



July 2021

Federal Government Announces Government-wide Measures Against Business Overconcentration, Monopolization, and Unfair Competition

Two major actions earlier this month signal a significant shift in federal government oversight of economic activity within the United States. The President of the United States issued an Executive Order announcing a government-wide effort to fight “overconcentration, monopolization, and unfair competition in or directly affecting the American economy.” The “whole-of-government” approach will affect businesses throughout the United States. The Federal Trade Commission also approved several changes that broaden its unfair competition investigation and enforcement, increase its use of compulsory process, and update its rulemaking procedures.

A New Executive Order—Enforcement on a Whole-of-Government Basis

President Biden issued an [Executive Order](#) on Promoting Competition in the American Economy, with accompanying [Fact Sheet](#), calling for a “whole-of-government” approach. The order establishes a White House Competition Counsel which is expected to “work across agencies to provide a coordinated response to overconcentration, monopolization, and unfair competition in or directly affecting the American economy.”

Although the executive order particularly focuses on the technology and health care sectors, it contemplates government investigation and enforcement changes in a wide range of areas from worker protection and scope of patent limitations to greater oversight of banking mergers and protecting individual privacy. It also specifically contemplates the government’s authority to initiate look-back enforcement actions to challenge previously consummated transactions that violated federal laws including the Sherman Act, the Clayton Act, “or other laws.”

The Executive Order urges federal agencies to adopt “pro-competitive regulations and approaches to procurement and spending” and to rescind regulations that hamper competition. It encourages agencies with overlapping jurisdiction to coordinate their investigations and oversight of mergers, acquisitions, and joint ventures. It also contemplates agency cooperation in creating remedies and sharing information and data. Further, agencies are encouraged to solicit and take into consideration the views of the DOJ and FTC and cooperate with those agencies if they are conducting oversight actions under the Sherman or Clayton Acts.

The Federal Trade Commission Changes How It Does Business

In its public meeting on July 1, 2021, the FTC adopted significant substantive and procedural changes to how it does business. The FTC Chair's [remarks](#) reflect the agency's intent to "comprehensively investigate unlawful business practices across the economy." Here is an overview of some of the key provisions.

Made in the USA Fraud

The FTC established a [new rule](#) for penalizing those who abuse "Made in the USA" claims. Under the new rule, a marketer is not permitted to claim, without qualification, that a product was made in the USA unless:

1. Final assembly or processing of the product occurs in the United States;
2. All significant processing that goes into the product occurs in the United States; and
3. All or virtually all ingredients or components of the product are made and sourced in the United States.

Although the Congress enacted legislation in 1994 authorizing the FTC to pursue and penalize those who fraudulently claimed their products were made in the USA, the FTC's efforts in this area have been less than robust. Under the new rule, the FTC can pursue restitution on behalf of those harmed by such claims and can seek civil penalties against violators of up to \$43,280 per violation. The USDA has announced a similar [enforcement initiative](#) to pursue those who fraudulently label beef and other agricultural products as USA products.

Broader Investigation and Enforcement of Unfair Competition

The FTC enforces "unfair methods of competition" (UMC) cases under Section 5 of the Federal Trade Commission Act. Courts have ruled that Section 5 covers Sherman Act and Clayton act conduct but the law is not clear on the extent to which Section 5 extends beyond those Acts.

In 2015, the agency adopted a bipartisan UMC Policy Statement which limited FTC authority by embracing the consumer welfare standard pursuant to which conduct was deemed to run afoul of Section 5 if it harmed competition or the competitive process. But the standard allowed businesses to justify certain noncompetitive behavior based on efficiencies and other considerations.

The Commission has now rescinded the 2015 UMC Policy Statement. In a [press release](#) issued that day, the FTC indicated that it intended to work within "congressional directives and appropriate case law" and it anticipated considering further policy changes and rulemaking actions concerning unfair methods of competition.

These moves effectively challenge the body of law that has developed around unfair methods of competition actions. The rescission of the 2015 UMC Policy Statement is expected to lead to more stringent enforcement actions—and related litigation—as well as new rulemaking regarding rules of competition. It could even reawaken the Robinson-Patman Act for price discrimination cases.

Investigating "Key Enforcement Priorities" and Increasing the Use of Compulsory Process

The FTC has approved the use of “[compulsory process](#)” to “comprehensively investigate unlawful business practices across the economy.” Prior to this vote, the agency required its antitrust attorneys to obtain approval from the full Commission before launching investigations.

Under the new rules, the FTC can compel companies, through court enforceable subpoena and civil investigative demands, to produce information and documents concerning their activities. A majority of the Commission is no longer required to sign such demands for information. An individual Commissioner’s approval is now sufficient.

The FTC’s stated target areas include repeat offenders, technology companies, digital platforms, pharmaceutical companies, pharmacy benefits managers, hospitals, harms against workers and small businesses, harms related to the COVID-19 pandemic, and proposed and already-completed illegal mergers.

Updating Rulemaking Procedures to Deter Corporate Misconduct

The FTC issues Trade Regulation Rules—also known as Magnuson-Moss Rules—under Section 18 of the FTC Act. The FTC has voted to [change its rulemaking procedures](#) in several key ways.

First, the FTC Chair or someone of her choosing, rather than an administrative law judge, will now preside over FTC rulemaking procedures. This includes public hearing oversight and the development of the official factual records underlying new rulemaking. Second, a staff report will no longer be required before rulemaking changes can occur. Third, recommendations regarding the form of the final rule for public comment is eliminated.

This move follows an earlier FTC announcement regarding the creation of a rulemaking group within the Office of General Counsel.

Vega Economics Antitrust Practice

The Vega Economics team and experts are well positioned to navigate through the ever-changing landscape of government investigations and enforcement. Our team has extensive experience providing analyses across the complete range of economic issues arising in antitrust litigation and anticompetitive effects of monopolization. We look forward to sharing more on this topic from our experts in the coming weeks.

For any additional inquiries, please contact info@vegaeconomics.com.