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Executive Order on Competition Policy May Increase Regulation and Merger Enforcement

- President Biden signed a wide-ranging Executive Order on Promoting Competition in the American Economy that invites federal agencies to implement or revise policies relating to mergers, intellectual property and labor and employment. It also calls for federal agencies to engage in competition-focused rulemaking concerning agriculture, air transportation, financial services, healthcare, railroads, maritime shipping, telecommunications and "platforms," among other things.

- While the consequences of the order will depend on what the agencies actually do, some actions called for by the President may result in regulations that impact multiple industries and increase merger enforcement activity by the Federal Trade Commission (FTC) and Department of Justice (DOJ).

- The executive order does not change substantive merger law. Agencies would have to persuade a court to block a transaction under existing precedents. Based on experience, we are skeptical courts will lightly change their standards in response to a change in executive policy. The order's call for greater scrutiny of mergers will, however, likely result in issuance of more Second Requests, longer investigations and potentially more attempts to block mergers through litigation. Parties exploring a merger should consider these implications in assessing transaction timetables and various provisions in merger agreements discussed below and may also have to begin preparing for litigation earlier in the merger review process.

On July 9, President Biden signed an executive order on competition policy that calls on the FTC, DOJ and other federal agencies to take numerous actions related to merger policy, standards-essential patent licensing practices and labor and employment practices. It also calls for federal agency rulemaking potentially affecting multiple industries. And it establishes a White House Competition Council to "coordinate, promote, and advance Federal Government efforts to address overconcentration, monopolization, and unfair competition in or directly affecting the American economy."

Details of the President's Executive Order on Promoting Competition in the American Economy

Merger Enforcement Policy

The executive order encourages vigorous enforcement of antitrust laws, with a particular focus on merger activity in certain industries, and it specifically reaffirms the government's authority to challenge consummated mergers. The order asserts that "decades of industry consolidation have often led to excessive market concentration" and sets forth a policy "to enforce the antitrust laws to combat the excessive concentration of industry." In particular, the order points to consolidation in the agricultural, internet platform, healthcare (including specifically insurance, hospitals and prescription drugs), financial services and container shipping sectors.

The order sets forth a policy "to enforce the antitrust laws to meet 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." The fact sheet accompanying the order states that "the law allows [the DOJ and FTC] to challenge prior bad mergers that past Administrations did not previously challenge," though it does not say which mergers were "bad." (The FTC brought suit late last year against Facebook alleging certain of Facebook's past acquisitions, among other things, allowed Facebook to maintain a monopoly in a purported market for "personal social networking," but a federal judge recently dismissed that complaint.)

The order further calls for coordination among agencies with overlapping jurisdiction in policing anticompetitive conduct and oversight of mergers, including sharing relevant information and industry data and, for "major transactions" (an undefined term), calls for soliciting (and giving significant consideration to) the view of the Attorney General or the Chair of the FTC, as applicable.

As we discussed in a prior memorandum, the executive order encourages "the Attorney General and the Chair of the FTC . . . to review the horizontal and vertical merger guidelines and consider whether to revise those guidelines" in order "to address the consolidation of industry in many markets across the economy." In response, the Acting Assistant Attorney General for the Antitrust Division and the Chair of the FTC issued a statement announcing that the agencies will undertake a review of their jointly-issued merger guidelines "with the goal of updating them to reflect a rigorous analytical approach consistent with applicable law." They say: "We must ensure that the merger guidelines reflect current economic realities and empirical learning and that they guide enforcers to review mergers with the skepticism the law demands. The current guidelines deserve a hard look to determine whether they are overly permissive." While the merger guidelines themselves are not binding on courts, they can influence court decisions in particular cases; as a result, revisions to the merger guidelines can affect the development of merger law through litigated cases.

Specifically with respect to bank mergers, the order encourages "the Attorney General, in consultation with the Chairman of the Board of Governors of the Federal Reserve System, the Chairperson of the Board of Directors of the Federal Deposit Insurance Corporation, and the Comptroller of the Currency" to "adopt a plan . . . for the revitalization of merger oversight."

Standards-Essential Patents Policy

The executive order states that "the Attorney General and the Secretary of Commerce are encouraged to consider whether to revise their position on the intersection of the intellectual property and antitrust laws, including by considering whether to revise the Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments" (the F/RAND Statement). (Generally speaking, F/RAND commitments are agreements by patent holders with standard-setting bodies to license their standards-essential intellectual property on fair, reasonable and non-discriminatory terms.) This statement was issued in late 2019 by the DOJ, United States Patent and Trademark Office (PTO) and National Institute of Standards and Technology (NIST). As we wrote in a previous memorandum, the statement sets forth the view of these agencies that a patent holder's commitment to offer a fair, reasonable and non-discriminatory license for a standards-essential patent (SEP) does not bar the patent holder from seeking injunctive relief or other remedies for infringement. Prior to the 2019 statement, in 2018, the DOJ withdrew its support of an earlier DOJ-PTO statement which the DOJ said "had been construed incorrectly as suggesting that special remedies applied to SEPs and that seeking an injunction or exclusion order could potentially harm competition."

Labor and Employment Policy and Rulemaking

The order encourages the FTC to issue rules "to curtail the unfair use of non-compete clauses and other clauses or agreements that may unfairly limit worker mobility."

The order also "encourage[s] the Attorney General and the Chair of the FTC . . . to consider whether to revise the Antitrust Guidance for Human Resource Professionals of October 2016" in order to "better protect workers from wage collusion." The fact sheet asserts that "[w]orkers may . . . be harmed by" this prior guidance, issued during the Obama Administration, "that allows third parties to make wage data available to employers—and not to workers—in certain circumstances without triggering antitrust scrutiny." The guidance in question states that: "It is possible to design and carry out information exchanges in ways that conform with the antitrust laws" if "a neutral third party manages the exchange," the information is "relatively old," and "enough sources are aggregated to prevent competitors from linking particular data to an individual source." The fact sheet says that this guidance "may be used [by employers] to collaborate to suppress wages and benefits."

The order also encourages the FTC to issue rules regarding "unfair occupational licensing restrictions."

Agriculture, Financial Services, Healthcare, Platform and Other Rulemaking

The executive order calls for several government agencies to engage in rulemaking potentially affecting a number of industries.

- **Agriculture.** The order encourages the FTC to issue rules regarding "unfair 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." The order also directs the Secretary of Agriculture to "consider," among other things, rulemaking to identify "practices in the livestock, meat, and poultry industries that are unfair, unjustly discriminatory, or deceptive and therefore violate the Packers and Stockyards Act," and to give particular attention to practices of poultry companies affecting farmers. The Secretary of Agriculture is also directed to consider rules for meat origin labelling. In addition to rulemaking, the Secretary of Agriculture and Chair of the FTC are directed to submit a report to the White House "on the effect of retail concentration and retailers' practices on the conditions of competition in the food industries." Additionally, the order calls for a report on "concerns of the Department of Agriculture" relating to "competition in seed and other input markets" and "strategies for addressing those concerns across intellectual property, antitrust, and other relevant laws."

- **Beer, Wine and Spirits.** The order directs the Secretary of the Treasury to submit a report to the White House on various practices and "patterns of consolidation in production, distribution, or retail beer, wine, and spirits markets" and then directs the Treasury Department to "consider" rulemaking proceedings regarding competition in these industries.

- **Financial Services.** In addition to review of bank merger oversight discussed above, the order encourages the Consumer Financial Protection Bureau to engage in rulemaking "to facilitate the portability of consumer financial transaction data so consumers can more easily switch financial institutions and use new, innovative financial products."

- **Healthcare.** The order encourages the FTC to issue rules regarding "unfair anticompetitive conduct or agreements in the prescription drug industries, such as agreements to delay the market entry of generic drugs or biosimilars" and directs the Secretary of Health and Human Services (HHS) to "implement standardized options in the national Health Insurance Marketplace." The order also calls for the Secretary of HHS to take several actions relating to generic drugs and biosimilars, including with respect to FDA approval processes and, in cooperation with the Chair of the FTC, to "address[] any efforts to impede generic drug and biosimilar competition."

- **Platforms.** The order encourages the FTC to issue rules regarding "unfair data collection and surveillance practices that may damage competition, consumer autonomy, and consumer privacy" and "unfair competition in major Internet marketplaces." In addition, the order directs the Secretary of Commerce to "conduct a study, including by conducting an open and transparent stakeholder consultation process, of the mobile application ecosystem" and to

submit a report to the White House "regarding findings and recommendations for improving competition, reducing barriers to entry, and maximizing user benefit with respect to the ecosystem."

- **Telecommunications.** The order calls on the FCC to re-adopt "net neutrality" rules and to conduct "future spectrum auctions under rules that are designed to help avoid excessive concentration of spectrum license holdings in the United States, so as to prevent spectrum stockpiling, warehousing of spectrum by licensees, or the creation of barriers to entry, and to improve the conditions of competition in industries that depend upon radio spectrum, including mobile communications and radio-based broadband services." The order also calls for rules directed at internet service providers.

- **Other Rulemaking.** The order calls for rulemaking regarding airlines, railroads, maritime shippers and real estate brokerage.

Significance

The consequences of the executive order will not be known until federal agencies issue the regulations contemplated by the order, update guidance and take enforcement actions. However, the actions called for in the order may impact competition in a variety of ways.

Implications for Merger Reviews

Among other things, the call for increased scrutiny of mergers may lead the FTC and DOJ to conduct longer and more extensive investigations and to issue more Second Requests (which generally extend the merger review process by many months). Parties contemplating mergers and acquisitions may wish to consider this risk in projecting closing dates and in negotiating certain provisions in merger agreements, including divestiture obligations, obligations to litigate, control of the litigation and "drop dead" dates (among others). Also, to the extent the new policy increases merger challenges, parties may have to consider preparing for litigation at an earlier stage in the process and may sometimes choose to certify substantial compliance with a Second Request in the absence of a negotiated "timing agreement" with the reviewing agency, which can have the effect of causing the agency to complete its review more quickly.

The potential re-examination and revision of the horizontal and vertical merger guidelines, as we noted in a previous memorandum, may ultimately lead the agencies to challenge transactions that might not be challenged under current guidelines, potentially based on novel theories of competitive harm. Of course, the burden will remain on the agencies to persuade a court to enjoin a transaction under existing precedents, and the courts are not bound to follow the merger guidelines (although courts do sometimes cite them as persuasive authority). Based on our experience, however, we are skeptical that courts will significantly change the substantive standards they apply in litigated merger cases.

The order's other comments relating to merger enforcement are notable, if not surprising. While challenges to consummated mergers are exceedingly rare, they have been a topic of increased discussion. Last year, the FTC launched an inquiry into past acquisitions by large technology firms, and last week the FTC said that it "is ramping up enforcement against illegal mergers, both proposed and consummated."

As to the call for a plan to "revitalize[]" bank merger oversight, we will have to wait to see what specific actions, if any, it produces before evaluating their impact on mergers in this industry. We note that the DOJ has been active in bank merger enforcement in recent years; while it has allowed several deals to proceed, it typically has required divestitures of overlapping branches. And, while the order states that "[h]ospital consolidation has left many areas, particularly rural communities, with inadequate or more expensive healthcare options," we note that the FTC has brought numerous challenges to hospital mergers in recent years, some successful and some not.

Implications for Standard-Setting Activities

The request for the DOJ, PTO and NIST "to consider whether to revise their position on the intersection of the intellectual property and antitrust laws, including by considering whether to revise" the F/RAND Statement can be seen as part of a re-evaluation of the prior administration's position on important issues relating to how the antitrust laws affect patent rights. Makan Delrahim, the prior Assistant Attorney General for Antitrust at the DOJ, stated numerous times his view that a patent holder's refusal to license its technology in breach of its purported F/RAND commitments is not an antitrust problem (though it may be a contractual issue). Others take a different view. Any policy revision could lead to antitrust enforcement actions against SEP-licensing patent holders who breach F/RAND commitments.

Implications for Labor and Employment

With respect to labor and employment policy, we await with interest the FTC's reaction to the invitation to "curtail the unfair use of non-compete clauses." Some have suggested that the focus of any agency action might be on front-line workers rather than senior employees and, indeed, the President alluded to this in his remarks. The enforceability of non-compete clauses in employment contracts has commonly been addressed under state law, so it will be interesting to see how the FTC defines what constitutes the "unfair use" of non-compete clauses and what steps the FTC might take to "curtail" their use in light of existing state law.

In addition to action related to non-compete clauses, the order also mentions potential FTC action related to "clauses or agreements that may unfairly limit worker mobility." To the extent that this refers to so-called no-poach agreements among competitors for employee labor, the DOJ was quite vocal under the prior administration that, in certain circumstances, such agreements run afoul of the antitrust laws and can even give rise to criminal liability. Indeed, as we discussed in a prior memorandum, the DOJ recently brought its first criminal case against a company alleged to be involved in illegal employee non-solicitation agreements, and we would not be surprised to see the FTC and DOJ bring additional focus to these situations.

Finally, the request for the DOJ and FTC to revisit their guidance regarding information exchanges related to the terms and conditions of employment is notable. The existing guidance sets forth conditions under which such exchanges "may be lawful." These conditions are not inherently related to employment situations but rather standard guidance for information exchanges. It remains to be seen whether any revised guidance would have broader implications for information sharing generally.

Final Observations

Many of the calls for FTC rulemaking are for areas where the FTC has already been active for some time. For example, in recent years, the FTC has brought numerous pharmaceutical "pay-for-delay" cases under the existing laws and the FTC sued Facebook for monopolization last year (though a federal court recently dismissed the complaint). However, if the FTC were to issue rules in any given area where it has authority to do so, this would provide the agency with another, perhaps streamlined way to bring enforcement actions without necessarily having to rely on existing antitrust law. Indeed, the FTC is authorized by the FTC Act, in certain circumstances, to bring civil actions for violations of its rules, including actions seeking monetary relief.

One final note: The specificity of some of the antitrust-related provisions of the order is worth mentioning. Antitrust enforcement has traditionally – at least for the past several decades – been regarded as an apolitical endeavor and the FTC is an independent federal agency. While the order is careful to use the language of "encouraging" rather than "directing" the FTC to take action, the order makes clear that the President is calling for the FTC to take several specific actions, including potentially banning pharmaceutical pay-for-delay agreements and potentially banning employee non-compete agreements by rule and, more broadly, establishing rules for online marketplaces. Also worth mentioning are the President's numerous references to the desirability of "lower prices" in his remarks at the signing of the order. For all the talk of a move away from the consumer welfare standard as a framework for the measure of competitive harm, the President several times referred to the classic metric used under this standard.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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