

The “Promoting Competition” Executive Order: How Can Companies Comply with a “Right to Repair”?

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President Biden’s July 9, 2021 Executive Order “Promoting Competition in the American Economy,” sets out a policy to encourage market competition by encouraging cooperation between federal agencies and creating the White House Competition Council, which will bring together the heads of various federal Departments and agencies to coordinate enforcement against industries that are over concentrated, monopolized, or exhibit actions that amount to unfair competition.[1] This order addresses various industries, and specifically encourages the Federal Trade Commission (FTC) to exercise its rulemaking authority to address a wide breadth of industries, including the areas of data collection, prescription drugs, professional licensing, and real estate markets, among others.

For example, the Order specifically encourages the FTC to address “Unfair anticompetitive restrictions on third-party repair or self-repair of items, such as the restrictions imposed by powerful manufacturers that prevent farmers from repairing their own equipment.”[2]

It seems that the FTC is taking the White House’s directive on third-party repair and self-repair seriously. In a press release issued on July 12, 2021, the FTC released its agenda for an open meeting schedule July 21, 2021 – the agenda includes Proposed Policy Statement on Repair Restrictions Imposed by Manufacturers and Sellers.[3]

So, what is “third-party repair or self-repair”? The “right to repair” is a term used by consumer activists in favor of legislation recognizing a legal right for consumers to repair consumer electronics themselves or through third-party repair shops, without having to return to the manufacturer for the repair. After being directed by Congress, the FTC released a report in May 2021 entitled “Nixing the Fix: An FTC Report to Congress on Repair Restrictions,” which investigated the potentially anti-competitive behavior in the repair industries.[4]

Are there any laws on the books regarding this? The most relevant would be the Magnusson-Moss Warranty Act. Section 102(c) of the MMWA “prohibits warrantors from conditioning warranty coverage on the consumer’s use of an article or service identified by brand, trade, or corporate name, unless the warrantor provides that article or service without charge or the warrantor has received a waiver from the [FTC].”[5] This provision is intended to prohibit a manufacturer of consumer product, like a dishwasher or a cell phone, from revoking a warranty on the product simply because the consumer brought the product to a third-party repair company. This is an “anti-tying” provision, tying referring to the practice of conditioning the sale of one product on the purchase of a second product from the same manufacturer.[6] Legitimate tying exists in many consumer products. The FTC gave the example of razors and razor blades or software and software updates as legitimate forms of tying.[7] Tying becomes illegal “where the effect is to impair competition and harm consumers in the market for either the tying product or the tied product,” such as “[tying] the availability of parts to the purchase of its repair service.”[8]

While the MMWA is meant to combat illegal tying, the FTC’s report states that there are a variety of new ways in which companies can still restrict accessibility to self-repair. These include:

- Physical restrictions. This could include practices as mundane as gluing or welding a device together rather than using removeable and replaceable screws, making it difficult for consumers to repair their products without special tools.

- Unavailability of parts, repair manuals, and diagnostic software and tools. This means that the manufacturers might keep certain parts, instructions, and other materials away from public access.
- Designs that make independent repairs less safe. The FTC specifically notes the challenges of replacing lithium ion cells, which differ from household batteries in a variety of ways. The FTC warns that these cells are sometimes glued onto devices which could increase the chance of puncturing the cell, which may be dangerous without the proper tools.
- Telematics. This refers to information on the operation and status of vehicles which are collected and relayed to a manufacturer or a dealer.
- Intellectual property concerns regarding patent and trademark rights.
- Criticizing parts made by third-party companies.
- Software locks, digital rights management, and technical protection measures. These refer to locks and other tools and measures that control access to certain technologies. This practice is hotly debated, with manufacturers citing the need to protect their copyrights while repair advocates argue that these restrictions prevent basic self-repair.
- End user license agreements. These are agreements that specifically limit repairs by “prohibiting modifications of software for any purpose, prohibiting de-compiling or reverse engineering of software.”[9]

It's easy to see how this has led to a hotly contested debate. Manufacturers argue that certain practices are necessary to protect their intellectual property and maintain product safety, while repair activists argue that companies are creating intentionally unsafe designs in order to prevent self-repair, while also conducting anti-competitive practices against independent repair shops.

Currently, three states, Rhode Island, Indiana, and California, have right to repair laws.[10] Rhode Island has the most expansive law, requiring manufacturers to “have adequate service information and replacement parts available to warranty stations and independent service facilities, to effect repair and restore to operating condition.”[11] Rhode Island requires this information as well as parts to be available for at least four years after the date of last sale of any given model or type. California and Indiana have similar laws, but limit the scope to manufacturers who have made an express warranty.[12] California even sets different time periods for information and parts that must be made publicly accessible depending on the cost. While current state laws may someday serve as a model for a legislative solution, they will unlikely serve as a direct model for FTC rules.

Because each rule must be specially crafted to specific industries, it is difficult to anticipate what new FTC rules will look like. The FTC has the authority to enforce the MMWA, but this would be limited to products with a written warranty and only for the warranty duration.[13] Enforcement of the MMWA would also be based on restrictions that can be defined as “tying.” If the FTC decides to expand its definition of “tying,” this will likely lead to litigation.

The Executive Order itself paid special attention to farm equipment, so it is likely that the FTC may prioritize this industry in its potential rulemaking. The FTC Report, however, covered a variety of different industries, particularly electronic appliances. Rulemaking will be a challenge, as the FTC will likely be unable to craft a “one-size-fits-all” solution. Any potential rule will need to be specifically crafted for a specific industry and will need to fit a consumer's right to repair with a company's legitimate intellectual property, trade secret, and safety concerns. Further, if the rulemaking includes requirements on designs of products, it is uncertain how much time it will take to implement new rules.

The Biden administration is interested in forwarding a broad policy against anti-competitive practices in distinct and diverse industries. Within this broad policy is an acknowledgement of a right to repair. The extent of such a “right” remains to be seen and without national legislation on the topic, it is difficult to predict what the FTC's potential rules will look like. In order to navigate this uncertainty, it is important to keep legal counsel close at hand to for advice on how to comply with new rules as they come. For more information on the Executive Order, compliance in this uncertain environment, or any other legal topic, contact Aaron Walayat at awalayat@tuckerlaw.com.

[1] “Executive Order on Promoting Competition in the American Economy,” White House (July 9, 2021).

[2] Order at 5(h)(ii).

[3] “FTC Announces Agenda for July 21 Open Commission Meeting,” Federal Trade Commission (July 12, 2021).

[4] “Nixing the Fix: An FTC Report to Congress on Repair Restrictions,” Federal Trade Commission (May 2021).

[5] 15 U.S.C. § 2302(c). “Nixing the Fix,” at p. 7.

[6] “Nixing the Fix,” at p. 7.

[7] *Id.* at p. 9.

[8] *Id.* at p. 10.

[9] *Id.* at p. 18 -24.

[10] *Id.* at p. 47-48.

[11] *Id.* at 47. R.I. Gen. Laws § 6A-2-329(5).

[12] *Id.* at 47-48. Ind. Code Ann. § 26-2-6-2. Cal. Civ. Code § 1793.03.

[13] *Id.* at p. 45.