

Executive Order Launches ‘Whole-of-Government’ Antitrust Initiatives but Implementation Faces a Long Road Ahead

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Over the course of his first six months in office, President Joe Biden has signaled a clear commitment to reinvigorate antitrust enforcement. On July 9, 2021, he took his most specific and comprehensive action on the subject yet, issuing an Executive Order on Promoting Competition in the American Economy (the Order).¹ A newly created White House Competition Council will oversee what is described as a “whole-of-government approach” that involves over a dozen federal agencies collaborating to carry out the Order’s 72 initiatives. The council, led by the director of the National Economic Council, will act as the nerve center, coordinating the implementation of the Order’s initiatives.

The Order “affirms that it is the policy of [the Biden] Administration to enforce the anti-trust laws to combat the excessive concentration of industry, the abuses of market power, and the harmful effects of monopoly and monopsony,” and to “enforce the antitrust laws to meet the challenges posed by new industries and technologies.” The Order encourages agencies to “vigorously” enforce the antitrust laws, including through rulemaking, and touches on almost every corner of the American economy, from labor markets to health care, transportation to financial services, and technology to agriculture.² It thus adds significant policy detail to supplement signals that the Biden administration has sent through personnel decisions — the appointments of progressives Tim Wu to the National Economic Council and Lina Khan as chair of the Federal Trade Commission (FTC).³ For the most part, however, the Order launches — rather than completes — the policymaking process, and much of the important detail will emerge through the labyrinth of enforcement, regulation and (inevitable) litigation.

The Order

While proponents of antitrust reform were quick to praise the Order and the policies it reflects, the signing of the Order will not immediately revolutionize antitrust enforcement. As an initial matter, the Order primarily directs the relevant agencies to “consider” using their respective authorities to further its policies and “encourages” the agencies to take certain actions. For the most part, its only firm requirements are the submission of reports and plans by designated agencies to the Competition Council. The Order leaves the agencies with significant discretion, does not create any right of action and acknowledges that its enforcement must be consistent with existing applicable law. To the extent the Order calls for administrative rulemaking, that process is inevitably lengthy and complicated, with a notice and comment period that can often take years to finalize and face substantial litigation challenges.

Not surprisingly, the Order contains various initiatives to be spearheaded by the FTC and the Department of Justice (DOJ), the two principal federal antitrust enforcement agencies. For example, the Order encourages the two agencies to consider whether to revise the jointly issued Antitrust Guidance for Human Resource Professionals from October 2016. The Order also encourages the FTC and DOJ to review the existing merger guidelines and consider whether changes are needed; and within hours of the Order’s issuance, the DOJ’s Acting Assistant Attorney General for Antitrust Richard Powers and FTC Chair Lina Khan issued a joint statement committing to quickly launch

¹ Executive Order on Promoting Competition in the American Economy.

² Other industries specifically mentioned in the Order include beer, wine and spirits, pharmaceuticals, railroads, shipping, telecommunications, real estate, aviation and aerospace.

³ See our June 18, 2021, client alert “Lina Khan’s Appointment as FTC Chair Reflects Biden Administration’s Aggressive Stance on Antitrust Enforcement.”

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a joint review.⁴ The Order emphasizes scrutiny of certain mergers, including so-called serial mergers or those involving nascent competitors, already well underway at the agencies. And while reform of merger analysis has gained momentum in Congress, for now enforcement actions spurred by these new policies will be judged through the lens of existing law and well-established precedent.⁵ As the recent dismissal of the FTC’s Section 2 monopolization suit against Facebook demonstrates, a change in enforcement priorities can run aground in the courts.⁶

The Order additionally urges the FTC to engage in rulemaking on such topics as noncompete clauses, data collection and surveillance, occupational licensing, product labeling, prescription drugs, real estate, and “any other unfair industry-specific practices that substantially inhibit competition.” Under Chair Khan’s leadership, and with two other Democratic commissioners who are committed to progressive — and aggressive — antitrust enforcement (Commissioners Rohit Chopra and Rebecca Slaughter), the FTC may set a more robust enforcement and rulemaking agenda. Perhaps not coincidentally, on July 1, 2021, the FTC approved — by a 3-2 vote — changes to its rulemaking procedures under Section 18 of the FTC Act to “modernize” and “streamline” the rulemaking process.⁷ The Order’s initiatives may offer the FTC its first opportunity to test these procedural reforms.

In the meantime, additional important personnel decisions remain. FTC Commissioner Rohit Chopra’s seat will become available if he is confirmed (as expected) for the role of director of the Consumer Financial Protection Bureau, and the position of assistant attorney general for antitrust at the DOJ still remains open. Although we expect the nominee for either position to support the Order’s goals, the candidate may bring a more moderate (or, alternatively, more reform-minded) perspective.

⁴ Press Release, Dep’t of Justice, “[Statement of Acting Assistant Attorney General Richard A. Powers of the Antitrust Division and FTC Chair Lina Khan on Competition Executive Order’s Call To Consider Revisions to Merger Guidelines](#)” (July 9, 2021). Notably, the agencies’ Vertical Merger Guidelines are barely a year old, having been released jointly by the DOJ and the FTC on June 30, 2020.

⁵ For a discussion of the current state of merger law, see Steve Sunshine and Julia York, “[Why ‘Ramping Up’ Merger Enforcement Isn’t So Easy](#),” The CLS Blue Sky Blog (July 7, 2021).

⁶ See our July 18, 2021, client alert “[Facebook Rulings Are a Setback for Antitrust Regulators but May Spur Amendments](#).”

⁷ Press Release, Fed. Trade Comm’n., “[FTC Votes To Update Rulemaking Procedures, Sets Stage for Stronger Deterrence of Corporate Misconduct](#)” (July 1, 2021). Section 18 of the FTC Act provides the agency with rulemaking authority.

Political Landscape

The current antitrust reform effort has its roots in the 2017 “A Better Deal” agenda proposed by House and Senate Democrats, culminating in a Fall 2020 report by the House Judiciary Committee Subcommittee on Antitrust, Commercial and Administrative Law. The House Judiciary Committee report outlined several reforms focusing on large technology companies, and has served as the basis for current legislative proposals. Also, a remarkable bipartisan consensus has emerged around antitrust enforcement in the House of Representatives: Most recently, House Democrats and Republicans released a bipartisan package of five antitrust reform bills to address the practices of large technology companies and online marketplaces.

On the other side of the Capitol, Sen. Amy Klobuchar, the chair of the Senate Judiciary Committee Subcommittee on Antitrust, Competition Policy and Consumer Rights, also introduced expansive antitrust reform legislation in 2021. The “Competition and Antitrust Law Enforcement Act”⁸ would change the long-standing standard for proving that a merger breaches the Clayton Act. Rather than “substantially lessen competition,” a merger would only need to pose “appreciable risk of materially lessening competition” to be prohibited. The bill would also shift the burden to the defendants to show that a merger would not raise such an appreciable risk. Although members of both political parties appear to support enacting changes to antitrust statutes, the details remain in dispute.

Conclusion

The Order is designed to convey a clear message: the Biden administration is serious about reinvigorating antitrust policy through a coordinated government-wide effort to reshape the antitrust laws and rethink enforcement. But the Order’s goals will soon face difficult and time-intensive challenges to implementation. While the Order may embolden federal agencies to take a tougher stance in enforcing the antitrust laws, we expect any changes requiring rulemaking to be lengthy and complex. Any enforcement actions and regulatory changes will be adjudicated under current statutes and precedents, and the scope of legislative reforms may depend on the shape of potentially fragile bipartisan consensus.

⁸ Competition and Antitrust Law Enforcement Act, S. 225, 117th Cong. (2021).

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