

Axinn Antitrust Insight: White House Issues Executive Order Aimed at Increasing Antitrust Enforcement and Promoting Competition

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PRACTICE AREAS

Antitrust

Axinn Update

On Friday, July 9, 2021, President Biden signed a sweeping Executive Order addressing a range of competition-related issues across the economy. The order and the President's speech announcing it reflect a highwater mark in recent history for presidential attention to competition issues. This level of White House attention to competition issues is certain to embolden federal agencies -- especially the FTC and DOJ's Antitrust Division -- to be more aggressive in challenging mergers or conduct that would likely not have been challenged in previous administrations. Below is a summary of the Executive Order, along with some key highlights for those focused on technology, health care, agriculture and food, intellectual property, and labor issues.

According to the White House, "for decades, corporate consolidation has been accelerating" across a variety of industries, which has driven up prices for consumers, lowered wages for workers, and reduced growth and innovation. The Executive Order prescribes a "whole-of-government" effort to promote competition through 72 initiatives aimed at over a dozen federal agencies, many of which are directions to take or consider some action or policy. Among the notable initiatives, the Executive Order encourages (i) FTC to exercise statutory rulemaking to "curtail the unfair use of non-compete clauses," and (ii) FTC and DOJ to enforce the antitrust laws more vigorously.

With respect to mergers, the order directs FTC and DOJ to consider modifying the horizontal and vertical merger guidelines, presumably to provide for more aggressive enforcement. Indeed, shortly after the Executive Order was signed, FTC and DOJ issued a joint announcement indicating that the guidelines "deserve a hard look to determine whether they are overly permissive" and that they would soon "launch a review ... with the goal of updating them to reflect a rigorous analytical approach consistent with applicable law." The White House also noted that the

antitrust agencies have authority to challenge “prior bad mergers that past Administrations did not previously challenge,” which is clear encouragement for the agencies to use this authority.

The Executive Order is the latest indication that the administration is pursuing a significantly more aggressive approach to antitrust -- one untethered to the consumer-welfare standard that assesses mergers’ impact on prices, quality and innovation. Previously, the President appointed Lina Khan, noted critic of the consumer-welfare standard, to be FTC Chair, and Tim Wu, outspoken critic of prior antitrust enforcement, to serve on the National Economic Council.

On July 1, 2021, FTC’s new Democratic majority voted both to usher in revised procedural rules to allow for faster implementation of substantive rulemaking as well as to rescind the Commission’s 2015 *Unfair Methods of Competition* policy statement which tied FTC’s enforcement of Section 5 of the FTC Act to the consumer-welfare standard. These developments help lay the groundwork for FTC to pursue the more aggressive agenda encouraged by the Executive Order.

While this administration has focused on antitrust more than others in recent history, it has yet to nominate an Assistant Attorney General for DOJ’s Antitrust Division, who would be a key player in implementing a more aggressive antitrust posture.

The administration’s success in implementing its broad competition agenda embodied by the Executive Order ultimately will depend in great part on the courts, as companies are likely to challenge the agencies’ statutory authority or even the constitutionality of these new actions.

The Executive Order includes myriad initiatives specific to industries or other domains, including:

Technology

- An administration policy of greater scrutiny of mergers, especially by dominant platforms, particularly those involving nascent competitors, serial acquisitions, the accumulation of data, competition by “free” products, or an effect on user privacy
- Encourages FTC to establish rules on (i) surveillance and the accumulation of data, and (ii) unfair methods of competition on internet marketplaces

Health Care

- Encourages FTC to ban “pay for delay” and similar agreements by rule
- Ensure that patients are not harmed in hospital mergers

Agriculture and Food

- Directs USDA to consider issuing new rules making it easier for farmers to bring and win claims, “stopping chicken processors from exploiting and underpaying chicken farmers,” and adopting anti-retaliation protections for farmers who speak out about bad practices
- Directs the USDA and FTC to submit a report on the effect of retail concentration in the food industries

Intellectual Property

- Encourages DOJ and the Department of Commerce to revise their December 2019 policy regarding standard essential patents based on White House concerns about the extension of market power beyond the scope of granted patents

Labor

- As mentioned above, encourages the FTC to ban or limit non-compete agreements
- Criticizes the 2016 Antitrust Guidance for Human Resource Professionals¹ and encourages FTC and DOJ to issue guidance to prevent employers from suppressing wages or reducing benefits by sharing wage and benefit information with one another

Please contact Axinn to discuss in more detail how this Executive Order may affect your business.

¹ With respect to the exchange of information among competitors, the 2016 HR Guidance in turn relies on the 1996 Statements of Antitrust Enforcement Policy in Health Care, which sets forth guidance on information exchange, including safety zones for lawful conduct, that has been widely relied upon by companies for the past 25 years across a range of industries, i.e. not limited to the health care sector.