



July 9, 2021

Promoting Competition in the American Economy: Analysis

On Friday, July 9, President Joe Biden signed an Executive Order (“Order”) entitled “[Promoting Competition in the American Economy](#).” The Order outlines 72 actions by 12 federal agencies aimed at promoting competition throughout the U.S. economy and providing small businesses an opportunity to compete against dominant market actors.

The motivation behind the executive action, according to the Order, is to enhance competition in what President Biden believes is “excessive market concentration [which] threatens basic economic liberties, democratic accountability and the welfare of workers, farmers, small businesses, startups and consumers. Such concentration, it says, has reduced employee wages and working conditions, made success difficult for small farmers, allowed information technology platforms to exclude market entrants, increased the cost of health care options, increased broadband costs and generally reduced innovation.

The Order charges various federal agencies to protect competition by (1) policing unfair business practices, (2) conducting oversight of mergers and acquisitions, (3) issuing rules and (4) compelling disclosure of information. The Order also says these agencies can promote competition through their procurement processes.

The following agencies are specifically tasked with taking actions to promote competition in the markets outlined below:

Market	Agencies
Labor Markets	Department of Justice; Federal Trade Commission
Health Care	Department of Health and Human Services; Food and Drug Administration
Transportation	Department of Transportation
Agriculture	U.S. Department of Agriculture; Department of the Treasury
Internet Service	Federal Communications Commission
Technology	Department of Commerce
Banking and Consumer Finance	Consumer Financial Protection Bureau

Other agencies have more limited responsibilities, such as acting in an advisory capacity. These agencies include:

- Federal Reserve Board of Governors
- Securities and Exchange Commission

- Federal Deposit Insurance Corporation
- Commodity Futures Trading Commission
- Federal Energy Regulatory Commission
- Federal Maritime Commission
- Surface Transportation Board

White House Competition Council

The Order also establishes a White House Competition Council (“Council”), which will be responsible for spearheading efforts by the federal government to address overconcentration, monopolization and unfair competition in U.S. markets. It specifically tasks the Council with developing interagency coordination procedures and identifying other federal actions and potential legislative remedies necessary to carry out the Order.

The Council will be led by the Assistant to the President for Economic Policy, currently Daniel Hornung, and the Director of the National Economic Council, currently Brian Deese. The following officials will comprise the remainder of the Council:

- Secretary of the Treasury
- Secretary of Defense
- Attorney General
- Secretary of Agriculture
- Secretary of Commerce
- Secretary of Labor
- Secretary of Health and Human Services
- Secretary of Transportation
- Administrator of the Office of Information and Regulatory Affairs
- Other agency officials invited to participate

To the extent appropriate, the heads of the Federal Trade Commission, the Federal Communications Commission, the Federal Maritime Commission, the Consumer Financial Protection Bureau and the Surface Transportation Board shall also participate.

Before Aug. 8, each Council member shall appoint an agency official to coordinate with the Council and oversee the agency’s efforts under the Order.

Unless the Chair determines otherwise, the Council shall meet on a semiannual basis. It is prohibited, however, from discussing “any current or anticipated enforcement actions.”

Reaffirming Obama-Era Executive Order

In addition to the new policies outlined in the Order, the Biden administration reaffirmed an Obama-era Executive Order also designed to promote competition. Signed in April 2016, the [Steps to Increase Competition and Better Inform Consumers and Workers to Support Continued Growth of the American Economy](#) took a similar approach to market competition and consolidation, with a few notable differences.

That Order was much less specific, saying only that agencies should use their “authorities to promote competition, arm consumers and workers with the information they need to make informed choices, and eliminate regulations that restrict competition without corresponding benefits to the American public.”

It charged all federal agencies to identify actions they could take to detect market abuses and anticompetitive behavior before referring antitrust violations to the Department of Justice and the Federal Trade Commission. However, such a referral would not have precluded the agency from taking its own actions.

The Obama-era Order made the following requirements of agencies:

- Within 30 days, submit to the Director of the National Economic Council a list of potential pro-competitive actions, identify practices that restrict consumer and worker choice and suppress market entrants and available authorities to promote competition.
- Within 60 days, report to the president recommendations on agency-specific actions and timelines for rulemakings that eliminate barriers to competition and improve consumer access to information.

Because the Order was signed late in President Obama’s second term, many federal agencies did not fully carry out the Order’s directives. Those that did were ignored by the Trump administration.

Now that the Obama-era Order has been reinstated through the Biden administration’s executive action, the former’s policies are effective once again. As a result, all federal agencies, pursuant to the Obama Order, must submit the material above to the White House.

Summary and Analysis

After describing the market shortcomings identified by the administration, the table below outlines the responsibilities assigned to the various agencies in addressing competitiveness in each corresponding market.

Antitrust Reform: Department of Justice and Federal Trade Commission

The Order calls on the federal government’s two antitrust agencies, the Federal Trade Commission and the Department of Justice Antitrust Division, to adopt a number of changes to antitrust policy and enforcement.

Agency	Order
Department of Justice (DOJ), Federal Trade Commission (FTC)	<ul style="list-style-type: none"> • Enforce antitrust laws fairly and vigorously. • Review horizontal and vertical merger guidelines and consider whether to revise those guidelines. • DOJ and the Commerce Department shall consider whether to revise the Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments, issued on Dec. 19, 2019. • DOJ, in consultation with the Federal Reserve, the Federal Deposit Insurance Corporation (FDIC), and the Comptroller of the Currency shall review current practices of merger oversight under the Bank Merger Act and the Bank Holding Company Act of 1956. • FTC is also encouraged to use its rule-making authority to address practices that inhibit competition such as: <ul style="list-style-type: none"> ○ Unfair data collection and surveillance; ○ Restrictions on “right-to-repair” equipment; ○ Agreements delaying market entry of generic and biosimilar drugs; ○ Unfair competition in major internet marketplaces; ○ Unfair occupational licensing restrictions; and ○ Unfair real estate practices and any other unfair industry-specific practices that substantially inhibit competition.

Labor Markets

The Order seeks to “address agreements that may unduly limit workers’ ability to change jobs” and encourages the FTC to exercise its “statutory rulemaking authority under the Federal Trade Commission Act to curtail the unfair use of non-compete clauses and other clauses or agreements that may unfairly limit worker mobility.” It also targets overly burdensome occupational licensing requirements that serve as a barrier to entry and undermine worker mobility. Finally,

the administration said the [October 2016 guidance](#) from the Federal Trade Commission and the Department of Justice harmed workers by making wage data available to employers instead of workers, allowing for the suppression of wages.

Agency	Order
DOJ, FTC and other agencies with authority to enforce the Clayton Act	<ul style="list-style-type: none"> • DOJ and the FTC are encouraged to consider whether to revise the Antitrust Guidance for Human Resource Professionals of October 2016. • FTC is encouraged to exercise its statutory rulemaking authority to curtail the use of non-compete clauses and other agreements that may limit worker mobility.

Agriculture and Alcohol

The Order specifically identified the markets for seeds, equipment, feed and fertilizer as concentrated. Such consolidation, the Order says, limits the ability of farmers and ranchers to sell their products and forces “agricultural workers [to] struggle to retain autonomy and to make sustainable returns.”

Agency	Order
Department of Agriculture; Department of the Treasury	<ul style="list-style-type: none"> • Initiate rulemaking under the Packers and Stockyards Act to strengthen regulations concerning unfair, unjustly discriminatory or deceptive practices including: <ul style="list-style-type: none"> ○ Creating clear rules that identify recurrent practices in the livestock, meat and poultry industries that are unfair, unjustly discriminatory or deceptive ○ Reinforcing the department’s interpretation that it is unnecessary under the Packers and Stockyards Act to demonstrate industrywide harm to establish a violation of the Act ○ Prohibiting unfair practices related to grower ranking systems ○ Updating definitions for undue or unreasonable preferences, advantages, prejudices or disadvantages under the Act ○ Adopting appropriate anti-retaliation protections • Ensure consumers have accurate and transparent labels to identify products made in the U.S. • Develop a plan to promote competition in the agricultural industries, including: <ul style="list-style-type: none"> ○ Creating model contracts for farmers ○ Greater transparency to allow consumers to purchase products that support fair treatment of farmers and agricultural workers ○ Measures to enhance price discovery and transparency of livestock markets ○ Whistleblower protections ○ Investments to support competition in highly concentrated markets and any other means the Secretary of Agriculture deems appropriate • Improve farmers’ access to retail markets by examining the effect of retail concentration and practices that may violate the Federal Trade Commission Act, the Robinson-Patman Act or other law. • Report to the White House Competition Council any relevant concerns and strategies for addressing intellectual property and antitrust concerns. • The Treasury Department will submit to the FTC a report detailing current market structures and conditions in the beer, wine and spirits markets, including any threats or barriers to competition for new entrants caused by anticompetitive distribution practices, and consolidation in production, distribution or retail. • The Administrator of the Alcohol and Tobacco Tax and Trade Bureau shall consider issuing new rules to prompt competition and rescind rules that unnecessarily inhibit competition.

Transportation

The Order identified multiple modes of transportation—air travel, rail and shipping—as being dominated by large corporations. As a result, the administration said in the [Fact Sheet](#) accompanying the Order that this environment has led to the reduction of competition, higher prices and additional fees.

Agency	Order
Department of Transportation	<ul style="list-style-type: none"> • Appoint or reappoint members of the Advisory Committee for Aviation Consumer Protection. • Promote enhanced transparency through rulemaking, with the aims of enhancing consumer access to airline flight information, and ensuring consumers are not exposed to unfair or deceptive marketing and pricing practices. • Report to the White House Competition Council on investigatory and enforcement activities to address airline failure to provide timely refunds for flights canceled as a result of the COVID-19 pandemic. • Propose a rule to require refunds for baggage fees when a passenger’s luggage is substantially delayed, or for other ancillary services a passenger pays for but does not receive. • Develop amendments to the definitions of “unfair” and “deceptive.” • Consider initiating a rulemaking to ensure consumers have all ancillary fee information at the time of ticket purchase. • Provide consumers with more flight options at better prices by evaluating: <ul style="list-style-type: none"> ○ Effectiveness of existing commercial aviation programs ○ Existing consumer protections ○ Federal Aviation Administration (FAA) rules ○ Ability of new entrants to gain access to the market, ○ Measures to support airport development and slot access • Foster competition in the rail industry by strengthening regulations pertaining to reciprocal switching agreements and vigorously enforce on-time performance requirements pursuant to the Passenger Rail Investment and Improvement Act of 2008. • The Chair of the Federal Maritime Commission shall enforce the prohibition of unjust and unreasonable practices in the context of detention and demurrage pursuant to the Shipping Act, and request recommendations for improving detention and demurrage practices.

Health Care

The Order identifies four areas of health care—prescription drugs, hearing aids, hospitals and health insurance—in which it says inadequate competition has resulted in “inadequate or more expensive healthcare options.”

Agency	Order
Health and Human Services (HHS), Food and Drug Administration (FDA)	<ul style="list-style-type: none"> • Promote the wide availability of low-cost hearing aids by proposing a rule for over-the-counter hearing-aids. • Support existing price transparency initiatives and make changes made necessary by the No Surprises Act. • Implement standardized options in the national Health Insurance Marketplace to improve competition and consumer choice. • Submit a plan to the White House Competition Council detailing how to combat excessive pricing of prescription drugs and how to enhance domestic pharmaceutical supply chains. • Lower prescription drug prices by promoting generics and biosimilars.

	<ul style="list-style-type: none"> • Work with the Commissioner of the FDA to describe to the Director of the U.S. Patent and Trademark Office any concerns the FDA has regarding the patent system being used to unjustifiably delay generic drug and biosimilar competition. • Support market entry of lower-cost generic drugs and biosimilars through implementation of the CREATES Act of 2019. • Prepare for Medicare and Medicaid coverage of interchangeable biological products and payment models that support increased utilization of generics and biosimilars. • FDA shall work to develop section 804 Importation Programs in accordance with the Medicare Prescription Drug, Improvement and Modernization Act of 2003.
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Internet Service

The Order addresses four issues—the lack of competition among broadband providers, high termination fees, companies that discriminatorily slow down internet access and the lack of price transparency—that the administration says in the accompanying [Fact Sheet](#) limit competition, raise prices and reduce consumer options.

Agency	Order
Federal Communications Commission (FCC)	<ul style="list-style-type: none"> • Adopt “Net Neutrality” rules similar to those previously adopted under title II of the Communications Act of 1934. • Conduct future spectrum auctions under rules designed to avoid excessive concentration of spectrum license holdings • Promote increased openness, innovation and competition in the 5G Open Radio Access Network (O-RAN). • Prohibit unjust or unreasonable early termination fees to enable consumers to more easily change providers. • Develop a broadband consumer label to give consumers clear and accurate information regarding provider prices, fees, performance and network practices. • Require broadband service providers to report broadband prices and subscriptions rates to the FCC to improve consumer price transparency.

Technology

The Order addresses three areas—the purchase of would-be competitors by large platforms, the capture of use information and unfair competition among large and small businesses—in which “dominant tech firms are undermining competition and reducing innovation.”

Agency	Order
Department of Commerce	<ul style="list-style-type: none"> • Initiate a rulemaking to require agencies submit an annual report to the National Institute of Standards and Technology (NIST) detailing their contractors’ utilization activities. • Consider not finalizing any provisions on march-in rights and product pricing in the proposed rule “Rights to Federally Funded Inventions and Licensing of Government Owned Inventions.” • Study the mobile application ecosystem and report to the White House Competition Counsel recommendations for improving competition and reducing barriers to entry.

Banking and Consumer Finance

The Order says, as a result of consolidation in the banking industry, “consumers pay steep and often hidden fees because of industry consolidation.”

Agency	Order
Consumer Finance Protection Bureau (CFPB)	<ul style="list-style-type: none">• Continue rulemaking under section 1033 of the Dodd-Frank Act to facilitate consumer financial transaction data portability, enabling consumers to more easily switch financial institutions.• Enforce the prohibition of unfair or deceptive practices in consumer financial products or services pursuant to section 1031 of the Dodd-Frank Act.

Looking Ahead

Initial Reactions

Shortly after President Biden signed the Order, House Judiciary Committee Chair Jerrold Nadler (D-NY) and Subcommittee on Antitrust, Commercial and Administration Law Chair David Cicilline (D-RI) issued a [press release](#) applauding the Order. In their statement, the members said the Order “marks a critical turning point” in the nation’s history, adding that it would “usher in waves of economic opportunity and growth.” The duo did not, however, indicate whether the Order would affect the ongoing legislative effort to enact antitrust reform. They said only that they “look forward to passing legislation that will complement this historic effort.”

As of this writing, their Republican committee counterparts—House Judiciary Committee Ranking Member Jim Jordan (R-OH) and Subcommittee on Antitrust Ranking Member Ken Buck (R-CO)—have yet to issue a statement. However, their response can potentially be anticipated. Republicans are expected to oppose the administration’s Order and accuse it again of acting unilaterally through executive action, rather than seek bipartisan consensus. Moreover, Republicans will continue to prioritize their own legislative proposal, which is being drafted by a task force led by House Energy and Commerce Committee Ranking Member Cathy McMorris Rodgers (R-WA), that will tackle Section 230 and other Big Tech issues.

Notably, the Order has at least one idea that Republicans have supported in the past, and could be expected to support at least in principle, a reduction in state occupational licensing requirements. However, doing so through an FTC rulemaking process is likely to be opposed by Republicans. It is also noteworthy that the earlier Obama-era Order contains an idea that Republicans would be likely to support, at least in principle—namely, the elimination of regulations that restrict competition without corresponding benefit to the public. In practice, however, identifying and eliminating such regulations is likely to be a time- and resource-intensive process.

Several themes in the Order were previewed at the FTC’s Open Meeting on July 1.

Private industry has already responded. The U.S. Chamber of Commerce issued a [statement](#) shortly before President Biden signed the Order rebuffing the effort. In its statement, the Chamber said the “Order is built on the flawed belief that our economy is over concentrated, stagnant, and fails to generate private investment needed to spur innovation. Such broadsided claims are out of touch with reality.” The Chamber ultimately vowed to “vigorously oppose calls for government-set prices, onerous and legally questionable rulemakings, efforts to treat innovative industries as public utilities, and the politicization of antitrust enforcement.”

Next Steps

Under the Order, agencies were given various deadlines to issue new rulemakings, some as soon as 45 days from the signing date while others may take nearly a year. To support these efforts, the Department of Justice Antitrust Division will be responsible for developing an action plan for outreach and implementation. The division will report within 30 days on how it can support other federal agencies in executing the Order.

FTC Chair Lina Khan and acting FCC Chair Jessica Roseworcel will also play an important part in marshaling their respective agencies to issue regulatory actions as requested by the Order.

In Congress, competition and antitrust reform has been a hot topic, with Democrats and Republicans working on both a bipartisan and partisan basis to take on Big Tech. Most recently, the House Judiciary Committee held a markup of six bills aimed at reforming antitrust enforcement and promoting competition.

In response to these efforts, House Judiciary Committee Republicans criticized the Democratic bills as being too friendly to technology companies and crafted their own legislation aimed at reining in what they describe as Big Tech's censorship of conservative speech.

Meanwhile, the Senate has plans to take up its own legislation dealing with antitrust reform, being spearheaded by Sen. Amy Klobuchar (D-MN) and Sen. Mike Lee (R-UT).

Read more in our latest alert **on** [Congressional Antitrust Reform: State of Play](#).

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