

July 9, 2021

## **PRESIDENT SIGNS EXECUTIVE ORDER DIRECTING AGENCIES TO ADDRESS WIDE RANGE OF BUSINESSES' COMPETITIVE PRACTICES, INCLUDING NON-COMPETE AGREEMENTS**

To Our Clients and Friends:

Today, July 9, 2021, President Biden issued a sweeping Executive Order directing federal regulatory agencies to take a variety of steps that, if completed and upheld by the courts, would effect a sea change in the government's regulation of businesses' competitive practices.<sup>[1]</sup>

The Executive Order itself will have little immediate impact on regulated parties, although its tenor and objectives send an important message about the Administration's perception of the business climate and enforcement priorities. The Order's principal purpose is to set in motion a variety of proceedings before regulatory agencies. Interested parties will often (but not always) have the opportunity to participate in notice and comment rulemaking before the agencies. If the agencies exceed their statutory authority or fail to follow proper regulatory procedures, their actions typically will be subject to challenge in the courts.

### **General Overview of the Executive Order**

The Executive Order is expansive—addressing 72 initiatives involving more than a dozen federal agencies. The Order's premise is that the size and consolidation of American businesses has restricted competition and harmed consumers and workers. A White House "fact sheet" accompanying the Order expresses concern that "[f]or decades, corporate consolidation has been accelerating," including in healthcare, financial services, agriculture, and other sectors.<sup>[2]</sup> The Order asserts this has resulted in higher prices and lower wages, along with reduced "growth and innovation." In the technology sector, the Order states, "a small number of dominant Internet platforms use their power to exclude market entrants, to extract monopoly profits, and to gather intimate personal information that they can exploit for their own advantage." "When past presidents faced similar threats from growing corporate power," the accompanying fact sheet says, "they took bold action," such as trust-busting by Theodore Roosevelt and "supercharged antitrust enforcement" under Franklin Roosevelt. The fact sheet then lays out the "decisive," "whole-of-government effort" directed by President Biden in the Order.

The Order addresses matters as diverse as the cost of hearing aids, airline payments for delayed baggage, the price of beef, and international shipping fees. It "directs" executive branch agencies like the Department of Transportation ("DOT") to take certain action and "encourages" independent agencies like the Federal Trade Commission ("FTC") to consider others. Nonetheless, independent agencies like

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the FTC should be expected to pursue each of the actions the Order identifies. Indeed, some of the initiatives outlined in the Order relate to matters for which agencies are already engaging in rulemakings.

Initiatives in the Order include:

## Agriculture

1. The Order directs the United States Department of Agriculture (“USDA”) to consider issuing new rules regulating competition in the farming industry.
2. The Order “encourages” the Federal Trade Commission (“FTC”) to address restrictions on third-party repair or self-repair, such as restrictions prohibiting farmers from repairing their own tractors.

## Healthcare

3. The Order encourages the FTC to consider a rule addressing agreements in the prescription drug industries, such as settlements of patent litigation to delay the market entry of generic drugs or biosimilars.
4. The Order directs the United States Department of Health and Human Services (“HHS”) to consider issuing proposed rules allowing hearing aids to be sold over the counter.

## Labor Markets

5. The Order encourages the FTC “to curtail the unfair use of non-compete clauses and other clauses or agreements that may unfairly limit worker mobility.”
6. The Order encourages the FTC to consider a rule addressing occupational licensing restrictions.
7. The Order encourages the FTC and the Department of Justice (“DOJ”) to revise existing antitrust guidance to “better protect workers from wage collusion.”

## Merger Review

8. The Order encourages the FTC and DOJ “to review the horizontal and vertical merger guidelines and consider whether to revise those guidelines.”

## Technology

9. The Order encourages the FTC to consider a rule addressing data collection and surveillance practices.
10. The Order encourages the FTC to consider a rule addressing “unfair competition in major Internet marketplaces.”

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## Transportation

11. The Order directs the DOT to “publish for notice and comment a proposed rule requiring airlines to refund baggage fees when a passenger’s luggage is substantially delayed and other ancillary fees when passengers pay for a service that is not provided.”
12. The Order encourages the Federal Maritime Commission to consider a rule “to improve detention and demurrage practices and enforcement of related Shipping Act prohibitions.”

## **Next Steps, and Implications for Our Clients**

The Order is a significant and bold pronouncement of the Administration’s position on competition matters and business practices generally. However, its ultimate importance will depend principally on agencies’ success in implementing the changes the Order identifies. Many of the changes sought by the Order will require notice and comment rulemaking, a process that often takes years. In rulemakings, agencies must conduct appropriate analyses; draft and issue a proposed rule; invite and consider the public’s comments on the proposal; and then revise and finalize the rule in light of those comments and the evidence in the record. A hasty, sloppy rule—or one that gives insufficient attention to important problems identified by commenters, such as the absence of statutory authority or constitutional problems—is legally vulnerable.

Agencies must base and justify their regulatory action on their own statutory authority; the Order is not a basis for an agency to take actions that are not statutorily authorized by Congress.

Companies concerned about specific directives in the Order should begin making plans now to ensure those concerns are amply documented before the agency when rulemaking proceedings begin. Substantial, evidence-based rulemaking comments—whether submitted directly by a company, or by a trade association—are often very helpful to agencies in identifying changes they should make to their initial proposals. And, if those comments are ignored, they can provide a strong foundation for a successful legal challenge.

## **Focus on the FTC**

The FTC will be responsible for some of the Order’s most significant directives. For the FTC to simultaneously address such a large number of competition initiatives would be a historical novelty—the FTC has only issued one competition rule in its entire history.<sup>[3]</sup> That rule was issued in the 1960s, never enforced, and later withdrawn.<sup>[4]</sup>

Procedurally, the FTC recently streamlined its rulemaking procedures and gave the Chair more control over the process.<sup>[5]</sup> FTC Commissioner Wilson, who dissented from the procedural changes, expressed concern that they compromised the impartiality of the rulemaking process and unduly limited public input. And substantively, while any rulemaking must be based on a factual record, several of the initiatives outlined in the Order appear inconsistent with longstanding FTC enforcement policy and governing law. For example, the fact sheet accompanying the Order objects that “rapid[] consolidation” in the shipping industry has resulted in 10 shippers controlling 80% of the market. But under the long-

standing Horizontal Merger Guidelines of the Department of Justice and Federal Trade Commission that are cited regularly by the courts, such a market likely would be considered “unconcentrated.”<sup>[6]</sup> To the extent the FTC takes actions that conflict with courts’ interpretation of antitrust law, or that constitute a significant and unexplained deviation from existing enforcement policies, its initiatives may be subject to legal challenge.

Similarly, while the fact sheet accompanying the Order suggests the FTC is to “ban” non-compete agreements, such a sweeping rule by the agency likely would be invalidated in court. The Order therefore more modestly encourages the agency to “curtail” non-compete “clauses” and agreements “that may unfairly limit worker mobility”; still, even a rule adopting this narrower approach would be subject to legal challenge, particularly if not drawn with great care and precision. Indeed, given that many states already require non-compete agreements to be reasonable in their scope, it is unclear how—if at all—a federal effort to curtail such agreements that “unfairly” limit worker mobility would change the legal landscape.

Expansive rulemaking could also expose the FTC to legal challenges under the constitutional “nondelegation doctrine,” which limits the extent to which Congress may delegate lawmaking power to administrative agencies. Although the nondelegation doctrine has seldom been invoked by the Supreme Court since the New Deal Era, in 2019 five Supreme Court justices expressed interest in reviving the doctrine.<sup>[7]</sup> Those five justices constitute a majority of the current Supreme Court. The FTC Act, which delegates to the FTC the authority to regulate “unfair” behavior, may be susceptible to a challenge on the grounds that Congress must provide concrete guidance to cabin the FTC’s exercise of its delegated power.

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[1] Executive Order on Promoting Competition in the American Economy (July 9, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/>.

[2] FACT SHEET: Executive Order on Promoting Competition in the American Economy, (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] FTC Commissioner Noah Joshua Phillips, *Non-Compete Clauses in the Workplace: Examining Antitrust and Consumer Protection Issues*, (Jan. 9, 2021), available [here](#).

[4] *Id.*

[5] Statement of FTC Commissioner Rebecca Kelly Slaughter (July 1, 2021), available [here](#).

[6] U.S. Dept. of Justice and the Federal Trade Commission, *Horizontal Merger Guidelines*, (Aug. 19, 2010), <https://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf> (explaining that a Herfindahl-Hirschman Index of less than 1500 is “[u]nconcentrated”).

[7] *Gundy v. United States*, 139 S. Ct. 2116 (2019) (Gorsuch J., dissenting) (joined by Chief Justice Roberts and Justice Thomas); *Id.* at 2131 (Alito, J., concurring); *Paul v. United States*, 140 S. Ct. 342 (2019) (Kavanaugh, J., concurring in denial of certiorari).



*The following Gibson Dunn attorneys assisted in preparing this client update: Eugene Scalia, Helgi Walker, Rachel Brass, Kristen Limarzi, Michael Perry, Stephen Weissman, Jason Schwartz, Katherine Smith, and Chad Squitieri.*

*Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding these developments. To learn more about these issues, please contact the Gibson Dunn lawyer with whom you usually work, or any of the following in the firm's Administrative Law and Regulatory, Antitrust and Competition or Labor and Employment practice groups.*

***Administrative Law and Regulatory Group:***

*Eugene Scalia – Washington, D.C. (+1 202-955-8543, [escalia@gibsondunn.com](mailto:escalia@gibsondunn.com))  
Helgi C. Walker – Washington, D.C. (+1 202-887-3599, [hwalker@gibsondunn.com](mailto:hwalker@gibsondunn.com))*

***Antitrust and Competition Group:***

*Rachel S. Brass – San Francisco (+1 415-393-8293, [rbrass@gibsondunn.com](mailto:rbrass@gibsondunn.com))  
Kristen C. Limarzi – Washington, D.C. (+1 202-887-3518, [klimarzi@gibsondunn.com](mailto:klimarzi@gibsondunn.com))  
Michael J. Perry – Washington, D.C. (+1 202-887-3558, [mjperry@gibsondunn.com](mailto:mjperry@gibsondunn.com))  
Stephen Weissman – Washington, D.C. (+1 202-955-8678, [sweissman@gibsondunn.com](mailto:sweissman@gibsondunn.com))*

***Labor and Employment Group:***

*Jason C. Schwartz – Washington, D.C. (+1 202-955-8242, [jschwartz@gibsondunn.com](mailto:jschwartz@gibsondunn.com))  
Katherine V.A. Smith – Los Angeles (+1 213-229-7107, [ksmith@gibsondunn.com](mailto:ksmith@gibsondunn.com))*

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