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EXECUTIVE ORDER SIGNALS NEW ERA IN ANTITRUST ENFORCEMENT AND MERGER REVIEW

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Last month, President Biden issued a voluminous "Executive Order on Promoting Competition in the American Economy" ("the Order").[1] The Order is built on the premise that "excessive" corporate consolidation over the past several decades has weakened competition and widened inequality in the U.S., a premise disputed by a number of economists and business leaders. Billed as an effort to "reverse these dangerous trends," the Order outlines 72 discrete initiatives across the federal government coordinated by a new White House Competition Council. It singles out labor markets as well as the agricultural, healthcare, and tech sectors for particular scrutiny.

The Order expands on an executive order issued in the waning days of the Obama Administration. The "Steps to Increase Competition and Better Inform Consumers and Workers to Support Continued Growth of the American Economy" (the "Obama Order")[2] broadly encouraged all federal agencies to independently identify actions they could take to detect anticompetitive behavior and promote competition via rulemaking and regulation under the terms of their respective authorizing statutes. The Trump Administration reversed course: its appointees nixed their agencies' efforts to implement the Obama Order, including proposed rules related to airline baggage and change fees, meatpacking, and cable and satellite set-top boxes.

The Biden Order takes a granular regulatory approach, setting forth specific proposals by industry and agency. It encourages increased DOJ and FTC enforcement and harnesses industry-specific statutes and regulatory tools across more than a dozen agencies to achieve its goals—the most comprehensive "whole-of-government" approach to competition policy since the 1970s. Business leaders were quick to criticize the Order's direc-

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tives as " 'Government knows best' " "solutions in search of a problem," challenging the Order's presumption that the economy is over-concentrated and additional regulation is the solution.[3]

The Order calls on the DOJ and FTC to "vigorously" enforce traditional antitrust law, particularly in labor markets, as well as in the agricultural, healthcare (pharmaceutical, hospital, insurance), and tech industries. It notes that tech in particular is prone to "serial mergers, the acquisition of nascent competitors, the aggregation of data, . . . and the presence of network effects." To address these issues, the Order encourages revision of the horizontal and vertical merger guidelines—including those used specifically for hospital and bank mergers. The Fact Sheet[4] accompanying the Order calls for the DOJ, Federal Reserve, FDIC, and Comptroller of the Currency to update their guidelines on banking mergers to provide "more robust scrutiny" and "underscores" to the DOJ and FTC that "hospital mergers can be harmful to patients." It also reminds them "that the law allows them to challenge prior bad mergers that past Administrations did not previously challenge," opening the door to retrospective merger investigations. Outside the merger context, the Order embraces renewed use of FTC rulemaking to achieve specific goals, including bans or limits on employee non-compete agreements, "unnecessary" occupational licensing restrictions, and prohibitions on pharmaceutical reverse payment patent settlements.

The Order argues, however, that the DOJ and FTC alone cannot address "overconcentration, monopolization, and unfair competition in the American economy." It therefore includes competition-related directives for more than a dozen additional federal agencies. Several of those initiatives arguably replace competition on the merits with regulation, others eliminate existing government regulation, and others seem designed to support outcomes that might have naturally resulted from competition anyway. For example, the Order directs the Department of Health and Human Services ("HHS") to "standardize" benefit options in the national Health Insurance Marketplace to better enable consumers to compare insurance plan costs, eliminating competition on the types or quality of benefits offered

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to consumers. Likewise, the Order encourages the FTC to ban reverse payment patent settlements in the pharmaceutical industry through rulemaking, a practice the Supreme Court itself has acknowledged could have pro-competitive benefits.

Other key initiatives include:

- Directing the Food and Drug Administration to work with states and tribes to import prescription drugs from Canada;
- Directing HHS to issue rules allowing hearing aids to be sold over-the-counter;
- Directing the Department of Transportation to consider rules requiring the disclosure of airline fees and refunds of relevant fees for sub-par service;
- Encouraging the Surface Transportation Board to require railroad track owners to provide rights of way to passenger rail carriers; and
- Encouraging the Consumer Financial Protection Bureau to issue a new rule to facilitate the portability of consumer financial transaction data so consumers can more easily change financial institutions.

If implemented as drafted, the Order would significantly expand federal intervention across the economy. It does not impose new requirements on businesses directly, so its impact will depend on the affected agencies' response—in speed and scope—and on the inevitable litigation to follow. In an apparent attempt to head off challenges to presidential authority, the Order "encourages" rather than "directs" independent agencies like the FTC and the Federal Communications Commission to implement certain initiatives. Coming in the early days of the Biden Administration and coinciding with the appointment of new agency heads, that encouragement has already found a receptive audience.

Within hours of the Order's publication, DOJ and FTC leadership endorsed a more "rigorous analytical approach" to M&A writ large, issuing a press release stating that the existing merger guidelines "deserve a hard look to determine whether they are overly permissive."[5] And in the weeks since the Order, the agencies have implemented additional merger policy changes. First on the chopping block was the FTC's 15-year-old policy statement limiting the use of "prior notice" and "prior approval" provisions in merger settlements: in a July 21 party-line vote, the Commission scrapped its Clinton-era policy not to require companies who had settled prior mergers with the FTC to provide notice or receive approval (beyond the typical HSR process) before consummating additional transactions.[6]

Key leaders at the FTC have also publicly admonished companies for proposing transactions "that should not make it out of the boardroom" given the FTC's past enforcement history and speculated on "how to send a message to the markets" that arguably problematic deals should not reach the agency at all. The White House press secretary similarly praised the DOJ's challenge—and the parties' abandonment—of the proposed Aon and Willis Towers Watson merger, citing the DOJ's effort as "what the president was talking about when he called for more robust enforcement of the antitrust laws."[7] Future agency targets likely include the new Vertical Merger Guidelines (the first such guidelines issued in 35 years) adopted in 2020—over the objections of the FTC's two Democratic Commissioners who are now in the majority and claim the guidelines are too business-friendly.[8]

The FTC's policy changes have drawn objections from that body's two Republican Commissioners. One characterized the Biden-era FTC as "bulldoz[ing] through . . . guardrails" and creating uncertainty in the business community that will "chill procompetitive deals and hurt consumers."[9] Her colleague echoed that charge, adding that, like the Commission's "allegedly temporary" suspension of early termination grants under the HSR rules in February 2021, rescission of the "prior approval" rule "amounts to a gratuitous tax on normal market operations."[10] Their protests, however, have drawn little reaction from the Commission's majority.

Other agencies name-checked in the Executive Order also have answered the call to arms, initiating agency actions and issuing statements of support, including:

- A Department of Transportation proposed rulemaking on refunding airline checked baggage and Wi-Fi fees when service is delayed or sub-par;
- Execution of a Memorandum of Understanding between the Federal Maritime Commission and DOJ to enhance competition among ocean carriers;
- A statement by a newly-appointed Republican FCC Commissioner praising the President's "vociferous commitment to capitalism and competition";
- The USDA's announcement of a new $500 million investment in expanded meat and poultry processing capacity to "level the playing field" for small farmers and ranchers; and
- A proposal by the Department of Health & Human Services to increase penalties for hospitals that fail to comply with existing price transparency rules.

While it will take time for these processes to play out, the Order signals a potential sea-change underway in the federal government's approach to antitrust enforcement. Companies should expect downstream impacts in the form of more rulemakings, more (and longer) merger and conduct investigations, and more merger challenges as agencies work to implement the Order's directives.

This pro-enforcement agenda faces headwinds, however. Litigating nontraditional theories of harm will be an uphill battle against established court precedent—particularly if those theories are not backed by the economics. The agencies may also meet resistance from legislators responding to business constituents as well as the established views of agency staff, who are responsible for conducting investigations. And while there have been some bipartisan suggestions to increase the antitrust agencies' funding and staffing, unless or until their resources expand, the agencies will be forced to prioritize among their enforcement goals.

The views and opinions set forth herein are the personal views or opinions of the authors; they do not necessarily reflect views or opinions of the law firm with which they are associated.

ENDNOTES:

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

[2]The White House, Executive Order—Steps

to Increase Competition and Better Inform Consumers and Workers to Support Continued Growth of the American Economy (April 15, 2016), at https://obamawhitehouse.archives.gov/the-press-office/2016/04/15/executive-order-steps-increase-competition-and-better-inform-consumers.

[3]*See, e.g.*, National Association of Manufacturers, Manufacturers on Biden EO: Some Actions Are Solutions in Search of a Problem That Doesn't Exist (July 9, 2021), at https://www.nam.org/manufacturers-on-biden-eo-some-actions-are-solutions-in-search-of-a-problem-that-doesnt-exist-14545/; U.S. Chamber of Commerce, U.S. Chamber Believes Executive Order on Competition Fails to Advocate for Market-Based Competition, Instead Follows a 'Government Knows Best' Approach (July 9, 2021), at https://www.uschamber.com/press-release/us-chamber-believes-executive-order-competition-fails-advocate-market-based.

[4]The White House, 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/.

[5]Statement of Acting Assistant Attorney General Richard A. Powers of the Antitrust Division and FTC Chair Lina Khan on Competition Executive Order's Call to Consider Revisions to Merger Guidelines (July 9, 2021), at https://www.justice.gov/opa/pr/statement-acting-assistant-attorney-general-richard-powers-antitrust-division-and-ftc-chair.

[6]The FTC's "prior approval" policy was adopted in 1995 after the Commission spent eight-plus years in litigating an already-abandoned transaction in order to impose a prior approval order on the parties—a requirement it had not pursued in another similar merger abandoned before reaching litigation, resulting in public criticism that the FTC was using prior approval provisions vindictively against parties who opted to defend their proposed mergers in court. The 1995 policy limited the use of prior approval terms to occasions where there was a credible risk that the company would attempt the same or similar merger again or an otherwise unreportable anti-competitive merger.

[7]Press Briefing by Press Secretary Jen Psaki (July 27, 2021), at https://www.whitehouse.gov/briefing-room/press-briefings/2021/07/27/press-briefing-by-press-secretary-jen-psaki-july-27-2021/.

[8]Following the confirmation of Chair Khan, the FTC has committed to monthly Commission meetings to publicly discuss policy changes; to date, these meetings have announced changes in several non-merger antitrust rules/policies, including: the repeal of a 2015 Policy Statement limiting the types of conduct the FTC pursues under Section 5 of the FTC Act; authorization of investigative subpoenas by a single (rather than multiple) commissioners; and streamlined procedures to seek financial penalties for defrauded customers.

[9]Oral Remarks of Commissioner Christine S. Wilson (July 21, 2021), at https://www.ftc.gov/system/files/documents/public_statements/1592366/commissioner_christine_s_wilson_oral_remarks_at_open_comm_mtg_final.pdf.

[10]Dissenting Statement of Commissioner Noah Joshua Phillips (July 21, 2021), at https://www.ftc.gov/system/files/documents/public_statements/1592398/dissenting_statement_of_commissioner_phillips_regarding_the_commissions_withdrawal_of_the_1995.pdf. (*see also* elsewhere this issue).