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All Hands on Deck: Executive Order Promoting Competition in the American Economy

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President Biden signed a sweeping Executive Order on July 9, 2021, that establishes a "whole-of-government effort to promote competition" in the U.S. economy. The Executive Order directs or encourages 12 federal agencies to undertake 72 specific initiatives to counter what the Administration says are barriers to competition which result in higher prices to consumers, lower wages for workers, and decreased innovation across the economy.

While some of the initiatives in the Executive Order are new, others indicate White House support for agency initiatives already begun, such as the proposed Department of Agriculture (USDA) rulemakings under the [Packers and Stockyard Act](#) and the [suggestion](#) that the Federal Trade Commission (FTC) act to restrict the use of non-competes.

The Administration's determination to counter industry consolidation through mergers and acquisitions is evident throughout the Executive Order. Immediately after President Biden's White House press conference and signing ceremony, the FTC Chair and the acting Assistant Attorney General of the Justice Department Antitrust Division (DOJ) issued a joint [statement](#) announcing their intention to launch a review and update of the guidelines used by the agencies in reviewing proposed transactions to ensure they "review mergers with the skepticism the law demands."

The Executive Order is not law, but rather a pronouncement of the Administration's policy and enforcement priorities. While the Executive Order directs agencies within the Executive Branch to take certain actions (e.g., directing the Transportation Department to issue regulations regarding baggage fee refunds), it can only suggest independent agencies take certain steps (e.g, encouraging the Federal Communications Commission (FCC) to reinstate net neutrality rules).

Many of the initiatives in the Executive Order will require agency hearings and rulemakings. Others will require Congressional authorization through legislation, all of which will allow significant opportunities for industry participants to provide comments and other input in shaping policy.

Key General Initiatives:

- Establishes a White House Competition Council to coordinate the "whole of government approach, including developing procedures and practices to enable agency cooperation and coordination on areas of overlapping jurisdiction and to identify potential legislative changes to further the policies articulated in the Order." The Council will include designees from eight cabinet departments and will invite the participation of the FTC and other independent agencies.
- Directs the heads of all agencies to consider the impact of regulations on competition and concentration in the industries they oversee, and to use procurement and spending authority to promote competition by supporting small businesses.

- Encourages the FTC and the DOJ to review the horizontal and vertical merger guidelines used by the agencies to assess the likely competitive effects of proposed mergers and other transactions.
- Encourages the Attorney General and the Secretary of Commerce to revisit their respective agencies' position on the Policy Statement on Remedies for Standards-Essential Patents.
- Encourages the FTC to engage in rulemaking and other initiatives to restrict the ability of manufacturers from barring self-repairs or third-party repairs of their products (e.g., tractors, cell phones).
- Encourages the FTC to engage in rulemaking to ban or limit noncompete clauses and agreements in labor markets.
- Encourages the FTC to engage in rulemaking to limit unnecessary occupational licensing restrictions.
- Encourages the FTC and DOJ to strengthen antitrust guidance and enforcement to prevent employers from collaborating to suppress wages or reduce employee benefits.

Key Industry-Specific Initiatives:

Health Care

- Encourages the FTC and DOJ to review and revise merger guidelines to ensure hospital mergers do not harm patients through the elimination of services in rural areas.
- Directs Health & Human Services (HHS) to support hospital transparency rules.
- Encourages the FTC to engage in rulemaking to ban so-called "pay-for-delay" agreements between pharmaceutical manufacturers that delay competition between generic and branded pharmaceuticals.
- Directs the Food and Drug Administration to work on the safe importation of prescription drugs from Canada.
- Directs HHS to issue a plan to combat high prescription drug prices and price gouging.
- Directs HHS to issue rules allowing over-the-counter sales of hearing aids.
- Directs HHS to implement standardized options in the Health Insurance Marketplace

Agriculture

- Directs USDA to issue new rules:
 - under the Packers and Stockyards Act to address consolidation;
 - limiting the labeling of food as "Product of the USA" to products actually produced in the U.S.
- Directs the Secretary to take steps to ensure that small farmers have access to markets by developing a plan to promote competition and support value-added agriculture and alternative food distribution systems.

Internet Service

- Encourages the FCC to:
 - restore net neutrality rules;
 - limit excessive termination fees imposed by Internet service providers; and
 - prevent Internet providers from making deals with landlords that limit tenant choice

Technology

- Announces the Administration's policy to give greater scrutiny to tech mergers, with particular attention to acquisitions of nascent competitors.
- Encourages the FTC to establish rules on surveillance and the accumulation of data by companies.
- Encourages the FTC to establish rules barring unfair methods of competition in Internet marketplace.

Banking and Consumer Finance

- Encourages the DOJ and responsible agencies to update guidelines on banking mergers to provide more robust scrutiny of mergers.
- Encourages the Consumer Financial Protection Bureau to issue rules allowing customers to port their banking data.

Transportation

- Directs the Secretary of Transportation to engage in rulemaking:
 - to ensure consumers have access to flight information, including information about new competitors;
 - to ensure consumers are not exposed to deceptive advertising, or subject to fees that constitute unfair and deceptive practices or unfair methods of competition; and
 - requiring airlines to refund baggage fees when luggage is delayed, and other ancillary fees (e.g., wi-fi fees) when the service is not provided.

The implications of the Executive Order will unfold over the coming weeks and months. Baker Donelson will provide updates on developments, but it is clear now that federal agencies will be devoting substantially more attention to the numerous competition issues identified in the Executive Order. For more information, please contact antitrust attorneys [Katie Funk](#), [John Calender](#), or [Alex McIntyre](#), or [Sheila Burke](#), chair of the Firm's [Government Relations and Public Policy](#) team.