Professional Perspective

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Even as technology companies have occupied headlines about more muscular antitrust enforcement, the financial services industry should be paying close attention. President Joe Biden signaled he will prioritize antitrust enforcement, particularly against practices that restrain employee wages and uses of technology.

Indeed, in other potential harbingers of an enforcement revival, Biden issued a lengthy executive order committing the federal government to robust enforcement of competition laws, and became the first president to task a member of the National Economic Council (NEC) with focusing upon competition policy. In particular, the president's executive order directed various federal agencies to review competition in the financial services sector, including potential impacts from emerging technologies and the aggregation of data.

Additionally, in the waning days of the Trump administration, the Department of Justice began touting a revised "muscular" approach designed to bolster antitrust enforcement in this important sector. The Antitrust Division's structure has been altered to consolidate three separate sections in response to the "massive technological changes" in financial services that "blurred the lines between financial technology services, credit cards, and banking."

Between the new administration's expressed priorities and the Antitrust Division's new structure, the financial services industry could encounter growing scrutiny from competition authorities—a phenomenon often followed by civil litigation. This article focuses on aspects of the financial services industry that could face increased scrutiny.

Labor Practices

The DOJ recently delivered on five years of warning about criminal sanctions against agreements that restrain employee wages and, in particular, no-poach agreements among employers not to solicit or hire each other's employees. In December 2020, the Antitrust Division obtained its first criminal indictment concerning an alleged wage-fixing conspiracy to lower the rates paid for physical therapists. That was quickly followed by an indictment charging health care competitors with agreeing not to solicit each other's senior-level employees. And, to no one's surprise, follow-on civil class action lawsuits quickly followed.

The Division's focus on labor markets aligns with the administration's priorities, as President Biden called for a ban on most no-poach agreements, directed numerous federal officials—including the secretary of labor and the attorney general—to submit a report "on the effects of lack of competition on labor markets," and requested that senior NEC official Timothy Wu review the administration's policy toward no-poach agreements.

The financial services sector could feel this spotlight as investigations and civil suits in the past have focused upon no-poach pacts in a range of industries, including those with highly skilled employees. Although the DOJ previously clarified that only "naked" no-poach agreements that are not reasonably necessary to a broader legitimate collaboration are per se unlawful—and therefore subject to criminal sanctions—it remains uncertain how rigorously the Biden administration intends to draw this distinction. It also remains to be seen how the administration will define which agreements are reasonably necessary to support legitimate collaboration and which procompetitive justifications are acceptable.

The administration's focus on labor markets may also lead to scrutiny of businesses, including those in financial services, exchanging information about their employees' wages. In fact, federal regulators warned that companies should avoid sharing competitively sensitive information and singled out wage information as something companies should avoid communicating.

Regulators have advised that exchanges of wage data may be lawful if it is relatively outdated, managed by a neutral third party, and anonymized. But Biden's executive order on competition "encouraged" the attorney general and the chair of the FTC "to consider whether to revise the Antitrust Guidance for Human Resource Professionals of October 2016."

Technology

As the Antitrust Division has recognized, the "financial markets and the financial services industry are currently undergoing massive transformation" as new technologies "are disrupting how we do business, how we transact with each other, and how the economy functions." To keep pace, members of the Antitrust Division have touted taking courses offered by the Massachusetts Institute of Technology on the use of machine learning and artificial intelligence in the financial services sector.

Biden also directed federal officials to review competition in the financial services sector and declared that it is "the policy of [the Biden] administration to enforce the antitrust laws to meet the challenges posed by new industries and technologies … especially as they stem from … the aggregation of data."

One significant change wrought by technology in the financial services sector is the adoption of algorithms to automate pricing and trading. While algorithms offer banks and consumers pro-competitive benefits, their rise has drawn the attention of regulators and academics because certain algorithms could arguably result in parallel pricing, and some have even expressed concern that they could facilitate a form of price fixing.

Because Section 1 of the Sherman Act does not bar competitors from parallel pricing absent an agreement to do so, most concerns pertain to the human element in algorithms: using algorithms to implement price fixing agreements among competitors, or "hub-and-spoke" agreements where competitors use a third-party pricing algorithm to coordinate their prices. For instance, a court sustained a complaint alleging that Uber's pricing algorithm yielded supra-competitive results and that adherence to the pricing algorithm reflected a horizontal agreement among drivers to charge higher prices. See *Meyer v. Kalanick*, No. 15-CV-09796, 174 F. Supp. 3d 817 (S.D.N.Y. Mar. 31, 2016).

Algorithms' vast accumulation of data, and any effect they may have on competition in financial markets, could attract scrutiny from the Biden administration because algorithms are now widely used in the financial markets to facilitate automated trading and pricing. Indeed, in 2017, demand for data scientists in the financial sector outpaced demand for quantitative analysts. And a recent report indicated most equities are traded via an algorithm.

Considering the widespread use of algorithms in financial markets, the Antitrust Division may attempt to leverage its new expertise on these issues by scrutinizing algorithmic pricing engines, their impact on competition, and whether they facilitate coordinated or parallel pricing.

The retooled Antitrust Division also appears to be scrutinizing transactions occurring in the digital marketplace, particularly in light of the increase in online shopping as a result of the pandemic. In March 2021, Visa confirmed that the division was probing whether its debit card routing technology unfairly limits merchants from choosing less expensive debit networks over which to route consumers' online transactions.

Subsequently, in August 2021, the Antitrust Division commented with approval on a proposed rule from the Federal Reserve aimed at increasing competition among debit card networks for online transactions, while also expressing concern that additional steps may be needed to ensure vigorous competition in that market.

Conclusion

Biden's antitrust enforcement priorities, including scrutinizing labor practices and uses of technology help identify important compliance priorities for the financial services industry. Coupling the president's agenda with the Antitrust Division's reorganization may lead to increased oversight for this important industry in the coming months and years.

