drugs from Canada.
- Department of Health and Human Services (HHS) to propose rules within 120 days to make hearing aids available over the counter.
- HHS to increase support for generic drugs, to issue a plan within 45 days to combat high prescription drug prices and price gouging, and to implement federal legislation to address surprise hospital billing.

- HHS to standardize plan options in the National Health Insurance Marketplace to make it easier for people to comparison shop.
- FTC to implement a rule that bans “pay for delay” agreements.
- DOJ and FTC to revise merger guidelines so that patients are not harmed by hospital mergers.

Transportation

- Department of Transportation (DOT) to propose rules within 45 days that require airlines to refund fees for services not provided, such as baggage fees when luggage is substantially delayed.
- DOT, within 90 days, to consider rules that require airlines to clearly disclose to customers any ancillary fees, such as for baggage, ticket changes, or cancellations.

Agriculture

- Department of Agriculture (USDA) to consider new rules under the Packers and Stockyards Act to address the unfair treatment of farmers and improve competition in markets for their products.
- USDA to consider new rules regarding when meat products can have “Product of USA” labels.
- USDA to develop a plan to increase farmers’ and small food processors’ access to retail markets and to submit a report to the Council chair within 300 days of the executive order.
- FTC to propose rules that limit equipment manufacturers from restricting farmers from repairing their own equipment.

Internet Service

- Federal Communications Commission (FCC) to conduct future spectrum auction under rules that avoid excessive concentration of spectrum licenses.
- FCC to prohibit internet service providers from charging excessive early termination fees.
- FCC to establish rules that prevents landlords from making deals with ISPs to limit tenants’ choices.
- FCC to restore net neutrality rules.
- FCC to establish rules that requires broadband providers to provide a consumer label with clear information about prices and fees, performance, and network practices and to require those providers to report broadband

price and subscription rates to the FCC for public dissemination.

Technology

- Announce an administration policy to enforce antitrust laws in the area of new industries and technologies, and to scrutinize mergers by dominant internet platforms when they “stem from serial mergers, the acquisition of nascent competitors, the aggregation of data, unfair competition in attention markets, the surveillance of users, and the presence of network effects.”
- FTC to establish rules pertaining to data collection and surveillance that may damage competition, consumer autonomy, and consumer privacy.
- FTC to establish rules against unfair competition in major internet marketplaces.

Banking and Consumer Finance

- DOJ and federal banking agencies, within 180 days, to review current practices and increase scrutiny of mergers under the Bank Merger Act and the Bank Holding Company Act of 1956.
- Consumer Financial Protection Bureau (CFPB) to use rulemaking to make consumer financial data more portable and make it easier for consumers to switch banks.

Takeaways

Some in the business community have expressed skepticism about the Biden administration’s commitment to execute on this expansive executive order. Based on the centrality of antitrust enforcement to core administrative economic and labor initiatives, as well as the anticipated direct role of the White House in coordinating the implementation of the executive order, however, it is our recommendation that companies treat these developments seriously.

While the executive order does not immediately change the existing antitrust framework, businesses should be prepared for a near-term change in enforcement by the agencies and should consider or be prepared to take steps, such as those identified here:

- Agreements or policies affecting employee freedom of movement should be assessed for less restrictive alternatives.
- Compliance programs should be updated to shift focus from only or primarily customers/consumers to include competitors.
- Companies previously relying on a broad market definition when assessing the lawfulness of their actions

should reexamine such actions to determine how their actions have affected their competitors.

- Existing or contemplated discount, rebate, pricing, or other promotional allowance programs that cover 30% or more of the total U.S. market, particularly those that go back to dollar zero, apply retroactively, or allow for the claw back of credits already awarded, should be reassessed.
- Agreements or programs that require or strongly encourage exclusive or bundled purchases should be reviewed.
- Practices or programs that have generated multiple or significant complaints of foreclosure from customers or critical inputs should be examined.

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