

PRESIDENT BIDEN ISSUES EXECUTIVE ORDER ON PROMOTING COMPETITION: INVOKING THE SPIRIT OF THE ROOSEVELTS' TRUSTBUSTING AS THE FUTURE OF U.S. ANTITRUST POLICY

On July 9, 2021, President Biden signed *Executive Order on Promoting Competition in the American Economy* ("Order"), a sweeping statement on his administration's focus on antitrust enforcement. The White House's statement on the Order invokes the legacies of Presidents Theodore Roosevelt and Franklin D. Roosevelt, who "took bold action" in the face of "threats of growing corporate power."¹ The tone of the Order indicates support for a more progressive antitrust policy, stating that "excessive market concentration threatens basic economic liberties, democratic accountability, and the welfare of workers, farmers, small businesses, startups, and consumers."² The protests against the danger of excessive market concentration are a familiar refrain now, but this Order cements President Biden's stance on the future of U.S. antitrust policy, likely leading to increased merger scrutiny (including previously consummated mergers) affecting particular market sectors and the implementation of new federal agency rules impacting competition.

The Order contains 72 initiatives and calls more than a dozen federal agencies to action in what the Order terms a "whole-of-government approach" to competition. The Department of Justice ("DOJ") and the Federal Trade Commission ("FTC") are the "first line of defense against the monopolization of the American economy"

¹ *FACT SHEET: Executive Order on Promoting Competition in the American Economy*, White House Briefing Room (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/>.

by enforcing the Clayton Act, the Sherman Act, and the FTC Act. However, the Order notes that numerous other federal agencies influence competition through enforcement of industry specific laws or regulations, including the Department of the Treasury, the Department of Agriculture, the Department of Health and Human Services, the Department of Transportation, the Federal Reserve System, the Securities and Exchange Commission, the Federal Deposit Insurance Corporation, the Federal Communications Commission, the Federal Maritime Commission, the Commodity Futures Trading Commission, the Federal Energy Regulatory Commission, the Consumer Financial Protection Bureau, and the Surface Transportation Board. President Biden calls on these agencies to adopt pro-competitive regulations and to rollback restrictive licensing restrictions.

The Order's initiatives call for general heightened antitrust enforcement as well as specific focus on the following industries: labor, healthcare, agriculture, banking and consumer finance, transportation, internet service, and information technology (namely larger internet platforms).

While the Order encourages more active enforcement by the FTC and the DOJ, it also calls on various federal agencies, including the FTC, to utilize their respective authority to issue new rules to enhance competition. These "encouraged" rules range from requiring broadband providers to regularly report prices to improve transparency, curtailing non-compete clauses in employment agreements, and banning "pay for delay" tactics involving generic drugs, to prohibiting online marketplaces from unfairly competing against third-party sellers. It should be noted that the FTC recently established a new rulemaking group and updated its rulemaking procedures, actions that were not without criticism from interested parties.³ Some may construe this new Order's recommendation for increased rulemaking as support for the Democratic Commissioners' actions.

The Order also establishes a White House Competition Council ("WHCC"). The WHCC is tasked with "work[ing] with each [federal] agency to ensure that agency operations are conducted in a manner that promotes fair competition, as appropriate and consistent with applicable law." The creation of the WHCC and the Order's request for agencies to achieve certain goals call into question the independent nature of the federal agencies tasked with enforcing the antitrust laws. It is important to note, however, that unlike federal legislation, the Order only "encourages" the agencies to consider rulemaking and can be undone by future administrations.

The Order

The following are the major provisions discussed in the Order.

Non-Industry Specific

The Order recommends the following non-industry specific actions:

- The FTC and the DOJ re-examine their joint horizontal and vertical merger guidelines, the latter of which were recently revised in 2020;

³ See Press Release, Federal Trade Comm'n, *FTC Acting Chairwoman Slaughter Announces New Rulemaking Group* (Mar. 25, 2021), available at <https://www.ftc.gov/news-events/press-releases/2021/03/ftc-acting-chairwoman-slaughter-announces-new-rulemaking-group>; Press Release, Federal Trade Comm'n, *FTC Votes to Update Rulemaking Procedures, Sets Stage for Stronger Deterrence on Corporate Misconduct* (July 1, 2021), available at <https://www.ftc.gov/news-events/press-releases/2021/07/ftc-votes-update-rulemaking-procedures-sets-stage-stronger>.

- The Attorney General and Secretary of Commerce are encouraged to consider whether it is necessary to revise their positions on the intersection of intellectual property and antitrust; and
- The FTC and the DOJ are encouraged to consider rulemaking regarding unfair restrictions on third-party or self-repair of devices and equipment, with the White House's fact sheet on the Order specifically calling out such restrictions on agricultural equipment and cell phones.

Labor

During his public address prior to signing the Order, President Biden emphasized his concerns regarding unfair restrictions on American workers.⁴ The Order's labor initiatives include:

- Recommending that the DOJ and the FTC consider revising the Antitrust Guidance for Human Resources Professionals from 2016, with particular concerns that employers are sharing employee salary and benefit information to the detriment of workers;
- Encouraging the FTC to limit or eliminate non-competes that restrict competition in the labor market through the rulemaking process; and
- Recommending the elimination of unnecessary restrictive occupational licensing restrictions.

Healthcare

Healthcare has long been an industry heavily scrutinized under an antitrust lens, with an increasing outcry for even further action.⁵ The Order's healthcare initiatives directed at the Secretary of Health and Human Services include:

- Promoting availability of low-cost hearing aids by issuing a proposed rule on over-the-counter hearing aids;
- Supporting existing price transparency initiatives for hospitals and other healthcare providers and new price transparency initiatives; and
- Developing a plan to combat excessive pricing of pharmaceutical drugs, which includes promoting development of generic pharmaceuticals and facilitating the Food and Drug Administration's approval of biosimilar and interchangeable products.
- The Order also directs the FTC to consider using its rulemaking authority to address unfair conduct or agreements that delay the introduction of generic or biosimilar pharmaceutical products.

Transportation

American infrastructure has been a key focus of the Biden Administration to-date, so it is unsurprising that the industry is also addressed in the Order. The following

⁴ *Remarks by President Biden At Signing of An Executive Order Promoting Competition in the American Economy*, White House Briefing Room (July 9, 2021), available at <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/07/09/remarks-by-president-biden-at-signing-of-an-executive-order-promoting-competition-in-the-american-economy/>.

⁵ *Statement of Commissioner Christine S. Wilson, Joined by Commissioner Rohit Chopra Concerning Non-Reportable Hart-Scott-Rodino Act Filing 6(b) Orders*, Federal Trade Comm'n (Feb. 11, 2020), available at <https://www.ftc.gov/news-events/press-releases/2020/02/ftc-examine-past-acquisitions-large-technology-companies>.

are initiatives the Secretary of Transportation, the Surface Transportation Board, and the Federal Maritime Commission are encouraged to consider:

- Enhancing consumer access to airline flight information;
- Issuing a rule requiring airlines to refund ancillary fees when the relevant service is not provided, including baggage fees if luggage is substantially delayed;
- Ensuring passenger rail service is not subjected to unwarranted delays and interruptions and enforcing on-time performance requirements; and
- Enforcing the prohibition of unjust and unreasonable practices regarding detention and demurrage, pursuant to the Shipping Act.

Agriculture

The proposals for the Department of Agriculture include the following:

- Consider initiating rulemaking under the Packers and Stockyards Act to strengthen Department of Agriculture rules on unfair or deceptive practices;
- Adopting anti-retaliation protections for farmers;
- Ensuring accurate and transparent labels for products made in the United States; and
- Ensuring farmers have increased opportunities for accessing markets, including access to retail markets.

Technology and Data Privacy

Given the intense antitrust focus on "Big Tech," it is not surprising that the Order addresses technology platforms, including the following initiatives:

- Recommending rulemaking to address unfair data collection and surveillance practices;
- Establishing a policy for greater scrutiny of mergers, particularly mergers by dominant tech platforms; and
- Encouraging the FTC to develop rules regarding unfair methods of competition by online marketplaces. The White House fact sheet on the Order provides, as an example, how dominant online marketplaces can track how third-party products are sold on the platform and then unfairly compete using the platform's own products.

Alcohol

The proposals are for the Secretary of the Treasury and the Alcohol and Tobacco Tax and Trade Bureau to consider:

- Engaging in rulemaking to update the Alcohol and Tobacco Tax and Trade Bureau's trade regulations;
- Rescinding or revising any regulations regarding the alcohol industry that unnecessarily inhibits competition; and

- Reducing barriers that impede market access for smaller breweries, distillers, or winemakers.

Banking and Consumer Finance

The proposals are for the Consumer Financial Protection Bureau to:

- Consider rulemaking to allow for the portability of consumer financial transaction data; and
- Enforce the Dodd-Frank Act prohibition on unfair, abusive, or deceptive acts or practices in consumer financial products or services.

White House Competition Council

The Order also establishes the WHCC. The role of the WHCC is to advance government efforts to address overconcentration, monopolization, and unfair competition. The WHCC will be chaired by the Assistant to the President for Economic Policy and Director of the National Economic Council and will consist of the Secretary of the Treasury, the Secretary of Defense, the Attorney General, the Secretary of Agriculture, the Secretary of Commerce, the Secretary of Labor, the Secretary of Health and Human Services, the Secretary of Transportation, and the Administrator of the Office of Information and Regulatory Affairs.

The Order also directs various agencies to provide reports setting forth their plans to promote competition to the WHCC by enumerated deadlines. For example, within a year, the DOJ and the FTC must undertake a study and submit a report of findings and recommendations on how to increase competition and reduce barriers to entry in the mobile application ecosystem. Additionally, the Department of Transportation is required to submit a report within 45 days on its investigation and enforcement actions against airlines that failed to provide timely refunds for flights cancelled due to the pandemic.

Key Takeaways

President Biden signed the Order in the midst of numerous proposed federal legislation and debate regarding the direction of antitrust enforcement in the United States. At the end of June, the House Judiciary Committee debated and passed six bills targeting tech platforms and large transactions (see our previous alert on the topic [here](#)). President Biden's Order differs somewhat from some of the legislative proposals designed to curb the power of Big Tech. In fact, the Order grants the FTC significant leeway to tackle certain allegedly anti-competitive business practices by technology companies. However, the Order further signals a potential shift away from the current "consumer welfare standard."⁶ In his speech upon signing the Order, President Biden stated that he believes the United States took the wrong path years ago when it followed Robert Bork and the Chicago School's "consumer welfare standard," which have underpinned antitrust jurisprudence for approximately the last four decades.

In addition, the degree of impact of an executive order is debatable, especially compared to federal legislation. Executive orders can be undone or priorities shifted by successive presidents. And President Biden's Order is not the first

⁶ Press Release, Federal Trade Comm'n, *FTC Rescinds 2015 Policy that Limited Its Enforcement Ability Under the FTC Act* (July 1, 2021), available at <https://www.ftc.gov/news-events/press-releases/2021/07/ftc-rescinds-2015-policy-limited-its-enforcement-ability-under>.

executive order on competition in recent years. On April 15, 2016, President Obama issued an executive order on increasing competition—Executive Order 13,725, titled *Steps to Increase Competition and Better Inform Consumers and Workers to Support Continued Growth of the American Economy* ("2016 Order").⁷ The 2016 Order was issued near the end of the Obama Administration and many agencies did not act on the more open-ended proposals contained within the 2016 Order. Other actions taken in response to the 2016 Order were reversed during the Trump Administration. While this Order builds on the 2016 Order (and reaffirms its principles), its vision is far more sweeping and more pointed, drilling into some very specific policy recommendations.

Time will tell how the enumerated federal agencies implement the proposals set forth in the Order, but the FTC and the DOJ appear already activated on the initiatives outlined in the Order. The Order recommends that the DOJ and the FTC review the horizontal and vertical merger guidelines and consider whether they should be revised. The same day the Order was issued, the DOJ and the FTC issued a joint statement in response, acknowledging there should be "a hard look to determine whether [the guidelines] are overly permissive" and promising a joint review would be undertaken.⁸

The future of U.S. antitrust policy is still being shaped through this swirl of activity. As noted, multiple legislative proposals are pending congressional approval and leadership at the antitrust agencies is still not finalized. President Biden has yet to nominate the head of the DOJ Antitrust Division or a replacement for FTC Commissioner Rohit Chopra, who will move to be Chair of the Consumer Financial Protection Bureau once confirmed for that new position. No doubt the Order provides more pressure and approval for federal agencies to pursue an aggressive antitrust enforcement policy, the likes of which the United States has not seen in decades.

⁷ *Executive Order -- Steps to Increase Competition and Better Inform Consumers and Workers to Support Continued Growth of the American Economy* (Apr. 15, 2016), available at <https://obamawhitehouse.archives.gov/the-press-office/2016/04/15/executive-order-steps-increase-competition-and-better-inform-consumers>.

⁸ Press Release, Dep't of Justice & Federal Trade Comm'n, *Statement of FTC Chair Lina Khan and Antitrust Division Acting Assistant Attorney General Richard A. Powers on Competition Executive Order's Call to Consider Revisions to Merger Guidelines* (July 9, 2021), available at https://www.ftc.gov/news-events/press-releases/2021/07/statement-ftc-chair-lina-khan-antitrust-division-acting-assistant?utm_source=govdelivery.

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