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President Biden's Executive Order on Competition: Three Important Takeaways for Tech and Life Sciences Companies

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On July 9, President Joe Biden issued an executive order on "Promoting Competition in the American Economy." With 72 initiatives and directives by more than a dozen federal agencies, the order seeks to aggressively "reduce the trend of corporate consolidation, increase competition, and deliver concrete benefits to America's consumers, workers, farmers, and small businesses."

President Biden stated the order was necessary because "[w]e are now 40 years into the experiment of letting giant corporations accumulate more and more power, and what have we gotten from it? Less growth, weakened investment, fewer small businesses. … I believe the experiment failed."

The executive order does not put specific policies into effect or establish any requirements now. Rather, President Biden directs federal agencies to consider sweeping policies and rules in numerous sectors, with a substantial focus on the tech and life sciences industries. This is no surprise given the White House's recent critiques of market concentration and conduct in those fields.

Here is a breakdown of the key aspects of the order that affect tech and life sciences companies, and what to expect around the corner:

Expect increased merger scrutiny

Tech and life sciences companies, including those focused on pharmaceutical products and medical devices, should expect to see greater scrutiny of their M&A activity, with the government paying particular attention to the acquisition of nascent competitors, serial mergers and killer acquisitions, i.e.,those meant to shut down a potential competitive threat. In addition, with respect to tech mergers, we can expect the antitrust agencies to consider factors beyond consumer prices (especially in light of the number of "free" digital platforms and services), such as whether a merger will result in the accumulation of data or impact user privacy.

The administration also noted there should be a directed focus on "unchecked mergers," referring to past consolidation in both the tech and life sciences spaces and noting that "[t]oo often, federal agencies have not blocked, conditioned, or, in some cases, meaningfully examined these acquisitions." The White House called for the antitrust agencies to correct course and "challenge prior bad mergers the past administration did not previously challenge."

The order further encourages the FTC and DOJ to revise both the horizontal and vertical merger guidelines, last issued in 2010 and 2020, respectively, to reflect a "rigorous analytical approach." Within hours of the order, FTC Chair Lina Khan and Acting Assistant Attorney General of the Justice Department's antitrust division, Richard A. Powers, said in a joint statement, "[w]e plan soon to jointly launch a review of our merger guidelines," to understand if they may be overly permissive. A review of the merger guidelines may result in significant changes, such as lowering the market concentration thresholds or heightening a focus on barriers to entry, making it more difficult for companies – especially tech and pharma companies already under the spotlight – to clear the government review process for M&A.

Khan has also announced the FTC will vote later this month on rescinding a 1995 policy statement in which the FTC relaxed prior approval requirements in merger clearance settlements and shifted away from the practice of requiring settling parties to notify the government of future transactions. In 2019, 43 state attorneys general asked the FTC for prior approval to be applied to tech platforms, with no success. But now, if the 1995 policy is rescinded, companies agreeing to conditions with the government to close a merger would be required to get

pre-approval before engaging in future M&A activity.

Expect increased focus on the collection and use of sensitive personal information

The order encourages Khan to issue guidance or exercise the FTC's statutory rulemaking authority to address tech platforms' gathering of too much personal information. According to the White House, "[m]any of the large platforms' business models have depended on the accumulation of extraordinary amounts of sensitive personal related data."

The order further encourages the FTC to issue guidance or exercise the FTC's statutory rulemaking authority to address "unfair competition in major internet marketplaces," specifically noting that such rules and guidance could target dominant online retail marketplaces' use of small businesses' data in order to launch their own competing product.

Tech companies should be on the lookout for future guidance or rules regarding the surveillance and accumulation of data. In addition, companies should expect that the FTC or DOJ could consider the collection of data or misuse of data as a potential harmful effect on competition.

Expect more attention on drug prices

The order also focuses on the life sciences industry, seeking to tackle areas where "lack of competition in healthcare increases prices and reduces access to quality care." According to the White House, "Americans pay more than 2.5 times as much for the same prescription drugs as peer countries," and, "[a]s a result, nearly one in four Americans report difficulties paying for medication." The order encourages HHS to issue a comprehensive plan within 45 days "to continue the effort to combat excessive pricing of prescription drugs" and "the recurrent problem of price gouging."

In addition, the order directs Khan, along with HHS, to identify and address efforts that impede generic and biosimilar competition, resulting in higher prices, including "unfair anticompetitive conduct or agreements in the prescription drug industries, such as agreements to delay the market entry of generic drugs or biosimilars." Indeed, the order goes as far as to suggest such agreements should be banned by rule, instead of being evaluated under the current antitrust legal framework. The order also directs HHS and the FTC to identify any false, misleading or otherwise deceptive statements about the safety or efficacy of generic drugs or biosimilars.

The scrutiny of competition within the tech and life sciences industries is nothing new. Reigning in Big Tech has been a key enforcement priority for the past year, with the DOJ and FTC pursuing massive monopolization cases against dominant digital platforms and Congress considering a slate of legislative proposals that would give enforcers new tools to take on tech giants, following the House Judiciary antitrust subcommittee's deep probe of the tech industry last year. Similarly, drug pricing and consolidation in the life sciences industry has been a top concern for the antitrust agencies, with the FTC announcing a Multilateral Pharmaceutical Merger Task Force to modernize the agencies' approach to analyzing the effects of pharmaceutical mergers earlier this year.

President Biden's executive order, while consistent with these trends, goes further than ever before, establishing a whole-of-government effort to protect competition and fully committing to laser focus and heightened scrutiny of business practices and strategic transactions within the tech and life sciences industries. Looking forward, transactions and practices that might have gone under the radar before may now draw the attention of antitrust and other regulators. This may result in expensive and burdensome investigations but is also likely to trigger drawn out private litigation.

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