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President Biden Signs Executive Order Promoting Competition in the American Economy and Announces Nominee for Assistant Attorney General for Antitrust

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There have been two key antitrust developments under the Biden administration in recent weeks, both of which underscore the Biden administration's commitment to heightened antitrust enforcement in both merger review and conduct matters.

First, on July 9, 2021, President Biden signed Executive Order 14,036¹ on Promoting Competition in the American Economy (the "Order"). The Order has the stated goal of "affirm[ing] that it is the policy of [the Biden] Administration to enforce the antitrust laws to combat the excessive concentration of industry, the abuses of market power, and the harmful effects of monopoly and monopsony".² To achieve this goal, the Order calls on federal agencies to coordinate amongst themselves in a "whole-of-government approach" towards promoting competition and sets in motion a sweeping series of reviews and rulemakings ranging from general policies aimed at heightening antitrust enforcement to specific directives for over a dozen federal agencies. These directives target competition issues arising in labor markets, agricultural markets, Internet platform industries, healthcare markets and consumer finance markets, among other industries. In his signing remarks, President Biden declared the Order a commitment to "full and aggressive enforcement of our antitrust laws" and noted its inclusion of 72 specific action items "to help restore competition so that we have lower prices, higher wages, more options, and more convenience for the American people".³ Given its ambitious breadth and detailed set of recommendations and directives, the Order is a significant pronouncement of the Biden administration's position on competition matters and business practices generally. A more detailed summary of the Order is set forth below.

Second, on July 20, 2021, President Biden announced his intent to nominate Jonathan Kanter as Assistant Attorney General for the Antitrust Division at the Department of Justice. The White House statement making this announcement described Kanter as "a leading advocate and expert in the effort to promote strong and meaningful antitrust enforcement and competition policy".⁴ Kanter has a strong antitrust enforcement background, having previously served as an attorney for the FTC's Bureau of Competition and most recently in private practice counseling mobile application developers and other critics of "Big Tech" in their complaints against Apple and Google, in particular.

Together, these two recent developments indicate that the Biden administration will not hesitate to challenge both transactions and conduct that it believes to be anticompetitive across all industries, particularly those that directly touch consumers, and that its focus on Big Tech antitrust enforcement will not decrease any time soon.

SUMMARY OF THE EXECUTIVE ORDER PROMOTING COMPETITION IN THE AMERICAN ECONOMY

The Order has three main parts. First, the Order sets forth a general policy statement that the Biden administration is dedicated to fighting against existing excessive market concentration as well as meeting the “challenges posed by new industries and technologies, including the rise of the dominant Internet platforms, especially as they stem from serial mergers, the acquisition of nascent competitors, the aggregation of data, unfair competition in attention markets, the surveillance of users, and the presence of network effects”.⁵ The Order further reaffirms that the government “retains the authority to challenge transactions whose previous consummation was in violation of the Sherman Antitrust Act”.⁶

Second, the Order calls for a “whole-of-government” approach to competition policy supported by existing statutory mandates.⁷ The whole-of-government approach endeavors to have federal agencies cooperate on oversight when there is overlapping jurisdiction. To better facilitate such cooperation, Section 4 of the Order creates the White House Competition Council (the “Council”). The Council’s functions are to coordinate, promote and advance Federal Government efforts to address overconcentration, monopolization and unfair competition in or directly affecting the American economy. The Council will consist of the various heads of agencies, and will be led by the Assistant to the President for Economic Policy and the Director of the National Economic Council. The heads of certain independent agencies, such as the FCC, are invited to participate in the Council, but are not required to do so.

Third, the Order lists 72 specific action items that various federal agencies are ordered or encouraged to enact according to their existing legal authority.⁸ Certain items concern non-industry specific directives; for example, the Attorney General and the Chair of the FTC are encouraged to “review the horizontal and vertical merger guidelines and consider whether to revise those guidelines”.⁹ Pursuant to that encouragement, FTC Chair Lina Khan and Acting Assistant Attorney General of the Justice Department Antitrust Division Richard A. Powers issued a joint statement on the day the Order was signed announcing the launch of a joint review of the merger guidelines and noting that “[t]he current guidelines deserve a hard look to determine whether they are overly permissive”.¹⁰ The Order also encourages the Attorney General and the Secretary of Commerce to consider whether to revise their position on the intersection of intellectual property and antitrust laws, specifically by revisiting the 2019 Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments.¹¹ Other action items included in the Order, such as those highlighted below, are targeted at specific industries.

Labor Markets.

Both the Order and President Biden’s comments upon signing the Order emphasize combating competition issues in labor markets, perhaps a reflection of bipartisan support for reform in this area.¹² The Order’s labor-specific initiatives include: Recommending that the DOJ and the FTC consider revising the 2016 Antitrust Guidance for Human Resources Professionals to better protect workers from wage collusion; encouraging the FTC to curtail the unfair use of non-compete clauses and other clauses or agreements that may unfairly limit worker mobility; and recommending the elimination of unnecessary restrictive occupational licensing restrictions.

Agricultural Markets.

The Order also emphasizes combating consolidation and anticompetitive effects in the agricultural industry. The proposals for the Department of Agriculture include: Adopting anti-retaliation protections for farmers; ensuring farmers have increased opportunities for accessing markets, including access to retail markets, and receiving a fair return for their products; and ensuring accurate and transparent labels for products made in the United States. In addition, the Order directs the FTC to exercise its statutory rulemaking authority in the area of “anticompetitive restrictions on third-party repair or self-repair of items, such as the restrictions imposed by powerful manufacturers that prevent farmers from repairing their own equipment”.¹³

Internet Platform Industries.

With respect to Internet platform industries, the Order’s initiatives include: Recommending rulemaking to address unfair data collection and surveillance practices that may damage competition, consumer autonomy and consumer privacy; encouraging the FTC to develop rules regarding unfair methods of competition by major Internet

marketplaces; and directing the Secretary of Commerce to conduct a study of the “mobile application ecosystem” and submit a report on the topic to the Chair of the Council within one year from the Order’s signing.¹⁴

Healthcare Markets.

The Order’s healthcare initiatives directed at the Secretary of Health and Human Services include: Promoting the wide availability of low-cost hearing aids by issuing a proposed rule on over-the-counter hearing aids; supporting existing price transparency initiatives for hospitals and other healthcare providers and new price transparency initiatives; and developing a plan to combat excessive pricing of pharmaceutical drugs and enhance domestic pharmaceutical supply chains. The Order also directs the FTC to consider using its rulemaking authority to address unfair anticompetitive conduct or agreements that delay the introduction of generic or biosimilar pharmaceutical products.

Consumer Finance Markets.

The Order includes proposals for the Consumer Financial Protection Bureau to consider rulemaking to facilitate the portability of consumer financial transaction data and enforce the Dodd-Frank Act’s prohibition on unfair, abusive or deceptive acts or practices in consumer financial products or services.

The Order includes additional measures aimed at a broad range of other industries, for example, directing the FTC to submit a report to the Chair of the Council regarding any unlawful trade practices in the beer, wine and spirits markets, and directing the Secretary of Transportation to provide consumers with more flight options at better prices and with improved service.

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¹ 86 Fed. Reg. 36,987 (July 14, 2021).

² Exec. Order No. 14,036, § 1, 86 Fed. Reg. at 36,988.

³ President Joseph R. Biden, Jr., Remarks at Signing of Executive Order Promoting Competition in the American Economy (July 9, 2021), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/07/09/remarks-by-president-biden-at-signing-of-an-executive-order-promoting-competition-in-the-american-economy/>.

⁴ Press Release, President Biden Announces Jonathan Kanter for Assistant Attorney General for Antitrust (July 20, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/20/president-biden-announces-jonathan-kanter-for-assistant-attorney-general-for-antitrust/>.

⁵ Exec. Order No. 14,036, § 1, 86 Fed. Reg. at 36,988.

⁶ *Id.* (citing 15. U.S.C. § 18; *Standard Oil Co. v. United States*, 221 U.S. 1 (1911)).

⁷ *Id.* §§ 2-4, 86 Fed. Reg. at 36,989-91.

⁸ *Id.* § 5, 86 Fed. Reg. at 36,991-99.

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- ⁹ *Id.* § 5(c), 86 Fed. Reg. at 36,991. The horizontal merger guidelines were last revised in 2010; a revised version of the vertical merger guidelines was released in June 2020. See Guidelines, “Vertical Merger Guidelines”, dated June 30, 2020, *available at* https://www.ftc.gov/system/files/documents/reports/us-department-justice-federal-trade-commission-vertical-merger-guidelines/vertical_merger_guidelines_6-30-20.pdf; Guidelines, “Horizontal Merger Guidelines”, dated Aug. 19, 2010, *available at* <https://www.justice.gov/sites/default/files/atr/legacy/2010/08/19/hmg-2010.pdf>.
- ¹⁰ Statement of FTC Chair Lina Khan and Antitrust Division Acting Assistant Attorney General Richard A. Powers on Competition Executive Order’s Call to Consider Revisions to Merger Guidelines (July 9, 2021), <https://www.ftc.gov/news-events/press-releases/2021/07/statement-ftc-chair-lina-khan-antitrust-division-acting-assistant>.
- ¹¹ Exec. Order No. 14,036, § 5(d), 86 Fed. Reg. at 36,991-92.
- ¹² See, e.g., Press Release, Senator Marco Rubio, Rubio Introduces Bill to Protect Low-Wage Workers from Non-Compete Agreements (Jan. 15, 2019), <https://www.rubio.senate.gov/public/index.cfm/2019/1/rubio-introduces-bill-to-protect-low-wage-workers-from-non-compete-agreements>.
- ¹³ Exec. Order No. 14,036, § 5(h)(ii), 86 Fed. Reg. at 36,992.
- ¹⁴ *Id.* § 5(r)(iii), 86 Fed. Reg. at 36,998.