

# President Biden Issues Sweeping Executive Order to Strengthen Antitrust Regulation and Expand Enforcement

July 14, 2021

On July 9, 2021, President Biden issued an Executive Order on “Promoting Competition in the American Economy.” The Order focuses on promoting competition in the United States by calling on more than a dozen federal agencies to swiftly confront “some of the most pressing competition problems across our economy.”<sup>1</sup> The Order calls for tougher enforcement of existing antitrust laws and for implementation of new directives in order to combat a perceived excessive concentration of industry and abuses of market power.

The Order is being hailed as the most ambitious effort in generations to reduce the power of monopolies and concentrated markets in major industries, although several steps remain before the Order’s initiatives can become law.

**Overview of the Executive Order.** President Biden’s Executive Order is striking in its scope and ambition. Broadly speaking, it “affirms that it is the policy of [the Biden] administration to enforce the antitrust laws to combat the excessive concentration of industry, the abuses of market power, and the harmful effects of monopoly and monopsony—especially as these issues arise in labor markets, agricultural markets, Internet platform industries, healthcare markets (including insurance, hospital, and prescription drug markets), repair markets, and United States markets directly affected by foreign cartel activity.” Similarly, the Order aims “to meet the challenges posed by new industries and technologies . . . 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.”<sup>2</sup>

To meet its goals, the Administration recommends 72 initiatives across a swath of business sectors and involving the action and coordination of more than a dozen federal agencies. This “whole-of-government approach” is intended to challenge the business practices of America’s most powerful businesses and to shake up smaller sectors dominated by only a handful of companies. The Administration calls upon the agencies

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<sup>1</sup> FACT SHEET: Executive Order on Promoting Competition in the American Economy, White House Press Release (July 9, 2021).

<sup>2</sup> Executive Order on Promoting Competition in the American Economy (July 9, 2021).

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to promote competition by “adopting procompetitive regulations and approaches to procurement and spending, and by rescinding regulations that create unnecessary barriers to entry that stifle competition.”

With regard to merger review, the Order encourages the FTC and Department of Justice (“DOJ”) to “fairly and vigorously” enforce the existing antitrust laws. Notably, the Order reaffirms the agencies’ authority to revisit anticompetitive mergers, particularly in the technology and internet sectors. The President also urges the FTC and DOJ to revisit their guidance on mergers and toughen scrutiny of future transactions. This may mean revising both the Horizontal Merger Guidelines issued by the agencies in 2010, which outline the principal analytical techniques, practices, and enforcement policy for mergers and acquisitions involving actual or potential competitors, as well as the Vertical Merger Guidelines issued by the Trump administration last year, which address merger review for transactions involving companies that are not direct competitors but are in the same supply chain. The President also called for “the revitalization of merger oversight under the Bank Merger Act and the Bank Holding Company Act of 1956.”<sup>3</sup>

Recognizing that the FTC and DOJ have overlapping jurisdiction, the Biden Executive Order further encourages the agencies to “cooperate fully in the exercise of their oversight authority,” including collaboration to ensure consistency in their resolutions. Such cooperation should include not only sharing relevant data, but “in the case of major transactions, soliciting and giving significant consideration to the views of” the other agency.

Finally, the Order establishes a White House Competition Council to promote and advance the initiatives outlined in the Order and to further coordinate the federal government’s response to the rising power of large corporations. The Council will be spearheaded by the Director of the National Economic Council and include the Attorney General and other members of the President’s Cabinet, among other executive officials.

**Next Steps and Challenges to Enforcement.** Immediately following the issuance of President Biden’s Executive Order, FTC Chair Lina Khan and the Acting Assistant Attorney General for Antitrust at the DOJ, Richard A. Powers, announced a joint review of the agencies’ merger guidelines, indicating that “the current guidelines deserve a hard look to determine whether they are overly permissive. We plan to jointly launch a

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<sup>3</sup> *Id.*

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review of our merger guidelines with the goal of updating them to reflect a rigorous analytical approach consistent with applicable law.”<sup>4</sup>

Although the Administration’s Order is potentially far-reaching, the timing and scope of its directives are constrained by several factors:

- The Order does not contain any specific orders and cannot actually put its own initiatives into effect. Rather, it directs federal agencies to begin work on their own rules. This is due to the constitutional limits of executive action and the fact that independent agencies such as the FTC are not subject to directives from the Executive Branch. In particular, many of the changes sought by the Order will require notice-and-comment rulemaking by the agencies—a process that could take months or even years and could temper the effect of controversial initiatives. The FTC had already begun the process of advancing some of the President’s initiatives and moved to consolidate and streamline its rule-making power earlier this month. See Debevoise Client Update: [Flurry of New FTC Rules and Policies Signals Era of Aggressive Enforcement Despite Recent Supreme Court Defeat](#).
- The FTC, DOJ and other regulatory agencies are also limited in the rules that they can promulgate. This is because agency action must be rooted in the statutory authority granted by Congress, not in the President’s Executive Order. New rules and more robust enforcement are likely to be challenged in court, where the agencies face a mixed record on their competition-related arguments.
- Both the agencies and the Biden Administration are likely to face significant opposition by political opponents and certain industry groups, who will argue the President’s measures are excessive government overreach into private industry. Influential businesses and industry groups faced with additional restrictions will lobby against the stricter regulation at every opportunity.
- Even if the FTC, DOJ and other agencies promulgate new rules and regulations to reflect the current Administration’s priorities, a subsequent administration could simply choose to reverse course. For this reason, the Biden Administration and supporters in Congress are also likely to pursue corresponding legislation that would be substantially harder to overturn in the future.

Despite a long and arduous road ahead to accomplish its substantial objectives, the Biden Executive Order is an emphatic statement on the Administration’s fresh approach

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<sup>4</sup> Statement of FTC Chair Lina Khan and Antitrust Division Acting Assistant Attorney General Richard A. Powers on Competition Executive Order’s Call to Consider Revisions to Merger Guidelines, FTC Press Release (July 9, 2021).

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to market competition and a testament to the central role that antitrust law is likely to play in the United States in the coming years. If the proposed measures are implemented by regulatory agencies and upheld by the courts, the Executive Order could lead to the most robust antitrust enforcement in decades and reshape aspects of the U.S. economy.

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Please do not hesitate to contact us with any questions.

**NEW YORK**



Michael Schaper  
mschaper@debevoise.com



Erica S. Weisgerber  
eweisgerber@debevoise.com



Adam C. Saunders  
asaunders@debevoise.com

**WASHINGTON, D.C.**



Ted Hassi  
thassi@debevoise.com



Leah Martin  
lmartin@debevoise.com