

President Biden Issues Sweeping Competition Executive Order

July 9, 2021

Key Points

- On Friday, July 9, 2021, President Biden issued EO 14036, “Promoting Competition in the American Economy.” The EO includes 72 initiatives by more than a dozen federal agencies in an aim to address competition issues across the economy. In the view of the administration, the current trend of corporate consolidation requires a whole-of-government approach to drive down prices for consumers, increase wages for workers and facilitate innovation.
- The EO sets in motion a series of reviews and rulemakings around initiatives that aim to enforce existing antitrust laws, and other laws that may impact competition,¹ to combat excessive concentration of industry and abuses of market power, as well as to address challenges posed by new industries and technologies.
- Notably, the EO establishes a new White House Competition Council to coordinate the White House response to anticompetitive behavior. The Council will consist of representatives from key agencies and will invite the participation of the FTC and several other independent agencies.²
- The EO does not immediately establish any requirements or prohibitions for nongovernmental entities, but it calls for swift action by federal agencies to establish policies and propose changes to implement the EO. The order provides a number of deadlines for individual agencies to develop guidance or submit reports to the White House Competition Council in order to examine the current competition landscape in specific markets.
- The Chair of the FTC and the Acting Assistant Attorney General for Antitrust at the DOJ announced that they will initiate a review of the agencies’ joint merger guidelines, updating them to reflect “a rigorous analytical approach.”

Background

On July 9, 2021, President Biden issued Executive Order (EO) 14036 on “Promoting Competition in the American Economy.” As noted in the administration’s accompanying [Fact Sheet](#), the EO is a direct response to the acceleration of corporate

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consolidation in recent years, as well as increased concern about competition from both Congress and antitrust enforcement agencies.

In response to concerns regarding consolidation and weakening competition in certain markets, the order stresses that it is the Biden-Harris administration's policy to enforce antitrust laws to address the impacts of "excessive" concentration and abuse of market power, particularly as these issues relate to labor markets, agricultural markets, Internet platform industries, health care markets, repair markets, and U.S. markets directly affected by foreign cartel activity.

The EO expands significantly beyond the current focus of the Department of Justice (DOJ) and Federal Trade Commission (FTC) on enforcement regarding particular cases and the legislative interest on certain industries, to the role of large businesses in the economy writ large. Through the EO, the administration is directing government agencies, beyond those responsible for antitrust enforcement, to pursue the regulation of industries where there is a perception of market concentration. Actions by the administration continue to expand from a focus on technology companies to include additional regulation and enforcement directed at banking, health care, agriculture and other industries, as well as labor markets. In short, the EO seeks to have a coordinated whole-of-government approach on competition issues.

EO Overview

The EO consists of six sections:

- Section 1: Policy
- Section 2: The Statutory Basis of a Whole-of-Government Competition Policy
- Section 3: Agency Cooperation in Oversight, Investigation and Remedies
- Section 4: The White House Competition Council
- Section 5: Further Agency Responsibilities
- Section 6: General Provisions

The EO calls on the DOJ and FTC to enforce existing antitrust laws "vigorously," also stipulating that this enforcement policy should hone in on labor markets, agricultural markets, health care markets and the tech sector.

The order establishes a White House Competition Council to coordinate the White House response to anticompetitive behavior, as well as various deadlines, noted below, for agency response.

Further, the EO directs the Attorney General and the Secretary of Commerce to examine the possibility of revising their stance on the intersection of the intellectual property and antitrust laws, including by considering changes to the [Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments](#), issued on December 19, 2019.

White House Competition Council

The newly established Council will be chaired by the Assistant to the President for Economic Policy and Director of the National Economic Council, and consist of the following members:

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- 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
- The heads of such other agencies and offices as the Chair may from time to time invite to participate.

Within 30 days, the order directs members of the Council to designate a senior official within their agency to be the point of contact with the Council and oversee the agency's efforts to address competition issues. The FTC and other independent agencies will be invited to participate. The EO stipulates that the Council will meet on a semi-annual basis unless the Chair determines that a meeting is unnecessary.

The EO asks the FTC Chair to address persistent and recurrent practices that inhibit competition, and encourages the FTC to exercise its statutory rulemaking authority to address, in particular, seven areas. These include: (i) unfair data collection and surveillance processes, (ii) unfair anticompetitive restrictions on third-party or self-repair of items; (iii) unfair anticompetitive drug industry conduct or agreements, including involving generics and biosimilars; (iv) unfair competition in the major Internet marketplaces; (v) unfair occupational licensing restrictions; (vi) unfair tying or exclusionary practices in the brokerage or listing of real estate; and (vii) a catchall "any other unfair industry-specific practices that substantially inhibit competition."

Sector-Specific Analysis

Labor Markets

- The order calls on the FTC to ban or limit non-compete agreements.
- The EO notes that certain occupational licensing requirements restrict competition, and asks the FTC to ban "unnecessary" occupational licensing restrictions that restrict worker mobility.
- The order encourages the FTC and DOJ to bolster existing guidance to prevent employers from sharing wage and benefit information in a manner that suppresses wages or benefits, and to consider revising their Antitrust Guidance for Human Resource Professionals of October 2016.
- It specifically calls out "labor markets" as markets that FTC and DOJ should consider in evaluating proposed mergers.
- The Treasury Department is directed to, within 180 days, submit a report on the impact of the current lack of competition on labor markets.

Health Care

- With respect to prescription drugs, the order directs the Food and Drug Administration (FDA):
 - To work with states and tribes that propose to develop programs to import prescription drugs from Canada.
 - To continue to promote generic drug and biosimilar competition through a number of actions, including actions with FTC.
- It directs the Department of Health and Human Services Administration (HHS) to, within 45 days, release a plan to address high prescription drug prices and price gouging.
- The EO raises concern about health care consolidation, including consolidation between hospitals, prescription drugs and insurance.
 - The order specifically calls on the DOJ and FTC to make changes to their merger guidelines for hospitals.
 - It calls on HHS to support existing hospital price transparency rules and to continue implementing legislation to address surprise billing.
- Further, the EO outlines concerns about consolidation in the health insurance industry, directing HHS to standardize plan options in the National Health Insurance Marketplace.
- HHS is also directed to, within 120 days, publish for notice-and-comment a proposed rule to promote the availability of low-cost, over-the-counter hearing aids.
- In an aim to ensure that the patent system encourages innovation without delaying generic drug and biosimilar competition, it directs the FDA to, within 45 days, send a letter to the Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office outlining relevant concerns of the agency.

Transportation

- The EO directs the Secretary of Transportation to take or consider taking the following actions within a specified time period to address airline competition and consumer protection:
 - Appoint members of the Advisory Committee for Aviation Consumer Protection and convene a meeting as soon as possible.
 - Consider initiating rulemakings and enforcement actions and issuing guidance to (1) enhance consumer access to flight information, including by new or lesser known airlines; and (2) ensure advertising, marketing, pricing and charging of ancillary fees does not constitute an unfair or deceptive practice or unfair method of competition.
 - Report to the White House Competition Council regarding progress with airlines providing refunds for flights cancelled because of the COVID-19 pandemic.
 - Publish for notice-and-comment a proposed rule requiring airlines to refund baggage fees when a passenger's luggage is substantially delayed and when other ancillary fees are charged and the service is not provided.
 - Propose amendments to the definition of "unfair" and "deceptive" in transportation law governing airline consumer protection.

- Consider initiating a rulemaking to ensure consumers have ancillary fee information at the time of ticket purchase.
- Convene a Department of Transportation (DOT) working group to (1) evaluate the effectiveness of commercial aviation programs, consumer rules and Federal Aviation Administration (FAA) rules; (2) consult with the Attorney General about better coordination between DOT and the Department of Justice regarding airline competition and the ability of new entrants to gain access; and (3) consider measures to support airport development and increased capacity and improve airport congestion management, gate access and implementation of airport competition plans and slot administration; and
- Ensure that DOT facilitates innovation and competition in new aviation technologies (including unmanned aircraft systems) while ensuring safety, security and privacy, protecting the environment and promoting equity and providing oversight over market participants.
- The EO directs the chair of the Surface Transportation Board (STB) to take certain steps aimed at addressing industry consolidation and shipping prices:
 - Consider undertaking a rulemaking to address reciprocal switching agreements if the Chair determines it is in the public interest or needed to provide competitive rail service.
 - Consider undertaking rulemakings to address other issues regarding competitive access, including bottleneck rates, interchange commitments or other matters.
 - Ensure freight railroads are giving passenger rail access without unwarranted delays or interruption consistent with existing federal law.
 - In determining whether a merger, acquisition or other transaction involving rail carriers is consistent with the public interest, consider whether the subject carrier has fulfilled its responsibilities regarding Amtrak’s statutory right of access.
- The EO directs the Chair of the Federal Maritime Commission (FMC) to work with the other FMC commissioners to take certain actions to address high shipping costs resulting from various factors, including the consolidation of the global container shipping industry:
 - Vigorously enforce the prohibition against unjust and unreasonable practices related to detention and demurrage practices.
 - Request recommendations from the National Shipper Advisory Committee regarding how to improve detention and demurrage practices and enforcement of related Shipping Act prohibitions.
 - Consider rulemakings to improve demurrage and detention practices and enforcement.

Agriculture

- The order particularly expresses concern about increased consolidation in key agricultural markets and the resulting impact on farmers. It provides several recommendations for the U.S. Department of Agriculture (USDA), including that USDA issue rules under the Packers and Stockyards Act to allow farmers to more easily bring claims and vocalize concern about bad practices.

- It calls on USDA to issue a plan to increase opportunities for farmers to access markets within 180 days, and to issue a report on the effect of retail concentration on competition in the food industries within 300 days.
- USDA is directed to work to ensure that the intellectual property system both encourages innovation and avoids unnecessarily reducing competition in seed and other input markets, further directing USDA to submit a report detailing any concerns related to intellectual property, antitrust and other relevant laws.
- The EO calls on the FTC to place restrictions on the ability of large equipment manufacturers to limit individuals' ability to utilize independent repair shops or do repairs on their own with respect to equipment such as tractors.
- The order specifically calls out "agriculture markets" as markets that the FTC and DOJ should consider in evaluating proposed mergers.

Beer, Wine and Spirits

- The order requires the Treasury Secretary to, within 120 days, submit a report assessing the current market structure and conditions of competition, including an assessment of any threats to competition and barriers to new entrants.
- Within 240 days, the Treasury Department must initiate a rulemaking to update the Alcohol and Tobacco Tax and Trade Bureau's trade practice regulations and revise any other policies that may inhibit competition.

Internet Service

- With respect to broadband providers, the EO points to decreased competition, calling on the Federal Communications Commission (FCC) to halt the ability of Internet service providers (ISPs) to negotiate with landlords in order to limit tenants' choices, to require providers to report prices and subscription rates to the FCC, to restrict "excessive" early termination fees and to restore Net Neutrality rules.

Technology

- Regarding Big Tech, the EO broadly outlines an administration policy of greater scrutiny of mergers, especially by dominant Internet platforms, with "particular attention to the acquisition of nascent competitors, serial mergers, the accumulation of data, competition by 'free' products, and the effect on user privacy."
- The order encourages the FTC to take several actions, including issuing rules on surveillance and the accumulation of data, rules prohibiting unfair methods of competition on Internet marketplaces and anticompetitive limits on utilizing independent repair shops or on individuals repairing their own devices.
- Further, the EO directs the Treasury Department to, within 270 days, submit a report examining the impact of competition of large technology firms' and other nonbank companies' entry into consumer finance markets.

Banking and Consumer Finance

- The EO underscores the need to address "excessive" consolidation in the banking and consumer finance industries, calling on the DOJ and banking agencies to update guidelines to provide increased scrutiny of banking mergers.
- The order calls on the Consumer Financial Protection Bureau (CFPB) to develop rules allowing customers to port their banking data.

- Within 180 days, the order directs the Attorney General to review current practices and adopt a plan for the revitalization of merger oversight under the Bank Merger Act and the Bank Holding Company Act of 1956.

National Security

- The EO provides several recommendations for the Department of Defense (DoD), including that DoD, within 180 days, submit a report assessing the state of competition within the defense industrial base, as well as a plan for avoiding contract terms in procurement agreements that limit the ability of DoD or service members to repair their own equipment.

Other Significant Developments and Initiatives

Shortly before the release of the EO, Utah Attorney General Sean D. Reyes led a coalition of 37 attorneys general to file a lawsuit against Google in California. The suit, *Utah v. Google*, alleges that Google's control of the Google Play Store for Android violates antitrust laws by limiting choice and driving up app prices.

The EO also closely follows the House Judiciary Committee's approval of six bills (see prior alert [here](#)) to hold Big Tech monopolies accountable for anticompetitive conduct, as well as the Senate Judiciary Committee's approval of the Merger Filing Fee Modernization Act of 2021 ([S. 228](#)), a bipartisan proposal to increase Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR) filing fees for the largest transactions (see prior alert [here](#)).

Sen. Amy Klobuchar (D-MN), Chair of the Senate Judiciary Committee's Subcommittee on Antitrust, Competition Policy and Consumer Rights, has also introduced a sweeping antitrust reform bill—the Competition and Antitrust Law Enforcement Reform Act (CALERA, [S. 225](#))—which will likely be a jumping-off point for increased congressional discussions on changes in antitrust laws and enforcement (see prior alert [here](#)).

At the agency level, the FTC in February announced the latest annual revision to the size thresholds governing premerger notification requirements under the HSR Act, and the new thresholds apply to transactions consummated on or after March 4, 2021 (see prior alert [here](#)). The FTC also just last week (on July 1) passed several new resolutions purportedly designed to streamline the agency's investigative authority and review and to facilitate future rulemaking. Shortly after the release of the EO, the Chair of the FTC and the Acting Assistant Attorney General for Antitrust released a [statement](#) saying that they will examine whether the current merger guidelines are “overly permissive,” with the goal to update them to reflect a “rigorous analytical approach.”

Recommendations and Next Steps

With so much of the EO's scope and implications left to unfold, it will be critical for potentially affected stakeholders to closely monitor the various timelines and mandates laid out in the order. Each juncture will provide critical opportunities to engage and educate policy-makers, as well as gain insights to anticipate the eventual scope of each agency's forthcoming policies and regulations.

Akin Gump will host a webinar in the coming weeks focusing on the issues outlined in the EO. Stay tuned for further details.

¹ Including, Packers and Stockyards Act, the Federal Alcohol Administration Act (Public Law 74-401, 49 Stat. 977, 27 U.S.C. 201 et seq.), the Bank Merger Act, the Drug Price Competition and Patent Term Restoration Act of 1984 (Public Law 98-417, 98 Stat. 1585), the Shipping Act of 1984 (Public Law 98-237, 98 Stat. 67, 46 U.S.C. 40101 et seq.) (Shipping Act), the ICC Termination Act of 1995 (Public Law 104-88, 109 Stat. 803), the Telecommunications Act of 1996, the Fairness to Contact Lens Consumers Act (Public Law 108-164, 117 Stat. 2024, 15 U.S.C. 7601 et seq.), and the Dodd-Frank Wall Street Reform and Consumer Protection Act (Public Law 111-203, 124 Stat. 1376) (Dodd-Frank Act).

² Including, the Chair of the Federal Communications Commission, the Chair of the Federal Maritime Commission, the Director of the Consumer Financial Protection Bureau, and the Chair of the Surface Transportation Board.

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