

Far-Reaching Executive Order Pushes Toward National “Right to Repair”

July 14, 2021

President Biden signed into law on Friday, July 9, 2021, a sweeping executive order titled "Executive Order on Promoting Competition in the American Economy," laying out 72 actions for more than a dozen federal agencies.[1] The Order directly weighs in on the on-going national fight over the "right to repair," which directly impacts agricultural manufacturers and consumers alike. The language of the Order requires the FTC to exercise its rulemaking authority 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]

Without using the term "right to repair," the Order addresses the issues involved with it head-on. The "right to repair" is a concept used by consumer-minded advocates who believe that regardless of the technology, be it an iPhone or heavy agricultural equipment, consumers should have access to the tools and be permitted to repair their own products. Agricultural manufacturers have balked at this idea. First, it poses significant risks to consumers. If consumers are not able to correctly "repair" their technology, heavy agricultural machinery may pose life-threatening injuries to consumers. Second, the technology is proprietary, and creating a "right to repair" would open up manufacturers' software to potential tinkering. This could make hacking easier and may result in software changes that violate federal safety and emissions controls that are built into the software. In the end, all a "right to repair" would do is pass additional costs onto consumers by raising the liability risks on manufacturers.

Importantly, even though President Biden has signed the Order, it merely gives discretion to the Chair of the Federal Trade Commission to issue a rule addressing anticompetitive restrictions on third-party repair and self-repair. At this point, what the final regulation will look like is not clear as the rulemaking process is lengthy and requires public notice and comment. This will give industry representatives an opportunity to be heard on the issue before a rule is finalized. Yet, the FTC has shown increased interest in the issue and scrutiny of industry arguments. In May of this year, the FTC provided a report to Congress on the impacts of restricted "rights to repair" in which it strongly recommended to Congress to create a national "right to repair." In June, a bill was introduced in Congress on the "right to repair" issue. The United Kingdom recently passed a "right to repair" rule, and the European Commission is now considering similar rules, both of which will impact manufacturers who sell products in Europe. And, nearly 20 state governments are now



considering a "right to repair" as well. Momentum over the "right to repair" issue has been picking up globally and is unlikely to end with the FTC, regardless of the outcome of the rulemaking process. Future legal fights over the shape of the "right to repair" are all but inevitable.

For more information, please contact Jay Felton, Mara Cohara, or your regular Lathrop GPM contact.

[1] *FACT SHEET: Executive Order on Promoting Competition in the American Economy* (July 9, 2021), available at <https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/09/fact-sheet-executive-order-on-promoting-competition-in-the-american-economy/>.

[2] *Executive Order on Promoting Competition in the American Economy* (July 9, 2021), available at <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/>.