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Non-Compete Agreements Stifle Wages, Biden Seeks to Hasten Their Demise

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White House also calls for a look back at "bad mergers."

President Biden's July 9, 2021, Executive Order on Promoting Competition in the American Economy reflects a movement toward greater enforcement of antitrust and competition laws following decades of a more lax approach. During that time we have seen increased market concentration in key industries and the rise of the "Big Four" technology companies: Amazon, Apple, Facebook, and Google.

Perhaps most alarming to some businesses is the order's apparent proposal to restrict the use of non-compete clauses in employment contracts. But this is not as extreme as it may seem. In California, for example, non-compete clauses are already almost entirely unenforceable. A federal law addressing non-competes would serve to align divergent state laws on this issue. That would be beneficial to workers, who are increasingly mobile, as well as businesses, who would only need to comply with a single federal policy rather than navigating a panoply of state laws.

"When there are only a few employers in town, workers have less opportunity to bargain for a higher wage and to demand dignity and respect in the workplace. In fact," the White House says, "research shows that industry consolidation is decreasing advertised wages by as much as 17%. Tens of millions of Americans—including those working in construction and retail—are required to sign non-compete agreements as a condition of getting a job, which makes it harder for them to switch to better-paying options." The president also seeks a ban or limit on "unnecessary" and "cumbersome' occupational licensing requirements which the administration also says impedes economic mobility.

Of course, protecting confidential business information and trade secrets is an important concern and necessary to preserve innovation. But as California employers already know, there are alternatives to businesses who are no longer able to enforce broad non-competes, such as trade-secret claims. And while some have complained that banning non-competes will increase poaching and drive up wages, that is sort of the point. As the Executive Order states, non-competes serve to suppress worker mobility and wages. In a competitive labor market where workers are mobile, employers must pay competitive wages, provide good benefits, and ensure job satisfaction. These are good things.

President seeks to slow down, possibly reverse, industry consolidation.

The president's action on non-compete agreements isn't the only element that is giving corporations heartburn. Companies that have merged in the past few years in some of the nation's most critical industries could be revisited by the federal government's antitrust law enforcers. They can also plan on more robust scrutiny from competition regulators on the impact of their conduct on markets going forward.

President Biden calls for tempering industry consolidation past, present, and future and demands policies that favor workers, consumers, small businesses, entrepreneurs, and farmers. The Executive Order addresses workers, employers, mergers and acquisitions across industries, plus issues specific to agribusiness, banking and finance, drugs and devices, healthcare and insurance, internet services and control, technology and ecommerce, and transportation and shipping.

The administration calls on the Department of Justice and Federal Trade Commission to "enforce the antitrust laws vigorously" and challenge any "prior bad mergers" allowed by previous administrations. The government will take its own medicine. The Order calls upon all federal agencies to increase opportunities for small businesses through their procurement and spending decisions.

The Order creates a new group to monitor progress on its initiatives and coordinate the government's efforts to address "the rising power of large corporations." Called the White House Competition Council, the group is to be led by the Director of the National Economic Council.

"The Order includes 72 initiatives by more than a dozen federal agencies to promptly tackle some of the most pressing competition problems across our economy. Once implemented, these initiatives will result in concrete improvements to people's lives," the statement from the White House reads.

While the president has delegated much to his cabinet to consider or implement, of course, the overarching message of the Order is clear: More aggressive enforcement of antitrust laws is a must because too much consolidation is hurting free market competition and consumers.

Seven of the nation's industries.

The president seeks specific action regarding seven industries.

Agribusiness

- Empower family farmers and increase their incomes by strengthening the Department of Agriculture's tools to stop the abusive practices of some meat processors. Four companies dominate 80% of the beef market. Such consolidation has also limited where farmers and ranchers can sell their products. While prices for produce and meat increase, farmers and ranchers get less. Increased concentration has also taken place in the markets for seeds, equipment, feed, and fertilizer resulting in higher prices and fewer choices for farmers and ranchers, according to the White House.

- Clarify the definition of the label “Product of USA.” Ranchers are challenged by foreign competitors which erroneously lead consumers to believe they are purchasing U.S. meat.

- Increase opportunities for farmers to access markets and receive a fair return, including supporting alternative food distribution systems like farmers’ markets.

- Develop standards and labels so consumers can choose to buy products that treat farmers fairly.

- Enable farmers and ranchers to directly repair or have third-parties repair their equipment at lower rates, something manufactures currently prevent.

- “Consider issuing new rules” under the Packers and Stockyards Act to make it easier for farmers to bring and win anticompetition claims, stop chicken processors from underpaying chicken farmers, and adopt anti-retaliation protections for farmers who speak out about bad practices.

Banking and Finance

- Provide greater scrutiny of mergers. “Excessive consolidation” in the banking sector has reduced the number of banks available to consumers, disproportionately affecting people of color and rural residents. “Though subject to federal review, federal agencies have not formally denied a bank merger application in more than 15 years,” the White House says. The DOJ and financial regulators, namely the Federal Reserve, the FDIC, and the Office of the Comptroller of the Currency, are responsible for this enhanced scrutiny.

- Make it easier and cheaper for customers to switch banks by requiring banks to allow people to take their financial transaction data with them to competing institutions. This task is delegated to The Consumer Financial Protection Bureau.

Technology and Ecommerce

- Apply greater scrutiny to stem the pace of Big Tech acquisitions of smaller players in general, and the practice of “killer acquisitions” in particular, in which they use their power to purchase would-be competitors.

- Pay greater attention to the purchase of “nascent competitors, serial mergers, the accumulation of data, competition by ‘free’ products, and the effect on user privacy.”

- Establish rules on surveillance and data collection because “Big Tech platforms [are] gathering too much personal information.” The president directs the FTC to take action.

- Limit manufacturers from barring self-repairs or third-party repairs of their products. The order specifically refers to cell phone manufactures, and calls for a similar change for farming equipment.

- Bar unfair methods of competition on internet marketplaces, which put small businesses at a disadvantage. While not calling out Amazon by name, the administration says owners of these marketplaces can use sales data to launch their own competing products and display them more prominently than those sold by the smaller companies.

Drugs and Devices

- Ban brand-name drug companies from paying generic drug companies for not taking to market less expensive alternatives to brand-name drugs. These “pay for delay” schemes are harmful to consumers, the administration and other critics have said.

- Support state and tribal programs that can import safe and cheaper drugs from Canada.

- Allow hearing aids to be sold over the counter at drug stores. Because of the high cost of these devices and the fact that many insurers do not cover them, 86% of people with hearing loss do not use them. According to the administration only four companies control 84% of the market.

Healthcare and Insurance

- Stem the consolidation of hospitals by revising DOJ and FTC guidelines for reviewing these mergers. “Unchecked” consolidation has resulted in hospital closings, especially in rural areas, and increased healthcare costs, the administration says.

- Improve price transparency rules and implement federal legislation. To address pricing schemes and “surprise hospital billing,” the order directs the Department of Health and Human Services to propose new regulations.

- Give consumers better tools to shop for health insurance and standardize plan options in the National Health Insurance Marketplace. The administration says consumers have been left with a dwindling number of options due to consolidation.

Internet Services and Control

- Ban excessive early termination fees for internet services.

- Require disclosure of plan costs to facilitate comparison shopping.

- End landlord exclusivity arrangements that eliminate tenants’ options for internet services. Most Americans have the choice of only one or two reliable high-speed internet providers. Low-income consumers in particular are impacted by a lack of options. The administration wants the Federal Communications Commission to prevent ISPs from making exclusive deals with landlords and to require providers to report the actual prices of their services.

- Limit early termination fees.

- Restore Net Neutrality rules so big internet providers cannot use their power to block or slow down online services.

Transportation and Shipping

- Make it easier for travelers to get refunds from airlines.
- Require airlines to disclose add-on fees such as baggage and cancellation charges to better enable consumers to price shop. The administration says four airlines control nearly two-thirds of the market and that their fees are raised in “lockstep.” The 10 largest carriers collected more than $35 billion in ancillary fees in 2018, up from $1.2 billion just 11 years earlier. The Department of Transportation is to propose changes.
- Require refunds of fees when bags are delayed or promised services, such as in-flight Wi-Fi and entertainment services, are not working.
- Require freight railroad companies to provide rights of way to passenger rail and treat other freight companies fairly. The big players in this industry – down from 33 in 1980 to seven today – make it harder for passenger rail companies to provide on-time services and overcharge other freight carriers.
- Encourage the Federal Maritime Commission to enforce laws barring foreign shipping companies from overcharging domestic manufacturers for the time their freight is waiting to be loaded or unloaded.

The president covered a lot of ground in his Executive Order, many aspects of which have and will face opposition.

For a flavor of how these measures are being received, the U.S. Chamber of Commerce issued a statement that the Order is “built on the flawed belief that our economy is over concentrated, stagnant, and fails to generate private investment needed to spur innovation. Such broadsided claims are out of touch with reality, as our economy has proven to be resilient and remains the envy of the world.”

“The Chamber is a strong advocate for market-based competition, not a government-planned economy,” the statement reads, saying the Order “smacks of a ‘government knows best’ approach to managing the economy.”

Like many issues in today’s partisan landscape, little of the president’s Executive Order will go unchallenged. But one aspect of the order – limiting use of non-compete agreements that restrict workers’ ability to seek better-paying employment – would serve employees, employers and, therefore the economy, well.

Edited by Tom Hagy for MoginRubin LLP.

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