

# Memorandum

## Executive Order on Promoting Competition in the American Economy

July 28, 2021

On July 9, 2021, President Biden issued an [expansive Executive Order](#) calling for a wide range of new regulatory and enforcement measures meant to promote competition across key sectors of the U.S. economy. Set against the backdrop of heightened public attention to the antitrust laws and calls for reform by both Democratic and Republican lawmakers, the Order expresses concern that consolidation in recent decades has weakened competition in many industries. It identifies 72 specific initiatives for federal agencies to reverse that trend, which likely will have a significant impact on a variety of activities across multiple industries. In particular, the Order:

- contemplates increased antitrust scrutiny of mergers and acquisitions, including but not limited to transactions in the high-tech sector;
- contemplates increased scrutiny of business conduct in specific industries such as generic drugs, agriculture, airlines, rail and maritime shipping, and broadband internet; and
- authorizes federal regulators to adopt rules and regulations related to “no-poach” agreements or information sharing arrangements among competing employers.

Summaries of the industry-specific initiatives in the Order are below.

The announced policies dovetail with President Biden’s recent appointments of Lina Khan as FTC Chairwoman and Tim Wu to the National Economic Council, as well as his recent nomination of Jonathan Kanter to lead the DOJ Antitrust Division, all of whom have publicly called for increased antitrust scrutiny of technology companies and increased antitrust enforcement. Notably, in [his speech announcing the Order](#), President Biden echoed calls by some lawmakers to expand the goal of antitrust enforcement, which since the 1980s has been guided by the consumer welfare standard (*e.g.*, price, quality and innovation), to include other objectives such as protecting the interests of farmers, small businesses, and startups and promoting employment and wages. The Order also seeks to broaden the roles of the DOJ and FTC beyond traditional case-by-case enforcement to include more expansive regulation through the administrative rulemaking process.

Beyond the two antitrust agencies, the Order envisions roles for the rest of the federal bureaucracy in promoting competition through rulemaking and procurement decisions—part of what the President is calling a cooperative “whole-of-government” approach to addressing “overconcentration, monopolization, and unfair competition.” The strategy will be coordinated by the newly established White House Council on Competition, which will be led

by the Assistant to the President for Economic Policy and Director of the National Economic Council and will include the heads of at least 10 federal agencies.

## Expanded Merger Enforcement

With respect to merger reviews specifically, the Order instructs the FTC and DOJ to “enforce the antitrust laws fairly and vigorously” and to revisit both the horizontal merger guidelines, which were most recently revised in 2010, and the vertical merger guidelines, revised just last year, presumably to open the door for more prospective merger challenges and retrospective challenges to mergers that the agencies permitted previously. The day the Order was issued, Chairwoman Khan and Richard Powers, Acting Assistant Attorney General of the DOJ Antitrust Division, [issued a joint statement](#) that “the current guidelines deserve a hard look to determine whether they are overly permissive” and announcing a joint review of the guidelines “with the goal of updating them.” In addition to revisiting the merger guidelines, the Order “reaffirms that the United States retains the authority to challenge” consummated transactions. Although there is legally no statute of limitations on such challenges, agencies have typically been reluctant to bring them under ordinary circumstances. Last year, the FTC challenged Facebook’s acquisitions of Instagram and WhatsApp, which were completed in 2012 and 2014 respectively, and President Biden’s Order suggests that such challenges may occur more frequently in the future.

## Industry-Specific Initiatives

### TECHNOLOGY

Antitrust law is still adapting to the challenges presented by high-tech and digital markets, including how to measure harm in online and other “two-sided” markets, how to evaluate competitive effects in acquisitions of nascent or potential competitors, and how to balance protections of patent holders with goals of protecting competition. In the Order, the President identified a few goals, including to use the antitrust laws to prevent competitive harm in high-tech markets, “especially as they stem from serial mergers, the acquisition of nascent competitors, the aggregation of data, unfair competition in attention markets, the surveillance of users, and the presence of network effects.” It also instructs the Attorney General and the Secretary of Commerce to consider revisiting the 2019 joint Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments issued by the DOJ, the U.S. Patent and Trademark Office and the National Institute of Standards and Technology. That policy statement had rejected any special rules that would limit injunction remedies in patent infringement cases due when the infringed patent is a standard essential patent subject to a FRAND commitment.

### HEALTH CARE

In the Order, President Biden expressed concern that hospital consolidation has driven up the cost of healthcare services, particularly in rural communities, and that pharmaceutical companies’ use of patents to inhibit or delay generic competition has increased the cost of prescription drugs—primarily through “pay for delay” settlements in patent infringement lawsuits in which branded manufacturer plaintiffs pay generic entrants to delay their entry

into the market. Such reverse payments have been subject to extensive FTC enforcement in recent years, but the President's Order instructs the FTC to consider rulemaking in connection with the practice as well. The Order also instructs the Secretary of Health and Human Services to increase the transparency and efficiency of the approval process for generic drugs and biosimilars, as well as to propose rules allowing the over-the-counter sale of hearing aids, increasing hospital price transparency, permitting prescription drug importation from Canada, and standardizing options on the national Health Insurance Marketplace to increase consumer choice.

## LABOR

While the DOJ and FTC have already [jointly issued antitrust guidance](#) about how the antitrust laws apply to employers, including how they relate to “no-poach” and wage-fixing agreements, President Biden is encouraging those agencies to revisit and strengthen that guidance to prevent employers from sharing wage and benefit information with each other in other circumstances. The Order also includes other initiatives designed to improve employee compensation, working conditions and mobility, including by instructing the FTC to consider rulemaking to curtail the use of employee non-compete clauses and to limit occupational licensing restrictions. The Firm's recent client alert discussing the Order's effects on non-compete agreements is available [here](#).

## TELECOMMUNICATIONS

The Order contains a number of initiatives for the telecommunications sector, particularly related to broadband internet service. Specifically, the Order directs the FCC to initiate rulemaking to prevent providers from making deals with landlords that limit tenant choices, to require providers to report prices and subscription rates to the FCC, to limit “unreasonable” early termination fees that prevent consumers from switching providers, and to implement spectrum auction rules “designed to help avoid excessive concentration of spectrum” and barriers to entry. Significantly, the Order also directs the FCC to consider adopting “net neutrality” rules similar to those enacted by the Obama administration in 2015 to prevent providers from prioritizing, metering or blocking certain types of internet traffic. The Trump administration unwound those rules in 2017.

## BANKING AND FINANCE

The Order instructs the DOJ to consult with bank regulators—namely the Federal Reserve Board, the Federal Deposit Insurance Corporation and the Office of the Comptroller of the Currency—to adopt a plan for “the revitalization of merger oversight under the Bank Merger Act and the Bank Holding Company Act of 1956” to ensure that “Americans have choices among financial institutions and to guard against excessive market power.” An [accompanying fact sheet](#) that the President released alongside the Order notes that there has been a 70% reduction in the number of U.S. commercial banks over the past four decades, largely as a result of mergers and acquisitions. While it is too early to predict the long term effect of the Order on the DOJ's review of bank mergers, we expect the DOJ will conduct a review of its bank merger competitive review practices as encouraged by the Order, and that the banking agencies will consult in that review. However, that process will likely take time and if the agencies ultimately decide to propose revisions, those would typically be followed by public notice and comment prior to any changes being adopted and implemented.

In addition, the Order aims to reestablish the Consumer Financial Protection Bureau—for which President Biden has nominated current FTC Commissioner Rohit Chopra to lead—by instructing it to commence rulemaking regarding the portability of consumer financial transaction data to facilitate switching between financial institutions, and to enforce the “prohibition on unfair, deceptive, or abusive acts or practices in consumer financial products” pursuant to the Dodd Frank Act.

#### ALCOHOL DISTRIBUTION

“To protect the vibrancy of the American markets for beer, wine, and spirits, and to improve market access for smaller, independent, and new operations,” the Order instructs the Secretary of the Treasury, through the Alcohol and Tobacco Tax and Trade Bureau, to consider rulemaking to revise or rescind unnecessary regulations that may inhibit competition and to reduce barriers that impede market access for smaller and independent brewers, winemakers, and distilleries.

#### AGRICULTURE

The Order expresses concern that smaller farmers may be disadvantaged as a result of consolidation, including through higher prices for inputs like seeds, equipment, feed, and fertilizer, through lower selling prices to downstream processing companies despite rising food prices, and through unfair competition from foreign producers. To address these issues, the Order instructs the USDA to consider rulemaking to strengthen the Packers and Stockyards Act—which allows farmers and ranchers to report incidents of slow-or non-payment, antitrust violations, or other unfair or deceptive conduct—by making it easier for farmers to bring and win claims without retaliation, as well as to adopt labeling rules that prevent imported meat that is processed in the U.S. from being labeled “Product of USA” and that allow consumers to choose meat from farms that treat agricultural workers fairly. The Order also directs the FTC to address “unfair” restrictions by farm equipment manufacturers on farmers’ ability to repair equipment themselves or to hire independent repair shops.

#### TRANSPORTATION

The Order states that lost competition among domestic airlines as a result of consolidation has resulted in degraded service and has allowed the airlines to increase fees on items such as baggage and cancellations. In response, President Biden has directed the Department of Transportation to issue rules requiring all fees to be clearly disclosed and to be refunded when the service is not adequately provided—such as when baggage is delivered late or when a plane’s in-flight WiFi is broken.

With respect to rail shipping, the President is worried that the freight railroads that own their own tracks can privilege their own freight traffic, which increases costs to competitors’ freight cars and harms on-time service for passenger trains. To address these issues, the Order encourages the Surface Transportation Board to require railroad track owners to provide rights of way to passenger rail and to strengthen their obligations to treat other freight companies fairly.

In the maritime shipping industry, the Order directs the Federal Maritime Commission to increase enforcement against shippers that impose unreasonable “detention and demurrage” charges on U.S. exporters, which the President believes has been enabled by recent consolidation that has led to the top 10 shipping companies controlling 80% of the market.

---

For further information regarding this memorandum, please contact one of the following:

NEW YORK

---

**Peter Guryan**  
+1-212-455-2750  
[peter.guryan@stblaw.com](mailto:peter.guryan@stblaw.com)

**Richard J. Jamgochian**  
+1-212-455-3019  
[richard.jamgochian@stblaw.com](mailto:richard.jamgochian@stblaw.com)

**Joshua Hazan**  
+1-212-455-2683  
[joshua.hazan@stblaw.com](mailto:joshua.hazan@stblaw.com)

WASHINGTON, D.C.

---

**Abram J. Ellis**  
+1-202-636-5579  
[aellis@stblaw.com](mailto:aellis@stblaw.com)

**Sara Y. Razi**  
+1-202-636-5582  
[sara.razi@stblaw.com](mailto:sara.razi@stblaw.com)

**John Terzaken**  
+1-202-636-5858  
[john.terzaken@stblaw.com](mailto:john.terzaken@stblaw.com)

PALO ALTO

---

**Harrison J. (Buzz) Frahn**  
+1-650-251-5065  
[hfrahn@stblaw.com](mailto:hfrahn@stblaw.com)

---

*The contents of this publication are for informational purposes only. Neither this publication nor the lawyers who authored it are rendering legal or other professional advice or opinions on specific facts or matters, nor does the distribution of this publication to any person constitute the establishment of an attorney-client relationship. Simpson Thacher & Bartlett LLP assumes no liability in connection with the use of this publication. Please contact your relationship partner if we can be of assistance regarding these important developments. The names and office locations of all of our partners, as well as our recent memoranda, can be obtained from our website, [www.simpsonthacher.com](http://www.simpsonthacher.com).*