

Episode 11: Executive Order Promoting Competition in the American Economy

JULY 26, 2021



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Audio Transcript

Welcome to Winston & Strawn’s Competition Corner podcast—the place to discuss hot topics in U.S. antitrust law for businesses operating in the United States and elsewhere. In this episode, we’ll discuss the sweeping Executive Order on Promoting Competition and the American economy just signed by President Biden on July 9th. Broadly, the Order calls on the DOJ and FTC to vigorously enforce antitrust laws and to consider revising certain guidelines. And it also includes directives to a dozen or so federal agencies and departments in a whole-of-government approach to addressing competition concerns.

I have three guests to talk today about the key actions and recommendations that are outlined in the Order and how we think they’re likely to impact businesses across the relevant sectors. First, Kevin Goldstein. Kevin is counsel in Winston’s Antitrust Practice Group. He represents clients in all areas of antitrust law, including government investigations, private litigation, and mergers. Kevin has a particular focus on defending companies in connection with no-poach and wage-fixing claims. And so Kevin is here to talk to us about the Executive Order’s initiatives regarding labor markets. Kevin, I believe this is your debut appearance on our podcast, so welcome.

Kevin Goldstein: Thanks. Very happy to be here.

Next we’re joined by Susannah Torpey. Susannah co-chairs Winston’s Technology Antitrust Group, and she represents both plaintiffs and defendants in a wide range of matters often involving cutting edge issues at the evolving intersection of antitrust, IP, and technology. Susannah was with me as my very first guest for the original

podcast episode we did way back on vertical restraints. So, to Susannah, I welcome her back to talk today about how this Order will impact tech companies.

Susannah Torpey: Thank you so much for having me as always.

And last but not least, we have David Dahlquist to discuss the Order's initiatives focused on the healthcare and pharmaceutical sectors. As co-chair of Winston's Healthcare and Life Sciences group, David focuses on healthcare, antitrust, class actions and intellectual property matters. David advises healthcare clients looking to overcome the hurdles presented by both federal and state courts and regulatory agencies. David, I am thankful to you for making your first appearance on our podcast here today, and I'm glad you could join us.

David Dahlquist: Thank you for having me. It's a pleasure to be here.

There's a lot to unpack in this Executive Order, so let's just get started. And Kevin, I want to begin with you because a central focus of the Order across industries relates to strengthening protections for workers. So I want to ask, if you can, just sort of detail for us the specific directives in the Order that relate to labor markets.

Kevin Goldstein: That's right Molly, the Order does focus a lot on labor markets and has several different provisions related to them. At a broad level, the Order aims to promote worker mobility and the ability for workers to seek and negotiate for higher wages, including by restricting the use of non-compete agreements between employers and employees, and by eliminating "unnecessary, cumbersome" occupational licensing requirements. The Order also calls for revision to 2016 DOJ and FTC Joint Guidance to HR Professionals that addressed no-poach agreements and wage-fixing, and calls for revising that guidance to prohibit competing employers from sharing wage and compensation information. Finally another focus of the Order is to emphasize labor markets as an issue for the FTC and DOJ to consider when evaluating proposed mergers under the Hart-Scott-Rodino (HSR) regimen.

Okay, that's a helpful overview. I want to start with the subject you noted first—the non-compete agreements. I think there might be a little bit of confusion about this. Is the Executive Order an outright ban on non-competes, or no?

Kevin Goldstein: No, it's not. So it's instead a series of directives and some suggestions to various federal agencies to take certain actions. So regarding non-competes, the Order is encouraging the FTC to use its administrative rule-making authority to curtail the use of "unfair" non-compete clauses and other arrangements that may unfairly limit worker mobility, but it's not outright banning them. In fact, President Biden probably can't outright direct the FTC to do this, as it's an independent federal agency. But, under the new FTC Chair Lina Khan, who was recently appointed by President Biden, and with now a democratic progressive majority on the Commission, it's likely they'll take this directive to heart. And they are already taking steps toward new rulemaking. However, the actual proposed rules that they issue and the scope of them broadly remains to be seen. So the Order calls for curtailing "unfair" agreements, as I mentioned before, but it doesn't instruct the FTC as to whether or how to determine what is "unfair" and how to balance this with the legitimate concerns of employers behind non-competes such as protection of trade secrets, protection of other company proprietary information, which is one of the pro-competitive justifications that's often offered for why non-competes can be beneficial.

Another issue is how the federal rulemaking is going to interact with state law. So there are three states—California, North Dakota, and Oklahoma—that currently refuse to enforce non-compete agreements against employees, and there's legislation in several other states that limits the use of non-competes particularly where workers are paid hourly or below a certain threshold. So how the FTC rule interacts with those state laws, and whether it has specific provisions addressed at lower-wage employees or those situations remains to be seen. But it is fairly likely that it will take a different approach to certain categories of employees, as opposed to high-level, senior employees are more likely to have trade secret, proprietary information.

Finally, I will note that rulemaking can be a year's long process. So it's going to involve notice and public comments, and then there's likely to be litigation following this rulemaking. There's going to be challenges to the FTC's authority. There may be challenges to specific rules. There'll be challenges to how those rules are interpreted. So there's a long road ahead before we see how this directive plays out.

All right, so it's a space we're going to have to keep watching. What about the Executive Order directive regarding occupational licensing?

Kevin Goldstein: So, this is another interesting area where President Biden, again, encourages the FTC to promulgate new rules to limit "unnecessary" or overly restrictive occupational licensing requirements. The focus here is on interstate consistency so that workers—and there's a particular focus in the Order on military spouses—can move between states and work in the same professions without having to meet onerous licensing requirements. So, an example here is a barber's license or a cosmetology license. If you're licensed in one state and you have to relocate to another state, there's a question as to how many hurdles you have to go through to get relicensed in that new state, and whether those licensing requirements may be overly burdensome in order to protect incumbent residents and incumbent workers and actually keep competition down.

Right. That's a good example. I want to move to the another subject that you mentioned at the outset—this call to sort of revisit the DOJ and FTC joint Guidance for HR Professionals. Can you just tell us a little bit more about that?

Kevin Goldstein: So, the HR Guidance that came out jointly from the FTC and DOJ was really big news in 2016. It focused on no-poach and wage-fixing agreements and set out new enforcement priorities, including that the DOJ would start to prosecute certain types of labor market collusion, namely naked, no-poach and wage-fixing agreements, that the DOD would prosecute these on a criminal basis going forward. And this has been a big focus, and indeed the DOJ has finally started bringing their first criminal prosecutions. So in late 2020, we saw the first indictments for no-poach and wage-fixing claims. And just this month, just recently, there was another superseding indictment and another employer named in one of those cases. So this is ongoing, and there's every indication that this focus is going to continue.

So against this background, what the Executive Order calls for is for the DOJ and FTC to revisit and add to this Guidance from 2016. And the Order kind of contends that the Guidance fails to adequately discourage information sharing about wages between competing employers. So that's what the Order is asking agencies to strengthen, to put in more restrictions on that type of information sharing about wages. So here there's no rulemaking called for. It's different from the other provisions we talked about—no new administrative rules, but just stricter guidance potentially.

: Interesting. What about the instruction to the DOJ and FTC to consider how proposed mergers may impact labor markets?

Kevin Goldstein: So this one, I think, is really a big change and very interesting, and particularly going to be subject to a lot of litigation. So the Order specifically highlights labor markets as one area of concern in evaluating potential mergers and directs the agencies, as you said, to take account of labor conditions when they're doing merger review in order to consider whether a deal would lead to potentially a "labor monopsony" which is a phrase used in the Order—or with hurt worker mobility or the ability of employees to negotiate for better wages. So this would be a really big change in merger law if this gets traction here. We have decades of precedent and the U.S. courts under what's known as the "consumer welfare standard" or the Chicago School of Economics being used to evaluate standards. The consumer welfare standard holds that, basically, the ultimate good of a merger is consumer welfare, which is lower prices and higher output to the benefit of consumers.

By focusing on labor, there's really a shift there. So for example, employees are a cost to a business. And if you raise wages, that's an increased cost to businesses that is arguably going to be passed down to consumers in the form of higher prices for the products they make. On the other hand, reducing labor costs or head count is often pointed to as an efficiency of mergers that makes lower costs for the businesses and results in lower costs for consumers. So there's a strong tension here between this idea of raising wages which may raise costs for consumers, and the decades of precedent under the consumer welfare standard that says raising cost to consumers is a big no-no, that's the worst thing we're looking for, and rather we want to drive costs down and drive prices down for, for consumers. So there's going to be a lot of litigation here and a lot of precedent that the agencies have to fight against in trying to shift their focus to labor markets.

I think that's a very helpful explanation of this potential step away from the consumer welfare standard. I have to now turn to the tech industry. That's one of the sectors that's specifically called out by the Order. So, Susannah, can you

tell us broadly, you know, what initiatives outlined in the order you think are going to have the biggest effect on tech?

Susannah Torpey: Absolutely. Thank you, Molly. So first let's also start with mergers. As Kevin was just discussing, the Executive Order makes clear that that we can expect heightened merger scrutiny. This is especially true with respect to the tech sector, including with respect to internet platforms, acquisitions of nascent competitors, serial mergers, the accumulation of data, competition by purportedly free products in attention markets—as we see on the internet, and mergers that negatively affect consumer privacy. The Order directs the antitrust agencies to consider revising their vertical and horizontal merger guidelines. And the agencies have already put out statements promising to update these to reflect in more rigorous analytical approach. One thing to know is that the administration is also calling on the agencies to start challenging even prior bad mergers, even where past administration chose not to challenge them. In other words, the potential for unwinding consummated acquisitions is now legitimately on the table. The agencies have the legal authority to do this, but rarely take this route.

And in an area near and dear to my heart, as you know, the Order also tasks DOJ and the Secretary of Commerce to consider revising policies relating to the intersection of antitrust and intellectual property, including the 2019 Policy Statement on Remedies for Standard Essential Patents Subject to Voluntary FRAND Commitments.

And so since this is your area, Susannah, that you live in breathe, what do you expect that those changes are going to look like?

Susannah Torpey: Some people have speculated that this is going to be a huge shift, but I think we really need to take a bit more of a measured wait-and-see approach. Acting AAG Powers has indicated that the DOJ has been reviewing policies in this area to ensure a fair balance between the interests of patent holders and implementers. As you may know, the prior head of the Antitrust Division, Makan Delrahim, had criticized prior administrations for focusing too much on potential abuse by patent holders and advocated for a much more limited role of antitrust when dealing with standard-setting and FRAND commitments. We expect the new administration to take a more nuanced position, clarifying limited instances in which antitrust issues may arise in this area, particularly in the standard-setting context. Okay. And the Order also, I think, proposes that the FTC uses its rulemaking authority to target the tech sector specifically. Can you give us a few more details about what those proposals are?

Susannah Torpey: Sure thing. So, as Kevin already noted, the Order calls for new rules limiting non-competes. This should be of particular interest to tech companies, of course, because non-competes are often used in the tech sector to prevent the theft of trade secrets. In addition, the Order also encourages the FTC to establish rules relating to the accumulation of data, unfair methods of competition by internet platforms, such as those that impinge on consumer autonomy and privacy, and restrictions related to self-repair or third-party repair services. Guidelines in this area could have significant implications for manufacturers of devices and equipment, as well as for manufacturers of component parts.

The Order also calls on the FCC to take a number of actions with implications for broadband cable and communications companies, for example, (1) by preventing cable and internet service providers from making deals with landlords that limit the ability for tenants to choose their providers; (2) by reviving the “Broadband Nutrition Label” to help consumers better understand prices and comparison shop; (3) by limiting excessive early termination fees that deter switching among providers; (4) by restoring net neutrality rules; (5) by adopting measures to increase competition in 5G equipment markets; and (6) by seeking to increase competition in radio-based broadband services.

So, given that list, what is the takeaway here for companies?

Susannah Torpey: Sure, absolutely. So the main takeaway for broadband cable and communications companies is that it is time to start preparing for litigation. I have to say, one surprise in the Order was the administration's seemingly gratuitous statement that Americans pay too much for these services. But really, you know, this Order should be a wake-up call, I think, for all tech companies in general, especially those that thought they might be spared increased enforcement or that the focus would continue to be more limited, for example on internet platforms.

Right. Okay. Thanks, Susannah. I have to switch gears now and turn to the healthcare and life sciences sectors. David, what can you tell us about the Executive Order's various initiatives and recommendations targeting these industries specifically?

David Dahlquist: Sure. Happy to.. The Order is very specific in the area of healthcare, identifying healthcare as one of the areas of concern—competitive concern—and specifically targets healthcare for future improvements as an effort to lower costs for American consumers. And it tries to do that in four very specific ways. There's both the Order as well as the Fact Sheet, which I encourage other listeners to take a look at, which includes a lot of the details from the Order as well. But in the realm of healthcare, it's four specific areas: (1) prescription drugs, (2) hospitals, (3) health insurance, and lastly hearing aids, which is a very interesting focal point of the Order.

So, starting with prescription drugs, what does the Order cover with respect to each of those four areas?

David Dahlquist: With respect to prescription drugs, the Order and its Fact Sheet are very specific saying that prescription drugs cost too much in America. It identifies several strategies in order to lower that cost, focusing on biosimilars, the approval of those takes too long, and trying to encourage that reduction of profits for some prescription drug manufacturers, saying that their profits are 15 to 20% where some other non-drug companies in the healthcare industry are closer to 4 to 9%. And then lastly, focusing on pay-for delay, which is an intellectual property tactic that is used in order to sometimes keep generics off the marketplace. But specifically focusing on prescription drugs.

The next area is hospitals. It's critical of hospitals being combined and consolidated with each other. It claims that nearly 140 rural hospitals have been shuttered and closed in the last decade or so, and that these consolidated hospitals charge more money. Again, there's lots of debate back and forth, whether that's really true or not, but nonetheless it focuses on that piece of the battle. And lastly, it encourages the FTC to really look at its own merger guidelines, which I think one of our prior speakers spoke about as well, but to take a look at both the Horizontal Merger Guidelines and Vertical Merger Guidelines to potentially change that.

It also targets, third, health insurance, with similar criticisms—that health insurance and the consolidation of health insurers has made it, has given American consumers fewer options, and sometimes giving them little choice as to which health insurer to pick.

And lastly, hearing aids, a very specific target and a very specific instruction: make hearing aids sold over-the-counter as opposed to requiring a prescription, an expensive purchase, which they say costs over \$5,000 per pair. They're really trying to move that into more of a consumerism type of view in order to lower the cost. So those are, there's a lot more detail, but those are four very specific areas that the Order tries to target with respect to healthcare and life sciences.

And focusing now specifically on mergers, David, what are your thoughts about the real impact that Order's going to have in the healthcare sector, given that there's already quite active merger enforcement in this space already?

David Dahlquist: Sure. The FTC, and the DOJ as well, already have a very active program in order to investigate, challenge, and, where appropriate, litigate healthcare mergers, both in the hospital realm—which we, and myself, have done a lot of work in—as well as beyond hospitals, into healthcare companies themselves. It also focuses on insurance company mergers. So, in the merger realm, while I'd like to say it's a little bit of more of the same because the government has had an active program for at least the last 10-15 years, this Order is very specific and very focused on those. So I would say the scrutiny that is already being felt by those participants in the healthcare industry—whether in the hospital, whether in insurance or whether just in the healthcare industry in general—is going to be heightened. We're seeing that from a new leadership at the Federal Trade Commission, and as early as today, an announcement of a new leader of the DOJ Antitrust Division, all of whom have experience working at the FTC and prosecuting and fighting against some mergers. So, I think we're certainly seeing a turn and a lead-from-the-top instruction to continue to be diligent, continue to focus on the challenge of those mergers that are anti-competitive. I would say that that needs to be balanced, a lot of America creates lots of good mergers as well. And so it's going to be a tug and a pull to see how that balancing game comes out, which mergers they believe are worthy of challenge and which are not, and which are pro-competitive in order to continue to enhance American economics, American dynamics, and American industry.

Thanks, David, very helpful overview. I just want to go back and ask Susannah and Kevin, any final thoughts on the likely impact of the Order and what companies can do to prepare?

Susannah Torpey: Yes, absolutely. Thank you. So, there will be a little window while guidelines and rules are being established, but really now is the time for companies to get their house in order. Companies should consider doing an antitrust audit now to gauge risks. And to the extent they haven't already done this, they should make sure that their compliance programs are updated in line with the corporate compliance guidance that the DOJ released in June of 2020. It just might save them millions of dollars in fines or civil exposure in years to come. And anyone listening today of course, is welcome to contact us, and we can help guide you through that process.

In addition, I would just note that for all of the areas where the Order calls on agencies to issue new rules, companies should be monitoring that rulemaking process and, in particular, the public comment process. Companies can comment on proposed rules directly or through trade associations before any final rules are adopted.

Yeah, that's a good point. Kevin, can you think of anything else that companies should keep in mind moving forward?

Kevin Goldstein: I'd agree with Susannah that we are at the start of a process here, a statement of administration priorities, and we'll be seeing new rules and new guidance coming out. And it's something that we on the Winston team will certainly be monitoring very closely, and businesses should keep a close eye on as well. In the labor area, now's a good time to take a look at the non-competes you're entering into today, any information sharing practices you have as a business related to wages or employees. These are areas that as new guidance comes out, as new rules are issued, are going to be a focus of increased scrutiny, increased litigation challenges, coming both from the agencies and from private plaintiffs. And getting your house in order today can save a lot of money in the future, as Susannah said. So certainly these are things to keep an eye on.

And I'd also emphasize what I said earlier that as we get through these new rules and as the administration brings changes, they do have to bring them in federal court. And they're up against a lot of precedent in these areas, but in order to take that precedent into account, that means litigating and getting court rulings. And it's all going to unfold over a, a long period of time where we'll all be closely monitoring and adapting.

All right. So thank you all we're out of time for this episode, but I want to thank Kevin, Susannah, and David for doing this on short notice, given the importance of this development. So thanks to you guys.

Kevin Goldstein: Thank you, Molly, for bringing us all together for this.

Susannah Torpey: Thank you, Molly for all of these fantastic podcasts. We really appreciate all the work you put into them.

David Dahlquist: Thank you for having me. It's a pleasure to be here.

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