

Insights

ELEVATING ANTITRUST ISSUES: PRESIDENT BIDEN'S NEW EXECUTIVE ORDER

Jul 15, 2021

During an already busy year for antitrust legislative and regulatory proposals, on July 9, 2021, President Biden issued Executive Order 14036: "Promoting Competition in the American Economy."¹ The Executive Order ("EO") promises "to lower prices for families, increase wages for workers, and promote innovation and even faster economic growth."² The focus of the EO is continued scrutiny of large companies across multiple sectors of the U.S. economy. Like the proposed legislation in both the House of Representatives and Senate,³ the EO targets mergers and acquisitions by intensifying government enforcement efforts.

The EO creates 72 initiatives to address areas where President Biden believes there are competitive problems. Specifically, the EO adopts a "whole-of-government competition policy" that encourages coordinated efforts across all federal agencies that have a role in antitrust enforcement to address "overconcentration, monopolization, and unfair competition in the American economy." The Antitrust Division of the Department of Justice ("DOJ") and the Federal Trade Commission ("FTC") will lead this new coordinated effort to enforce the antitrust laws vigorously, including through challenges to closed mergers that past administrations failed to challenge. The EO also creates a new White House Competition Council that will implement the administrative actions of the EO and identify other administrative and legislative changes needed to promote the EO's goals.⁴

The EO focuses on the following sectors: (1) Big Tech, (2) agriculture, (3) healthcare, (4) banking and financial transactions, and (5) transportation. These areas appear to be organized by priority.

Big Tech:

The EO seeks to scrutinize dominant Internet platforms, with particular attention to large Internet platforms that engage in serial mergers, acquiring nascent competitors, aggregating data, user surveillance, and unfair competition in attention markets.⁵ Specifically, the FTC is "encouraged" to exercise its rulemaking authority to address: (1) unfair data collection and surveillance practices, (2) unfair competition in "major Internet marketplaces," and (3) unfair licensing restrictions. The EO

also attempts to facilitate job changes by Big Tech workers by encouraging the FTC to ban or limit non-compete agreements.

Agriculture:

The EO endeavors to empower family farmers to increase their incomes through rules that would address “unfair, unjustly discriminatory, or deceptive practices” in the livestock, meat, and poultry industries.⁶ Specifically, the Department of Agriculture is tasked to issue rules that would allow farmers to more easily bring claims regarding practices that are detrimental to their profitability.

Healthcare:

The EO targets several healthcare-related markets, including insurance, hospitals, and prescription drugs.⁷ With regard to insurance, the EO encourages the Department of Health and Human Services to “implement standardized options in the national Health Insurance Marketplace.” The DOJ and FTC are tasked to increase scrutiny of mergers between hospitals. Moreover, the EO seeks to lower the prescription drug prices by supporting programs that would import cheaper prescription drugs from Canada, decrease prescription drug prices in the US, and end price gouging.

Banking and Financial Transactions:

The EO encourages the DOJ, FTC and other agencies to review and revise guidelines to increase the oversight of mergers between financial institutions.⁸ The EO further authorizes the Consumer Financial Protection Bureau to consider rulemaking that would allow for greater data portability so that consumers could more easily change financial institutions to take advantage of financial innovation.

Transportation:

The EO address transportation competition concerns in the airline, railroad, and shipping industries.⁹ The Secretary of Transportation is tasked to enhance the transparency of the airline industry to allow consumers to better assess flight options across various airlines, and to ensure that consumers are aware of all ancillary fees, including fees for cancellations, flight changes, and baggage. For the railroad industry, the EO requires additional scrutiny of whether mergers are in the public interest, among other things.¹⁰ For shipping, the EO aims to address high shipping costs by vigorously enforcing unjust and unreasonable practices related to detention and demurrage practices.

Finally, the EO encourages the DOJ and FTC to reevaluate their horizontal and vertical merger guidelines to ensure they capture all types of anticompetitive conduct.¹¹ Shortly after the EO was issued, the agencies jointly stated: “[t]he current guidelines deserve a hard look to determine whether they are overly permissive. We plan soon 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.”¹²

Bryan Cave Leighton Paisner’s experienced antitrust attorneys can help clients navigate increased scrutiny from government agencies resulting from this Executive Order, and any changed merger guidelines. For more information, please contact a member of the Antitrust and Competition team.

1. Exec. Order No. 14036 (July 9, 2021).
2. *FACT SHEET: Executive Order on Promoting Competition in the American Economy*, The White House (July 9, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/09/fact-sheet-executive-order-on-promoting-competition-in-the-american-economy/>
3. See two recent alerts by Bryan Cave Leighton Paisner: “Big Tech Under Fire: New Antitrust Bill Targets ‘Extremely Large’ Companies,” <https://www.bclplaw.com/en-US/insights/big-tech-under-fire-new-antitrust-bill-targets-extremely-large-companies.html>; and “New Antitrust Bills Highlight Continued Big Tech Scrutiny,” <https://www.bclplaw.com/en-US/insights/new-antitrust-bills-highlight-continued-big-tech-scrutiny.html>.
4. Exec. Order No. 14036 § 4.
5. *Id.* at §§ 1 and 5(g)-(h).
6. *Id.* at § 5(i).
7. *Id.* at § 5(p)-(q).
8. *Id.* at §§ 5(e) and 5(t)(i).
9. *Id.* at §§ 5(i), 5(n), and 5(o).
10. See 49 U.S.C. 24308 (2020).
11. See Exec. Order No. 14036 § 5(f).
12. Statement of Acting Assistant Attorney General Richard A. Powers of the Antitrust Division and FTC Chair Lina Khan.

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