

## Client Alert

### Biden Executive Order on Competition Includes Directives to Increase Antitrust Enforcement

July 9, 2021

Today, President Biden signed an [Executive Order](#) establishing a “whole-of-government” effort to promote competition across broad swaths of the American economy. The Order is intended to address perceived harms from “excessive” corporate consolidation, which threatens “basic economic liberties, democratic accountability, and the welfare of workers, farmers, small businesses, startups, and consumers.” Sectors that receive particular focus are agriculture, healthcare, banking, internet platforms, telecommunications and labor markets generally. The Order builds upon the Biden/Sanders Unity Task Force recommendations for “Tackling Runaway Corporate Concentration.”

The Order sets forth 72 initiatives to be undertaken by more than a dozen federal agencies “to promptly tackle some of the most pressing competition problems across our economy.” Calling the antitrust laws the “first line of defense against the monopolization of the American economy,” many key proposals are aimed at increased antitrust enforcement by the Justice Department Antitrust Division (DOJ) and the Federal Trade Commission (FTC) or involving DOJ and FTC in competition policy issues with other agencies. Crowell & Moring will follow-up with additional alerts and analyses regarding specific industries and directives to other regulatory agencies.

The Order calls on DOJ and the FTC to “enforce the antitrust laws fairly and vigorously.” The Order recognizes that DOJ and FTC have overlapping jurisdiction, and encourages the agencies to “cooperate fully in the exercise of their oversight authority,” including coordinating to ensure consistency in outcomes and remedies. Such cooperation should include not only sharing information, but “in the case of major transactions, soliciting and giving significant consideration to the views of” the other agency.

With respect to mergers, the Order not only seeks an update of the DOJ/FTC Merger Guidelines (both horizontal and vertical), but also encourages the antitrust agencies to “[challenge prior bad mergers that past Administrations did not previously challenge](#).” Following signing of the order this afternoon, DOJ and FTC issued a [joint statement](#): “The current [merger] guidelines deserve a hard look to determine whether they are overly permissive. We plan to jointly launch a review of our merger guidelines with the goal of updating them to reflect a rigorous analytical approach consistent with applicable law.”

One notable initiative is that the Order encourages the FTC to ban or limit “the unfair use of” non-compete agreements in labor markets, on the premise that such clauses in employment contracts stifle competition for hiring workers. While the antitrust laws have been applied to certain types of non-competes, the availability and enforceability of employee non-competes was left largely to state law. The FTC will have to determine how far it can go to regulate such non-competes under its antitrust statutory authority, recognizing any such rules would likely trigger a legal challenge.

The Order establishes a White House Competition Council, led by the Director of the National Economic Council, to monitor progress with the Order and coordinate the federal government's response to "efforts to address overconcentration, monopolization, and unfair competition." The Council is also charged with identifying potential legislative changes necessary to further the Order's policies. There is speculation that Tim Wu, who serves as Special Assistant to the President for Technology and Competition Policy and has written extensively on the "The Curse of Big Business," likely played a significant role in drafting the Order. And if history is any guide, the draft Order likely was reviewed by leadership at both antitrust agencies. Although Biden has yet to nominate an Assistant Attorney General for the DOJ Antitrust Division, it is reasonable to expect the agencies are prepared to launch workstreams for these initiatives very quickly.

Specific directives aimed at increased antitrust enforcement include the following:

#### "Big Tech" Platforms

- Announces a policy of greater antitrust scrutiny of mergers, especially by "dominant internet platforms, with particular attention to the acquisition of nascent competitors, serial mergers, the accumulation of data, competition by 'free' products, and the effect on user privacy."
- Encourages the FTC to establish rules barring unfair methods of competition in internet marketplaces and regulating "unfair data collection and surveillance practices."

#### Labor Markets

- As noted above, encourages the FTC to exercise its rulemaking authority to ban or limit the unfair use of non-compete clauses in employee agreements.
- Encourages the FTC to ban unfair occupational licensing requirements often imposed by states that impede economic mobility.
- Encourages the FTC and DOJ to revise the Antitrust Guidance for HR Professionals to prevent employers from suppressing wages or reducing benefits by sharing information.

#### Intellectual Property

- Based on concerns about the extension of market power "beyond the scope of granted patents," and the protection of standard setting processes, calls on DOJ (along with the Department of Commerce which houses the Patent and Trademark Office) to revise its position on the intersection of antitrust and IP policy, including the Trump Administration Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments issued in December 2019.

#### Healthcare

- Encourages the FTC to issue a rule banning "pay for delay" and similar agreements in the pharma industry.
- Encourages the DOJ and FTC to revise merger guidelines to prevent hospital mergers that harm patients.

- With the Department of Health and Human Services, directs the FTC to identify and address efforts to impede generic drug and biosimilar competition.

#### Agriculture/Food

- Directs the FTC, along with the Department of Agriculture, to ensure that the intellectual property system does not reduce competition in seed and other input markets.
- Orders the FTC, along with the Department of Agriculture, to report on the effect of retail concentration and retailers' practices on the competition in the food industry.

#### Regulated Industries

- Airlines: instructs DOJ to work with the Department of Transportation to ensure competition in air transportation, particularly "the ability of new entrants to gain access."
- Banks: encourages DOJ and the banking agencies to update guidelines and provide more robust scrutiny of bank mergers.
- Beer, wine, spirits: directs DOJ, FTC, and the Department of Treasury to issue a report of threats to competition and barriers to new entry.

#### Defense/Government Contractors

- Directs the Defense Department to conduct a review of the state of competition within the defense industrial base and make recommendations for improving the solicitation process to promote greater competition.

#### Equipment Repair

- Encourages the FTC to issue rules limiting manufacturers of equipment, such as cell phones and farm tractors, from barring self-repairs or third-party repairs of their products.

#### Real Estate

- Encourages the FTC to issue a rule addressing unfair tying practices or exclusionary practices in the brokerage or listing of real estate.

Because the Executive Order is primarily a series of directives that federal agencies are encouraged to address and thus not self-executing, it will be up to the DOJ, FTC and other agencies to determine how to implement the directives. And in the case of antitrust enforcement, the agencies will confront the headwinds of decades of antitrust law created by federal courts that ultimately will rule on the legality of the conduct at issue. That means the shifting policy emphasis, revised agency guidelines, and new rules will have to withstand judicial scrutiny. Some directives may require supporting legislation to the extent they exceed the current statutory authority of the agencies. Others may involve preemption of state laws, and it is unclear whether the agencies can implement such changes through regulation. Accordingly, although the President's agenda is clear, the

ability of the antitrust agencies to execute will depend on the specific approach, likely accompanied by political controversy and legal challenges.

Crowell & Moring will continue to follow and update on these and related developments.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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