

Time for Tech Companies to Prepare for Increased Antitrust Enforcement and Private Litigation

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To the extent tech companies thought they might be spared from increased antitrust enforcement, President Biden's [Executive Order on Promoting Competition in the American Economy](#) (the "Order") makes clear it is time to gear up. The Order portends far-reaching enforcement extending well beyond the Big Tech platform focus of the Trump administration. Whether you might expect to be a defendant or think you might have claims as a plaintiff, now is the time to prepare.

Here are some key takeaways for tech companies. Among other changes, the Order encourages adopting new guidelines or policies relating to:

- the intersection of intellectual property and antitrust, signaling greater protections to come for implementers with a renewed emphasis on the "potential for anticompetitive extension of market power beyond the scope of granted patents" and the protection of standard-setting against abuse;
- the horizontal and vertical merger guidelines, encouraging greater focus on consummated mergers, acquisitions of nascent competitors, serial mergers, network effects, and the aggregation of data; and
- the [Antitrust Guidance for Human Resource Professionals](#) of October 2016 to broaden protections against wage collusion.

The Order further encourages the FTC to use its rule-making authority to issue new rules banning or curtailing:

- [non-compete provisions in agreements between employers and employees](#) that are prevalent in the tech sector to protect against theft of trade secrets;
- unfair data collection and surveillance practices, especially in attention markets;
- restrictions on third-party repair or self-repair of items; and
- unfair practices in internet and digital markets.

The Order will likely lead to an increase in antitrust litigation relating to "broadband, cable television, and communications services," given the administration's position that Americans "pay too much" for these services. The Order encourages the FCC to:

- promote the adoption of the 5G Open Radio Access Network and undertake measures to increase competition in the markets for 5G equipment;
- prohibit cable and internet service providers from making deals with landlords that limit tenants' choices;
- revive the "Broadband Nutrition Label" and require providers to report prices and subscription rates to the FCC;
- prohibit unreasonable early termination fees to enable consumers to switch providers more easily;
- restore net-neutrality rules; and
- issue rules to restrict the stockpiling of spectrum license holdings to improve competition in radio-based broadband services.

Contact us if you want to assess your risk—or your claims. Starting now will increase your company's chances of success.

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