

TO: NAW Direct Members

FR: NAW Government Relations Team

RE: NAW COVID/Government Relations Update Number 2021-17 – June 28 at 7:00 PM

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1. Latest on Congressional Antitrust Bills Targeting Amazon

Last week, the House Judiciary Committee passed six bipartisan bills targeting the abusive and anticompetitive practices of the four largest tech monopolies in the country. In particular, the American Innovation and Choice Online Act and the Ending Platform Monopolies Act, sponsored by Reps. David Cicilline (D-RI-1) and Pramila Jayapal (D-WA-7), would prohibit Amazon from abusing their power in ways that harm competition and third-party sellers. Together, these bills will restore competition on Amazon Business' (B2B) marketplace by preventing them from using their market power to pick winners and losers, favor their own products, or otherwise distort the marketplace through abusive conduct.

To read NAW's press release from last week, click [HERE](#).

The road ahead for these bills remains long and uncertain. House Speaker Pelosi has given a general thumbs-up to the antitrust push and supports bringing these bills to the floor. However, there are several Silicon Valley Democrats who have pushed back on these bills claiming that they go too far and will ultimately be bad for their constituents. Some conservatives are also upset that these bills do not include language to prevent these tech companies from censoring conservative speech. House Republicans, led by Minority Leader Kevin McCarthy (R-CA-23) and Rep. Jim Jordan (R-OH-4), rolled out their own alternative this week. Their proposal includes overhauling Section 230 of the Communications Decency Act and mandates that the companies publicly list content moderation decisions. Politics aside, last week was a major step in NAW's long journey to curb Amazon's anti-competitive and abusive actions.

In 2019, NAW engaged on a mission to urge the Federal Trade Commission (FTC) and Members of Congress to end Amazon Business' monopolistic mistreatment of third-party

sellers. Amazon Business (the company's B2B unit) has taken the B2B marketplace, in which NAW members operate, by force. The FTC has opened an investigation into Amazon's conduct in several areas, including that of the Business to Consumer (B2C) market. In early 2020, we held a meeting with the FTC to discuss Amazon Business' mistreatment of its third-party sellers in the B2B marketplace. We made the case that Amazon's exploitative conduct in B2B commerce mirrors the playbook it has executed in the B2C marketplace. Unchecked, Amazon's dominance threatens to cripple the highly competitive B2B system which exists in our country.

Around the same time, the House Judiciary Antitrust Subcommittee was underway with its own investigation into Amazon's abusive treatment of third-party sellers. In several meetings with Subcommittee Members and staff, we demonstrated how Amazon Business is anything but competitive. Like its B2C business, Amazon plays "both sides" of B2B by selling its own products in direct competition against third-party sellers who sell on Amazon Business. In late 2020, the Subcommittee released its blockbuster report detailing allegations of anti-competitive abuses by tech's most powerful companies, including Amazon, and offered a menu of policy remedies on how to clamp down on their anticompetitive and abusive practices. *Investigation of Competition in Digital Markets*, Majority Staff Report and Recommendations, Subcommittee on Antitrust, Commercial and Administrative Law, Committee on the Judiciary, House of Representatives, pages 237-339 (October 2020)
https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf

On a similar but separate mission, NAW continues our fight to stop Amazon from securing a government granted monopoly. Section 846 of the FY'18 National Defense Authorization Act (Public Law 115-91) established a framework for determining whether commercial e-commerce portals would be appropriate for government agencies use to make non-contract purchases of commercial off-the-shelf (COTS) products. The law charged the General Services Administration (GSA) with establishing and managing the testing of three models. Although the General Services Administration (GSA) identified three credible e-commerce purchasing channels, its June 2020 award tests only one model, the Amazon platform. All other e-commerce models are excluded. GSA's award to three vendors, the most prominent being Amazon Business, ignores the explicit Congressional direction to test several e-commerce platforms. GSA's selection of Amazon as the gatekeeper reduces competition for the federal customer and forecloses access to the federal market.

Since its award, GSA has released no meaningful information addressing the progress and challenges of its pilot marketplace. Amazon's inability to protect the federal

purchaser from counterfeit and illicit products presents significant risk but does not appear to be addressed by GSA's requirements beyond that it is a vendor responsibility. Nor is there any indication that the obligations associated with Section 889 of the National Defense Authorization Act for 2019 as to Chinese manufactured telecommunications equipment are being fulfilled.

We are currently working with Rep. Veronica Escobar's (D-TX-16) office on legislation that would require the GSA to expand its proof-of-concept testing to include the other two portal models mandated by Congress and prevents Amazon from selling its own products against third-party sellers on its marketplace. We are also requesting that the Government Accountability Office (GAO) conduct an independent study and report on the business practices of dominant online platform operators in the business-to-business digital market.

2. Latest on Bipartisan Infrastructure Deal

In March, President Biden put forward his American Jobs Plan, a massive \$2.3 trillion "infrastructure" proposal which was to be paid for by raising the corporate income tax rate from 21 to 28 percent, ending subsidies for fossil fuel companies, increasing the global minimum tax from approximately 13 percent to 21 percent, and deficit spending. The American Jobs Plan also proposed funding many things which have never traditionally been considered "infrastructure" like home healthcare and the Protecting the Right to Organize (PRO) Act, which is the union boss wish list of the past 70 years. This extremely broad view of what comprises "infrastructure" immediately made the legislation a non-starter for Republicans, as well as some moderate Democrats.

However, over the past several weeks there have been productive negotiations between the White House and Senate Republicans to find a path forward on an infrastructure bill, which resulted in the bipartisan compromise that was announced last week. The funding was scaled back and many of the provisions that Republicans believed to be extraneous were shelved. Finally, last week President Biden and a bipartisan group of 21 Senators (11 Republicans, 9 Democrats, and 1 Independent) announced that they had come to an agreement on a \$1.2 trillion infrastructure package and, for the first time in a long while, Washington D.C. seemed to be working again.

The compromise bill was composed of many of the traditional physical infrastructure policies put forward by President Biden in the American Jobs Plan, and although the bill has yet to be officially written, the White House has released a fact sheet on the

framework with the broad policy ideas and funding levels – the framework can be viewed [HERE](#).

But as soon as Washington seemed to be in harmony with Republicans and Democrats pedaling together, a fistful of sand was thrown into the gears. During the press conference announcing the bipartisan deal, President Biden bluntly stated that “I expect that in the coming months this summer, before the fiscal year is over, that we will have voted on this bill, the infrastructure bill, as well as voted on the budget resolution. But if only one comes to me...I’m not signing it. It’s in tandem.” In other words, the President said he would not sign the infrastructure bill he had just agreed to unless Congress also passes and sends to him a “reconciliation” bill with additional spending and trillions of dollars in tax hikes.

Republican negotiators were blindsided and threatened to walk away from the deal, and over the weekend the White House scrambled to put out the fires and save this delicate compromise. The White House sent out a lengthy clarification statement trying to walk back the President’s very clear statement that he would not sign an infrastructure bill without a tax hike-reconciliation bill reaching his desk at the same time. You can read the Administration’s clarification statement [HERE](#).

The cleanup has seemed to work for now, with several Republican Senate negotiators saying they were back on board and that they trust the President to keep his word and sign an infrastructure bill if one reaches his desk, irrespective of the possible passage of the tax-hike reconciliation bill.

The separation of the two measures will allow NAW and our allies in the business community to aggressively advocate for enactment of the infrastructure bill and equally aggressively oppose the Administration’s proposed tax increases as separate and distinct measures, as they should be, rather than having support for the much-needed infrastructure measure be jeopardized by burying it in tax hikes.

Even though in recent history passing an infrastructure bill has been the proverbial football that Lucy pulls out from under Charlie Brown, it appears that Congress is closer to passing a true infrastructure package today than at any other time in at least a decade.

There is still much work to be done and NAW will continue to monitor the situation and provide our members with updates on the progress of this important issue.

3. Latest on President Biden's Labor Policy

According to Harvard Professor Benjamin Sachs, "President Biden is being hailed as the most pro-union president in a generation." Professor Sachs is "optimistic," and the business community worried, that the description will be accurate.

Early in his administration, President Biden issued an "Executive Order [EO] on Worker Organizing and Empowerment." This EO argued that "the Federal Government has not used its full authority to promote and implement [the] policy of support for workers organizing unions and bargaining collectively with their employers" and that "it is the policy of my Administration to encourage worker organizing and collective bargaining." The EO created a "Task Force on Worker Organizing and Empowerment" to "identify executive branch policies, practices, and programs that could be used, consistent with applicable law, to promote my Administration's policy of support for worker power, worker organizing, and collective bargaining" and to "identify statutory, regulatory, or other changes that may be necessary to make policies, practices, and programs more effective means of supporting worker organizing and collective bargaining."

Pro-union appointments, nominations and policies have followed.

Personnel:

Just hours after taking the Oath of Office, President Biden fired the General Counsel of the National Labor Relations Board, an appointed position with a specific term of office. No incoming president of either political party has terminated a sitting GC for the entire 70-year history of the Board.

Pro-union activists were nominated and/or appointed to fill key positions at the Department of Labor, the National Labor Relations Board, and the Equal Employment Opportunity Commission. Just to name a few of his appointments:

Marty Walsh, former construction trade union official, to be Secretary of Labor;

Jennifer Abruzzo, executive at the Communications Workers of America, to be General Counsel of the National Labor Relations Board;

Sharon Block, former Obama NLRB member, to run the office that oversees federal regulatory issues (OIRA), who wrote that "OIRA can be a force for making sure that the most progressive regulations get through the gate;" and

Gwynne Wilcox, former member of the Board of the AFL-CIO Lawyers Coordinating Committee, to the NLRB.

Legislation:

The top priority of the Administration and their allies in Congress is enactment of the Protecting the Right to Organize (PRO) Act, a combination of pro-union polices that includes:

- Repealing all 27 state Right to Work laws;
- Making secondary boycotts legal;
- Prohibiting employer “captive audience” meetings during a union campaign;
- Making intermittent strikes “protected concerted activity;”
- Allowing employee access to employer email systems for union organizing activity; and
- Increasing penalties on employers for unfair labor practices.

The PRO Act has already passed the House of Representatives and has 47 co-sponsors in the U.S. Senate. Senate Majority Leader Chuck Schumer has said he will bring the PRO Act up for a vote as soon as it has 50 co-sponsors.

As enacting the PRO Act is labor’s top priority, defeating it is the top priority of the business community. The Coalition for a Democratic Workplace, which NAW helps manage, is leading that effort, and a member of our Government Relations team – Seth Waugh – co-chairs CDW’s Lobbying Committee and is leading the fight to prevent passage in the Senate.

Regulatory actions:

The Department of Labor has begun what is expected to be an ongoing effort to repeal or reverse Trump Administration labor regulations, beginning with their reversal of the Independent Contractor and Joint Employer rules of the previous Administration.

Also, the director of the Wage and Hour Division (WHD) under President Obama, David Weil, has been re-nominated to that position. It was under his direction that WHD promulgated the Fair Labor Standards Act “white collar exemption” rule that would have raised the minimum salary for exemption from \$23,000 to more than \$50,000 (the final rule raised it to \$47,000). NAW was a plaintiff in the lawsuit that resulted in that rule being overturned, but if Weil is confirmed to that position again, we anticipate he will again propose FLSA rules changes.

Summary:

We fully expect that the aggressive pro-union agenda of the Biden Administration will result in court challenges, as did the Obama-era rules and regulations. The Coalition for a Democratic Workplace led the effort against many of the rules and regulations throughout the Obama Administration – a summary of those actions can be found [here](#). NAW is fully committed to again participate in the effort to fight pro-union legislation and regulations in Congress and in the courts.

4. Latest on Other Issues Impacting NAW Members

Supreme Court Tosses Lawsuit Challenging Obamacare:

On June 17th, the Supreme Court threw out a lawsuit threatening the entirety of Obamacare. The court ruled in a 7-2 finding that Republican-led states behind the case lacked standing to challenge the health care law. The case argued that Obamacare was rendered unconstitutional after Congress eliminated the penalty for not having health insurance. Four of the court's conservative justices joined with the three-member liberal wing to reject the lawsuit.

The opinion by Justice Stephen Breyer was joined by the court's two other liberal justices and all but two conservatives, including Trump appointees Brett Kavanaugh and Amy Coney Barrett. By finding that Republican-led states could not contest a change to the law, the conservative justices were essentially shielded from grappling with larger questions about whether Obamacare was no longer constitutional. "[W]e conclude that the plaintiffs in this suit failed to show a concrete, particularized injury fairly traceable to the defendants' conduct in enforcing the specific statutory provision they attack as unconstitutional," Justice Breyer wrote.

The ruling will give new energy to Democratic efforts to build on Obamacare, through richer insurance subsidies and potentially a public option. However, the prospects for other Democratic health care priorities are uncertain. President Biden has avoided substantive debate on his campaign proposals, like lowering Medicare's eligibility age, government-mandated drug price negotiations and creating a government-run insurance option. With razor-thin margins in Congress, Democrats have just a small window to deliver on their health care plans before the 2022 midterm elections. As we mentioned in the last GR report, Senate Health Committee Chair Patty Murray and House Energy and Commerce Chair Frank Pallone have started collecting feedback on a public option.

The Chairs issued a Request for Information (RFI) to the general public, which is very unusual. Their letter asks for input on who should be eligible to join a government-run plan, how to structure its benefits, and how to maintain a network of doctors. The July 31st deadline they set for input just before Congress' August recess leaves little time to make actual progress this year. You can read the RFI [HERE](#). The [Partnership for Employer-Sponsored Coverage \(P4ESC\)](#), which NAW helps manage, is currently drafting comments to the RFI which we will share with you in a future update.

5. Latest on the Economic Recovery and Re-Opening the Workplace

As the Coronavirus Pandemic continues to impact the United States economy and businesses across the nation, it can be hard to decipher how new regulations and laws may impact your business. To help you manage these issues NAW is providing information about reports, webinars, and seminars that you may find useful:

From *Bloomberg Law*:

Masks Off—Navigating the Covid-19 Vaccine Era: Legal Insight

Employers face challenging times with return-to-work policies, especially surrounding the Covid-19 vaccine. Baker Botts attorneys break down the legal issues surrounding masks, vaccines, and privacy issues and offer recommendations for workplace guidelines. To read the full article, click [HERE](#).

Stateside Associates publishes a daily report about State and Local Government responses to the evolving situation. To read their latest report, click [HERE](#).

We are also providing a link to a spreadsheet that includes state and local COVID-19 response information provided by **MultiState Associates**. To view their spreadsheet, click [HERE](#).

[Click here](#) for links to **UPDATES** sent previously.

Many thanks—

Jade West, Chief Government Relations Officer
Blake Adami, Vice President-Government Relations

*Seth Waugh, Associate Vice President-Government Relations
National Association of Wholesaler-Distributors*

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