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President Biden Issues Wide-Ranging Competition Executive Order With Significant Implications for M&A Activity

The order directs a host of federal agencies to take a more interventionist role in regulating competition and preventing “unfair” business practices. Major agency rulemakings and policy changes are anticipated, that will lead to increased scrutiny of M&A activity and business practices in many industries, including banking, technology, telecommunications, transportation, and healthcare.

SUMMARY OF EXECUTIVE ORDER

On July 9, 2021, President Biden issued an Executive Order on “Promoting Competition in the American Economy” (hereinafter the “Order”), which includes a wide-ranging slate of initiatives and directives. The Order emanates from the Administration’s view that a “trend of corporate consolidation” has led to a diminution in competition that has, in turn, resulted in increased prices, stunted economic growth, and suppressed wages. It echoes President Obama’s 2016 executive order, which urged federal agencies to give greater consideration to competition issues, but goes further by suggesting specific rulemakings and policy changes, often on an agency-by-agency basis.

The Order sets forth 72 initiatives and directs more than a dozen federal agencies to take action. Certain aspects of the Order (if and when implemented by the relevant agencies) would apply across industries—such as the limiting or banning of non-compete agreements and a directive to the U.S. antitrust agencies to consider revising both the horizontal and vertical merger guidelines that currently govern merger enforcement. Industries that the Order targets for particular regulatory overhaul include technology, banking and financial services, healthcare, internet service, transportation, and agriculture. Companies in

these industries, in particular, should prepare to adapt to significant policy changes and heightened regulatory scrutiny.

IMPLICATIONS OF THE ORDER

Initiatives That Affect Businesses Operating in Multiple Industries

The Order directs the U.S. antitrust agencies—the Department of Justice (DOJ) and the Federal Trade Commission (FTC)—to “enforce the antitrust laws vigorously” and to prioritize enforcement in key markets of interest, such as banking, technology, and healthcare. As part of this mission, it encourages the DOJ and FTC to consider revising both the horizontal and vertical merger guidelines—a task that FTC Chair Lina Kahn and Acting Assistant Attorney General Richard Powers have already confirmed they will undertake, with the “goal of updating [the Horizontal and Vertical Merger Guidelines] to reflect a rigorous analytical approach.” The current Horizontal Merger Guidelines were issued in 2010, and the current Vertical Merger Guidelines were issued in 2020. The Order also reiterates the agencies’ power to challenge consummated mergers, especially in areas of “excessive market concentration.”

Consistent with recent activity and messaging from the agencies themselves, the Administration’s directives to the DOJ and FTC presage an era of aggressive merger enforcement and heightened scrutiny driven by the Biden Administration’s political leadership, particularly for companies in the technology, healthcare, and banking and financial services sectors. Revised vertical and horizontal merger guidance is likely to result in more challenges to proposed mergers which will likely feature novel theories of harm, while demonstrating greater skepticism towards companies’ efficiencies claims. Merger guidelines are, however, merely statements of enforcement policy and are not binding on courts; the extent to which federal courts find a basis for the application of the revised guidance in specific cases will depend both on how radically they depart from settled law and economics and how well the DOJ and FTC are able to articulate the factual basis for their claims in court.

Outside the M&A space, the Order promotes significant policy changes intended to augment competition for labor. Specifically, the Order encourages the FTC and/or DOJ to (i) ban or limit non-compete agreements; (ii) ban unnecessary occupational licensing restrictions; and (iii) strengthen antitrust guidance related to employer collaboration to suppress wages or reduce benefits.

To supervise the implementation of the directives set forth in the Order and to coordinate the federal government’s ongoing management of competition issues, the Administration is establishing a White House Competition Council, which will be led by the Assistant to the President for Economic Policy and Director of the National Economic Council. This level of White House involvement in antitrust enforcement policy is unusual, signaling that the White House intends to put its muscle behind the prioritization of the competition mission in the work of all federal agencies.

Implications for the Technology Industry

The Order sets forth several directives that will deepen and reinforce recent congressional and agency scrutiny of large technology platforms' business practices and transactions. Specifically, the Order articulates an Administration policy of greater scrutiny of mergers, especially those by "dominant internet platforms." Transactions that will receive particular attention include those involving (i) the acquisition of a nascent competitor (which have already been subject to heightened scrutiny from U.S., EU, and UK regulators, in recent years); (ii) serial mergers; and (iii) mergers that implicate consumer privacy or data accumulation. Likewise, the Order directs the FTC to promulgate rules and/or guidance to govern surveillance and the accumulation of data. In addition, the Order encourages the FTC to establish "rules barring unfair methods of competition on internet marketplaces." Such rules would potentially address methods by which large technology platforms are seen as competing unfairly with smaller businesses that interact with the platforms (e.g., by gaining non-public information about new products that a small business is selling or developing, or by utilizing knowledge with respect to sales data in deciding to launch a similar or "copycat" product and displaying their own products more prominently on their platform).

Implications for the Banking and Financial Services Industries

Based on concerns that "excessive consolidation" has an adverse impact on consumers, small businesses and low-income communities and that bank branch closures can reduce small business lending and lead to higher interest rates, the Order encourages the DOJ and bank regulators to update policy guidelines on bank mergers to augment scrutiny. Any new guidelines could extend beyond traditional competitive analysis to include the so-called "financial stability factor" and benefits to the community.¹ In addition, the Order directs the Consumer Financial Protection Bureau to commence a rulemaking under the Dodd-Frank Act to facilitate the portability of consumer financial data with the objective of enabling consumers to switch to another financial institution.

Implications for the Healthcare Sector

Citing the Administration's view that "Americans are paying too much for prescription drugs and healthcare services," and that "[h]ospital consolidation has left many areas ... with inadequate or more expensive healthcare options," the Order underscores the Administration's intention to prioritize antitrust enforcement in the healthcare arena. Among other initiatives, the Order directs the Secretary of Health and Human Services (HHS) to support hospital price transparency and address surprise hospital billing, and to help consumers comparison shop for health insurance more easily by standardizing plan options in the National Health Insurance Marketplace. The Order directs HHS to develop a plan for combatting high prescription drug prices and directs it to expedite the import of prescription drugs from Canada. The Order does not reflect any proposal to enable federal Medicare authorities to negotiate drug prices with manufacturers. Instead, it directs HHS to clarify and improve the approval framework for generic drugs and biosimilars, and to work alongside the FTC to ban so-called pay-for-delay arrangements, which have decreased in recent

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years but are intended to keep lower-cost generics off the market for a period of time. Accordingly, healthcare and pharmaceutical firms should anticipate enhanced scrutiny of certain business practices, with a particular focus on increasing price transparency and reducing consumer costs.

Implications for the Internet Services Industry

The Order addresses what the Administration sees as the rise of “a small number of dominant Internet platforms.” It encourages the Chair of the Federal Communications Commission (FCC) to work with the rest of the Commission to (i) restore Obama-era net neutrality rules; (ii) initiate rulemaking requiring broadband service providers to regularly report broadband price and subscription rates to the FCC; and (iii) consider conducting future spectrum auctions under rules designed to avoid excessive concentration of spectrum license holdings. Internet services companies should prepare to encounter a host of new regulations.

Implications for the Transportation Industry

Citing the dominance of several large firms in each of the air travel, rail, and shipping industries, the Order encourages “vigorous enforcement” or directs specific rulemaking at the major transportation agencies.

For example, the Order directs the Department of Transportation (DOT) to consider issuing rules promoting (i) more effective disclosure of ancillary fees; and (ii) the refund of fees when services are not adequately provided. It also encourages DOT to find ways to promote more competition at major U.S. airports. Citing Class I railroad consolidation, the Order seeks to address network access practices by directing the Surface Transportation Board to mandate that railroad track owners provide rights of way to passenger rail and strengthen their obligations to “treat other freight companies fairly.”

Implications for the Agricultural Industry

Motivated by perceived “[c]onsolidation in the agricultural industry,” the Order directs the Secretary of Agriculture to (i) design rules aimed at the elimination of “unfair practices related to grower ranking systems”; (ii) adopt anti-retaliation protections favoring farmers that assert their rights or raise issues in the industry; and (iii) “help ensure that the intellectual property system ... does not ... unnecessarily reduce competition in seed and other input markets” The Order confirms the Administration’s intent to prioritize regulatory overhaul in the agriculture sector.

CONCLUSION

The Order initiates a period of potentially far-reaching change in the manner in which competition issues are addressed by federal agencies with jurisdiction over a significant portion of the American economy. Parties that anticipate being affected by an agency’s forthcoming rulemaking or policy revision may also want to consider submitting comments during the various public comment processes, where available.

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Sullivan & Cromwell is actively consulting with clients and other interested stakeholders about the potential effects of the Order.

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ENDNOTES

- ¹ Governor Brainard, of the Board of Governors of the Federal Reserve, has also indicated a desire to reexamine the framework for the analysis of mergers involving large banking institutions, which could also implicate the financial stability factor. See S&C Memo to Clients, Federal Reserve Consideration of Bank Merger Proposals, May 15, 2021, <https://www.sullcrom.com/files/upload/SC-Publication-Fed-Gov-Comments-May-Indicate-Divergence-On-Framework-For-Consideration-Of-Large-Bank-Merger-Proposals.pdf>.

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