

Competition EO: Technology Sector Expectations

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President Biden's Executive Order (Order) promoting competition and the corresponding "Fact Sheet" include a number of directives with broad implications for the tech sector. Among other things, the Order seeks to address "excessive market concentration"; the exclusion of market entrants; supracompetitive pricing; exploitation of personal-use data by dominant internet platforms; and the contended charging of excessive rates for broadband, cable television, and other communications services. The Order portends significant changes to come, including greater scrutiny of mergers, renewed focus on practices extending market power beyond the scope of patents and standard-setting abuse, new rules covering platform competition including surveillance and data collection, a broader "right to repair," restoration of Net Neutrality rules, and exclusive dealing regulation for communications companies.

For what to look out for in labor markets, see our earlier Competition Corner blog post [here](#). Below we take a closer look some of the major implications for tech companies in the context of current litigation and proposed legislation.

Greater Scrutiny of Mergers

Greater scrutiny of mergers is now a formal policy of the Biden administration, with particular attention on internet platforms, the acquisition of nascent competitors, serial mergers, the accumulation of data, competition by "free" products, and the effect on consumer privacy. The Order encourages the DOJ and FTC to pursue actions to unwind mergers that were not challenged by prior administrations as anticompetitive, particularly in the technology and internet platform sectors. This scrutiny mirrors some work already underway by the DOJ, FTC, and many attorneys general; however, the Order goes further and urges the agencies to review and update their merger guidelines for both horizontal and vertical integrations. As we reported previously, recently-confirmed FTC chair, Lina Khan, and Acting Assistant Attorney General for the DOJ Antitrust Division, Richard Powers, responded quickly and issued a joint statement promising to review the merger guidelines "with the goal of updating them to reflect a rigorous analytical approach consistent with applicable law."

The Order finds parallels in existing litigation, including two lawsuits against Facebook filed in December 2020, one by the FTC and the other by 48 attorneys general, alleging illegal monopolization focusing on the acquisition of nascent competitors Instagram and WhatsApp, and stifling other would-be competitors by restricting access to

Facebook's data and platform. In June, a federal judge in the District of Columbia dismissed both complaints, ruling that the plaintiffs had failed to adequately allege Facebook's monopoly and timely bring their suit. Interestingly, while the states' case was dismissed with prejudice, the FTC was granted leave to file an amended complaint. On August 19, after FTC commissioners voted 3–2 along party lines, the FTC filed its amended complaint, nearly 30 pages longer than the first and including more detail about the alleged relevant markets and other competitors within them. Thus, while laches may bar untimely enforcement of the antitrust laws by certain enforcers, federal enforcement for previously unchallenged mergers could arise unexpectedly years later.

Several proposed bills currently under consideration address concerns similar to those of the Order with respect to perceived inadequate merger scrutiny. Specifically, the Ending Platform Monopolies Act (H.R. 3825) and the Platform Competition and Opportunity Act of 2021 (H.R. 3826) would prohibit covered platforms from owning, controlling, or having a beneficial interest in any other line of business that relies on the platform for sales and would prohibit dominant online platforms from acquiring competing platforms, respectively. These are just two of several antitrust bills (see here and here) recently approved by the House Judiciary panel with bipartisan support, four of which explicitly target tech companies.

Patent Licensing and Standard Setting

The Order further tasks the DOJ and the Secretary of Commerce with considering whether to revise their positions on the intersection of antitrust and intellectual property laws. One way to do this is by potentially revising the 2019 Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments, issued by the U.S. Patent and Trademark Office (USPTO), the National Institute of Standards and Technology (NIST), and the DOJ. That policy statement covers patents subject to FRAND commitments, where a patent holder has voluntarily agreed to license the patents on “fair, reasonable, and nondiscriminatory” terms while participating in activities at a standards-developing organization. These policies are intended to ensure interoperability among new and innovative technologies and are seen as a tool for balancing the need to promote innovation and preserve competition. The Order highlights the “potential for anticompetitive extension of market power beyond the scope of granted patents,” and the protection of standard setting against abuse by larger competitors could lead to uncertainty for enforcement priorities and create challenges for business planning.

Data Collection and Internet Companies

The Order encourages the FTC to establish rules on surveillance and the accumulation of data, particularly by firms with business models dependent on accumulating significant amounts of sensitive personal information. The Order also encourages the FTC to establish new rules on unfair methods of competition on internet platforms and especially marketplaces that might be seen to damage not only competition but also consumer autonomy and privacy. Internet marketplaces and vertical integration have also been hot topics for local enforcement, including the District of Columbia lawsuit against Amazon, filed in May 2021, alleging the use of most-favored-nations clauses to keep consumer prices artificially high and simultaneously restrain other online retailers' and platforms' ability to compete on price.

On the legislative side, this directive shares goals with the proposed American Choice and Innovation Online Act (H.R. 3816), which would make it illegal for internet platforms to restrict or impede a business user's access to or interoperability with the same platform and features as their own products, to condition access to their platforms on the purchase or use of their other products (i.e., tying), to prevent a business user from accessing data generated by it or its customers on the platforms, and to prevent the uninstallation of the platforms' preinstalled software that directs or steers users to products offered by the platforms, among others. Simply put, this law would make it illegal for companies to take actions that would give preference to their own products or services or discriminate against competitors' products or services.

Further, the Order directs the Secretary of Commerce to consult with the DOJ and FTC to study the mobile-application ecosystem, including stakeholder consultation, and to submit a report with recommendations for improving competition, reducing barriers to entry, and maximizing user benefit with respect to mobile applications.

Along the same lines, as we previously reported, in July, 37 attorneys general sued Google alleging that it maintains unlawful monopolies in the app-distribution and in-app payment-processing markets on the Android operating system. That lawsuit followed the Senate Subcommittee on Competition Policy, Antitrust, and Consumer Rights hearing to explore competition in Apple's App Store and Google Play, in which representatives from Apple, Google, Spotify, the Consumer Federation of America, Tile, Inc., and Match Group, Inc. testified about competition within the two app stores.

Communications Companies

The Order also tackles four issues related to internet service by encouraging the Federal Communications Commission (FCC) to:

- Prevent Internet service providers from making deals with residential landlords that limit tenants' choices among providers.
- Revive the "Broadband Nutrition Label" for consumers to better understand prices and comparison shop, then require providers to report prices and subscription rates to the FCC.
- Limit excessive early-termination fees.
- Adopt Net Neutrality rules similar to the ones previously in effect.

The Order further encourages the FCC to conduct spectrum license auctions to restrict the stockpiling of holdings with the goal of improving competition in radio-based broadband services. While certain of these directives, such as the revived new neutrality rules or Broadband Nutrition Label, are not new, the directive that early-termination fees be limited could have broad and unforeseen consequences for firms providing these services and using fee structures currently considered standard in the industry.

Product Repair, Components and Services

In the consumer-services and commodities-innovation space, the Order encourages the FTC to issue rules barring firms' use of restrictions related to self-repair or third-party repair shops for patented technologies implemented by manufacturers on goods from cellphones to farming equipment. The Fact Sheet for the Order specifically notes the means with which competitors "use proprietary repair tools, software, and diagnostics to prevent third-parties from performing repairs." The implications of this directive reach competing firms in wide-ranging markets that sell, repair, or upgrade services, including manufacturers of "devices and equipment" as well as component parts manufacturers.

The White House Competition Council

The Order establishes a new White House Competition Council to tie together the whole-of-government approach to antitrust law revitalization and enforcement. The council will monitor the progress of the actions and recommendations outlined in the Order and coordinate the federal agencies' responses to increasing corporate consolidation. The Director of the National Economic Council will lead the council, and other members will include the Attorney General, the Administrator of the Office of Information and Regulatory Affairs, and the Secretaries of the Treasury, Defense, Agriculture, Commerce, Labor, Health and Human Services, and Transportation, among others whom the chair may invite to participate.

This article is part of our "Unpacking the Executive Order on Promoting Competition" series. Click [here](#) for other related articles. Please contact a member of the Winston & Strawn Antitrust/Competition Practice Group or your Winston relationship attorney for further information.

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