

July 10, 2021

President Biden Issues Executive Order Regarding Competition

Yesterday, President Biden signed into law an [Executive Order on Promoting Competition in the American Economy](#). The Order creates a White House Competition Counsel to “coordinate, promote, and advance Federal Government efforts to address overconcentration, monopolization and unfair competition” and calls upon over a dozen federal agencies to review and more vigorously enforce their respective mandates and rectify “Federal Government inaction [which] has contributed” to “excessive market concentration.”

The Order addresses large portions of the economy, identifying labor markets, agriculture, the information technology sector (with emphasis on “a small number of dominant Internet platforms,” “especially as they stem from serial mergers, the acquisition of nascent competitors, . . . and the presence of network effects”), prescription drug and healthcare services, the telecommunications sector, the financial services sector, and markets directly affected by foreign cartel activity, such as the global container shipping industry, as areas of particular competitive concern.

In his [remarks](#), President Biden argued that previous administrations had allowed “bad mergers” to go forward, leading to mass layoffs, higher prices, and fewer options for consumers. The Order encourages the Department of Justice and the Federal Trade Commission to address these perceived deficiencies by considering the following:

- **Revisions to the [Horizontal](#) and [Vertical](#) Merger Guidelines.** In response to the Order, FTC Chair Lina Khan and Acting Assistant Attorney of the DOJ’s Antitrust Division Richard Powers issued a [joint statement](#) indicating their plans to launch a joint review of the agencies’ merger guidelines “with the goal of updating them to reflect a rigorous analytical approach,” and “to review mergers with the skepticism the law demands.”
- **Revisions to the [Policy Statement on Remedies for Standard-Essential Patents](#)** to “avoid the potential for anticompetitive extension of market power beyond the scope of granted patents and to protect standard-setting processes from abuse.”
- **Adopting a plan to revitalize merger oversight of financial institutions** together with the Federal Reserve Board, the FDIC, and the Comptroller of the Currency.
- **Exercising FTC rulemaking** to address unfair data collection, unfair anticompetitive conduct or agreements in the prescription drug industry and major Internet marketplaces, and other “unfair industry-specific practices that substantially inhibit competition.” The Order comes on the heels of the FTC’s [rescission](#) of its 2015 policy statement, which has guided the FTC’s enforcement of Section 5, and signals Executive support for wielding Section 5, which prohibits “unfair methods of competition,” as a means to prosecute actions falling outside the scope of the Sherman and Clayton Acts.

The Order and presidential remarks also confirm the Biden administration’s desire for more aggressive antitrust enforcement. Taken together with bipartisan Congressional support for increased enforcement, transacting parties should anticipate closer and more prolonged antitrust reviews and, in certain sectors, such as technology, banking and healthcare, potentially more politicized merger challenges.

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