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How To Avoid A Run-In With Biden's Anti-Competitive Order

By Erik Sherman
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Big tech has been a big issue for politicians on both sides of the aisle. Now it, and some other industries, caught attention from the Biden administration. In July, the White House announced an executive order to promote competition.

A fact sheet from the administration listed many factors that it says have reduced competition, including corporate consolidation, higher prices from fewer competitors in different markets, lower wages with more jobs concentrated among fewer employers, non-compete agreements required to get a job, fewer opportunities for new businesses, and lower median household incomes as a result.

The administration points to 72 planned initiatives by more than a dozen federal agencies "to promptly tackle some of the most pressing competition problems across our economy."

Some industries seem directly in the crosshairs of planned government action. But experts say on one hand not to read more into things than might happen and on the other, take measures because one aspect of the push could affect many companies.

The executive order itself goes on for about 20 pages when printed out.

“This order affirms that it is the policy of my Administration to enforce the antitrust laws to combat the excessive concentration of industry, the abuses of market power, and the harmful effects of monopoly and monopsony — especially as these issues arise in labor markets, agricultural markets, Internet platform industries, healthcare markets (including insurance, hospital, and prescription drug markets), repair markets, and United States markets directly affected by foreign cartel activity,” it read.

“The first thing that’s important to understand is what an executive order is compared to legislative action,” says Ben Widlanski, a partner with the law firm of Kozyak Tropin & Throckmorton. “The executive in our system of government is granted a substantial amount of authority and discretion of what to enforce under a congressionally mandated action,” he said.

The executive order is a signal to federal agencies of what to do in general terms and that has significant power. But they have limits. “At the end of the day, the vast majority of antitrust enforcement actions are only going to have any sort of teeth when they’re presented to the courts,” Widlanski said.

“None of that’s a new discussion of what can be upheld or not upheld,” says Stanley Jaskiewicz, a member in the corporate law department of Spector Gadon Rosen Vinci. “What is new is the smoke and mirrors … that says we’re prohibiting all these anti-competitive practices, the perception that this was all something happening right away. He’s setting a tone, but as we’ve seen, getting something through Congress and agencies takes time, and sometimes it doesn’t happen.”

That said, there are specific industries being put on notice, to some degree. Some called out as having too little competition include agriculture, information technology, healthcare and prescription drugs, and telecommunications.

The executive order repeatedly discussed impacts on consumer prices and incomes. The structure likely owes to how antitrust law changed in the 1970s under the influence of the late Robert Bork, who is better known to many as someone nominated to the Supreme Court by President Ronald Reagan but defeated in the Senate. Courts began to consider economic efficiency and the cost of goods and services to consumers, and courts are the ones ultimately that could judge antitrust actions.

But even if a business is not a giant that would garner direct attention from the Biden administration, or is in an industry not mentioned in the executive order, there is still one aspect that jumped out to lawyers that spoke with Zenger News: non-compete requirements for employees.

Companies frequently require employees to sign non-competes. “What the Biden administration is proposing now is advocating for federal legislation that would ban the whole concept of a non-compete,” says Paul Lopez, COO and head of litigation at law firm Tripp Scott. “This could definitely have some significant impact.”

Most companies, though, could work around any such limitation with more targeted language. “When you’re dealing with a non-compete, it clearly is a restraint on trade,” Lopez says. “Courts will construe those narrowly. Don’t write an agreement that looks like you’re trying to stifle from someone for gainful employment.”

Instead, Lopez asks whether companies are more worried about a former employee going to a competitor, or from revealing trade secrets or soliciting current employees or clients. “Draft it as a non-solicit, draft it as a non-disclosure,” he said.