

# Clients & Friends Memo

## The President's Competition Order – One Week On

July 20, 2021

On July 9, 2021, President Biden issued an [“Executive Order on Promoting Competition in the American Economy”](#) (the “Order”). The Order responds to what the President characterizes as a “failed experiment” in lax antitrust enforcement that he believes has led to undue concentration of businesses throughout the economy. It appears that the analytically-fuzzy era of “big is bad” may be returning to Washington. In the first week following the Order’s issuance, the federal antitrust enforcement agencies have begun actively gearing up for new enforcement initiatives and wholesale changes in the standards of antitrust review.

The Order calls-out a wide swath of industry sectors that the President suggests warrant particular scrutiny. These include:

- Airlines
- Agriculture
- Alcoholic Beverages
- Banking, consumer finance and financial services
- Healthcare, including
  - Hearing Aids
  - Hospitals
  - Prescription Drugs
- Insurance, including Health Insurance
- Internet Services
- Ocean Shipping
- Rail Transportation
- Technology Platforms – Big Tech

In addition to industry sectors, the President calls for increased antitrust scrutiny of:

- Labor markets, including no-poach and non-compete agreements as well as unnecessary licensing restrictions
- A tightening of the Department of Justice/Federal Trade Commission Merger Guidelines to block more proposed mergers

In this paper, we attempt to place the Order in the context of recent enforcement agency actions and review how the Order has already been implemented during its first week.

### **A Policy Trend**

The President's Order promoting competition policy is part of a trend toward so-called "progressive" antitrust standards that began even before the last election but gained considerable speed in the past several weeks. For example, then minority Democratic FTC Commissioner Rebecca Slaughter has essentially called for a moratorium on pharmaceutical mergers: "[T]he Commission should more broadly consider whether *any* pharmaceutical merger is likely to exacerbate anticompetitive conduct by the merged firm or to hinder innovation." [Dissenting Statement of Commissioner Rebecca Kelly Slaughter In the Matter of Bristol-Myers Squibb and Celgene Commission File No. 191-0061](#), Federal Trade Commission (Nov. 15, 2019) (emphasis added). More recently in May 2021, Commissioner's Slaughter (then Acting Chair) and Chopra caused the Commission to lose the benefit of a Staff-negotiated divestiture order due to endless requests for information from parties to a proposed merger well after the proposed order had been negotiated. See CWT Clients & Friends Memo, "[7-Eleven/Speedway: Bumps on the Road to Closing: Are Conventional Closing Conditions Sufficient to Protect Buyer Interests?](#)" (May 17, 2021). Congress has similarly taken up the baton and, under the leadership of Senator Amy Klobuchar and Representative David Cicilline, introduced legislation in both the Senate and House to overhaul the nation's antitrust laws and to meaningfully increase the budgets of the FTC and the DOJ's Antitrust Division. Representative Cicilline's Antitrust Subcommittee in the House, in particular, issued a detailed, scathing report on the state of alleged technology platform monopolization and proposed five separate bills aimed at reining in Big Tech. The staff architect of that report and proposed legislation was Lina Khan, who last month was confirmed as FTC Chair. Off to a quick start, the newly constituted FTC majority under the leadership of Chair Kahn has begun to repeal decades of economic-based antitrust analysis focused on protecting consumer price increases known as the "consumer welfare standard" in favor of an as yet ill-defined populist standard focusing on avoiding increases in corporate concentration.

Against this background, the President's Order has coordinated efforts amongst more than a dozen federal agencies to focus on enforcement.

### **Implementation Has Begun**

Although both houses of Congress are currently deliberating proposed revisions to the nation's antitrust laws, and even though cases are already pending against several Big Tech firms, the President has decided to implement significant proposed changes through executive order. The enforcement agencies are already ramping-up.

For example, the day the Order was issued, Acting Antitrust Division Head Richard Powers and FTC Chair Khan issued a joint statement questioning whether the Merger Guidelines have proved

to be “too permissive” and vowing to bring them in line with “current economic realities” without explaining what those “realities” are. [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). Similarly, on July 12, 2021, the DOJ and the Federal Maritime Commission issued a memorandum of understanding (“MOU”) targeting antitrust enforcement in the ocean shipping container industry. [Memorandum of Understanding Between the Federal Maritime Commission and the Antitrust Division, Department of Justice Relative to Cooperation with Respect to Promotion Competitive Conditions in the U.S.-International Ocean Liner Shipping Industry](#). At the FTC, the Commission stated its intention to consider restoring an abandoned (as overly burdensome) requirement in merger cases that consent order respondents may be required to seek Commission “prior approval” for possible future acquisitions within five years of entering into a consent decree. See [“Policy Statement on Prior Approval and Prior Notice Provisions in Merger Cases,”](#) Federal Trade Commission (July 12, 2021). While at DOJ, the Antitrust Division expects to bring more procurement cases this next year at a time when the Division is already “historically busy” with criminal cartel investigations and prosecutions. (Remarks reported from an antitrust conference.) Reportedly, there were 72 separate inter-agency initiatives on competitiveness already underway as of the day the Order was issued, and more appear to be hatching every day.

### **Conclusion**

We expect that the President’s Executive Order on Competitiveness is not mere bluster. Rather, it fits within a context of marked movement in antitrust enforcement toward the current emphasis on progressive antitrust at the federal and state enforcement agencies, the Congress and foreign antitrust enforcement regimes, most particularly the European Union. For industries identified specifically in the Order, we expect heightened activity of coordinated agency investigations into those sectors. Thus, for example, the Antitrust Division may pair with various financial/consumer service watchdogs to investigate banks and other financial services companies just as it has entered into an MOU with the Federal Maritime Commission to facilitate investigations of the maritime industry.

Targeted industries should consider their current state of preparedness for competition-related investigations. Preparedness may include undertaking an antitrust stress test and include reviewing current antitrust compliance programs or beefing up such programs. Firms in many sectors, especially sectors that have not experienced repetitive enforcement investigations, see the risk of antitrust enforcement as relatively low. For those industries specifically targeted in the Order, however, we recommend reconsideration of the risk.

We are reminded here of a quote from author Stephen King, “There is no harm in hoping for the best as long as you’re prepared for the worst.”

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If you have any questions, please feel free to contact any of the following Cadwalader attorneys.

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