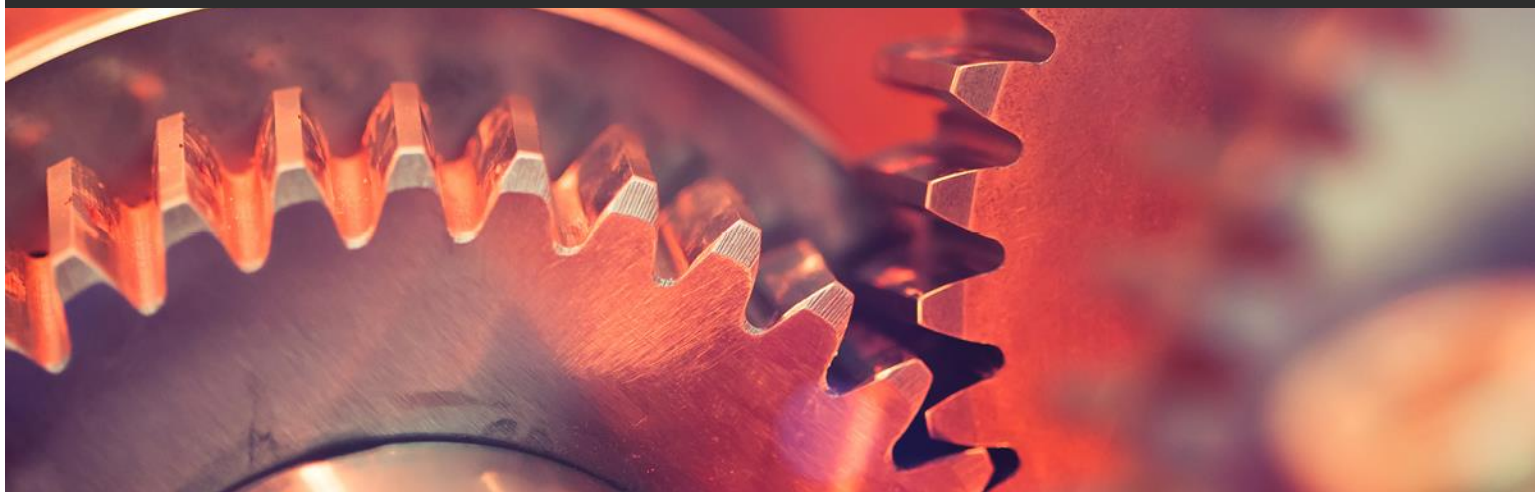


Alert | Antitrust Litigation & Competition Regulation



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President Biden Targets Antitrust Enforcement to Increase Competition in New Executive Order

On July 9, 2021, President Joe Biden signed his [Executive Order on Promoting Competition in the American Economy](#) (the Order). The Order, one of Biden's broadest to date, aims "to combat the excessive concentration of industry, the abuses of market power, and the harmful effects of monopoly and monopsony" through increased antitrust enforcement, rulemaking, and cooperation within the administration.

The Order directs the White House Competition Council to oversee and coordinate efforts between more than 20 Executive-branch departments, agencies, boards, and commissions to accomplish Biden's goal of protecting and promoting "an open and competitive economy." While the Order does little to make any immediate changes in law, it strongly "encourages" agencies to "consider" implementing rulemaking and policy changes in accordance with the administration's agenda. Highlighting the mandate that the president is directing to the agencies, both Federal Trade Commission (FTC) Chair Lina Khan and Department of Justice (DOJ) Assistant Attorney General Richard Powers were next to Biden as he announced the Order.

Agency Highlights

In the nearly 7,000-word Order, Biden outlines his "Whole-of-Government Competition Policy" by addressing traditional antitrust and competition laws such as the Sherman Act, the Clayton Act, and the FTC Act. But the Order does not stop there. Biden sketches specific frameworks and procedures for a host

of other, less traditional regulatory agencies to address industry-specific antitrust and competition goals. Below are some of the Order's highlights.

Key Antitrust Enforcement Provisions

To enforce his administration's goals, Biden encourages the leading antitrust agencies, DOJ (mentioned 16 times) and FTC (mentioned 22 times), and other agencies, "to enforce the antitrust laws fairly and vigorously" and recognize that the law allows the Biden administration "to challenge prior bad mergers that past Administrations did not previously challenge." Notably, the Order:

- Encourages the DOJ and FTC to revise the horizontal and vertical merger guidelines to address consolidation of industry in many markets across the economy, including directing the DOJ to consult with the Federal Reserve System, Federal Deposit Insurance Corporation (FDIC) and the Comptroller of the Currency to adopt a plan, within 180 days, to revive merger oversight under the [Bank Merger Act](#) and the [Bank Holding Company Act of 1956](#). Separately, Chair Khan and Assistant AG Powers issued a joint statement undertaking to study revising the joint FTC-DOJ merger guidelines.
- Encourages the FTC to ban or limit noncompete agreements to empower workers to demand higher wages and command greater dignity and respect in the workplace.
- Encourages the FTC to ban unnecessary occupational licensing restrictions that impede economic mobility and suppress wages.
- Encourages the FTC and DOJ to strengthen antitrust guidance that allows third parties to make wage data available to employers — and not to workers — in certain circumstances without triggering antitrust scrutiny. The Order seeks to prevent employers from collaborating to suppress wages or reduce benefits by sharing wage and benefit information with one another.
- Encourages the FTC to ban "pay for delay" and similar deals between generic and brand name manufacturers that inhibit innovation.
- Encourages the FTC to establish rules barring unfair methods of competition on internet marketplaces by "small number of dominant Internet platforms" and instructs the Secretary of the Treasury to submit a report "assessing the effects on competition of large technology firms' and other non-bank companies' entry into consumer finance markets."
- Encourages the Federal Communications Commission (FCC) to restore and revise the Obama-Era Net Neutrality rules.
- Directs the Department of Agriculture to provide clear rules that identify recurrent practices in livestock, mean, and poultry industries that violate the Packers and Stockyards Act; and reinforce the Department's interpretation that "it is unnecessary under the Packers and Stockyards Act to demonstrate industry-wide harm to establishes violation of the Act[.]"
- Encourages the Surface Transportation Board (STB) to consider a carrier's fulfilment of its statutory responsibilities related to Amtrak when determining the public interest factor in a merger, acquisition, or other transaction involving rail carriers.

Industry-Specific Measures

In addition to the measures listed above, the Order also addresses the following:

- Data collection and surveillance practices;
- Restrictions on third-party repair or self-repair imposed by manufacturers on farmers;
- Tying or exclusionary practices in the brokerage or listing of real estate;
- Grower-ranking systems in the poultry industry;
- Anti-retaliation rights of farmers;
- Labeling of certain products as “Product of USA”;
- Market-entry barriers and threats to competition in beer, wine, and spirits markets involving production, distribution, labeling, etc.;
- Preventing spectrum stockpiling and concentration of spectrum licensing in the telecommunications industry;
- Airlines being required to refund and/or fined for delayed and canceled flights, increase information about potential fees at the time of ticket purchase;
- Air traffic control problems resulting from increased use of low-altitude unmanned aircraft systems deliveries (e.g., drones);
- Detention and demurrage practices and procedures under the Federal Maritime Commission;
- Low-cost hearing aids;
- Price transparency initiatives for hospitals;
- Mobile application ecosystems;
- Avoidance of contract terms in procurement agreements with the Department of Defense for the armed forces to have the right to repair equipment.

While the Order may not change the law of today, it sets in motion his administration’s agenda on a clear course forward. The specifics of what that road ahead looks like may not be perfectly clear until the various departments, agencies, boards, and commissions return with their reports to the White House. Organizations should contact experienced legal counsel to help guide them on that path and chart a course to reach their business goals.

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