

## President Biden signs Executive Order on promoting competition

July 12, 2021 | Client Update | 20-minute read

President Biden signed an ambitious Executive Order on July 9, 2021, which pushes several federal agencies to advance competition principles in a range of economic sectors, and establishes a White House Competition Council within the Executive Office of the President. Much of the Executive Order is broad and its true effects are not likely to be felt until those efforts play out in a variety of rulemakings and other agency proceedings and likely subsequent litigations.

On Friday, July 9, 2021, President Biden issued an [Executive Order](#) announcing that his Administration would prioritize steps to “address overconcentration, monopolization, and unfair competition in the American economy” (Competition Order). Described in a [White House press release](#) as a bold “whole-of-government effort,” the Competition Order sets out and reaffirms the Administration’s antitrust policy and encourages or directs federal agencies to take dozens of specific measures in key economic sectors to further this policy.

### Takeaways

A number of federal agencies, in addition to the DOJ and the FTC, have historically played a role in promoting competition across industries. The Competition Order is directing executive agencies and encouraging independent agencies both to intensify those efforts and to implement policy priorities in furtherance of that objective via rulemaking or other agency efforts. While the Competition Order does include several specific initiatives that various agencies may adopt, much of the Competition Order is quite broad and, rather than enacting specific changes, directs or encourages federal agencies to consider potential rulemaking on topics as diverse as merger enforcement, Internet access, banking, and agribusiness. As a result, the true effects of the Competition Order are not likely to be felt until those efforts play out in a variety of rulemakings and other agency proceedings in the ensuing months and years. Many agency actions resulting from the Competition Order will be subject to legal challenge.

### Merger enforcement

The Competition Order calls on the DOJ, the FTC, and agencies with authority to enforce the Clayton Act to “enforce the antitrust laws fairly and vigorously,” and encourages the DOJ and FTC to “review the horizontal and vertical merger guidelines and consider whether to revise those guidelines,” notwithstanding the fact that both merger guidelines have recently been updated.

At the same time the Competition Order was issued, Acting Assistant Attorney General of the DOJ’s Antitrust Division, Richard Powers, and FTC Chair, Lina Khan, issued a [joint statement](#) committing to undertaking such a review, stating that the DOJ and FTC “plan soon to jointly launch a review of our merger guidelines with the goal of updating them to reflect a rigorous analytical approach consistent with applicable law.” This action is notable because the [horizontal merger guidelines](#) were last revised during the Obama Administration in 2010 and the [vertical merger guidelines](#) were issued in June 2020. Importantly, Democratic FTC Commissioners Rohit Chopra and Rebecca Slaughter dissented from the vertical merger guidelines. Commissioner Chopra expressed [concern](#) that the guidelines did not adequately address express entry suppression and relied too heavily on unproven economic theory. Commissioner Slaughter principally

[argued](#) that the guidelines should have been more demanding with respect to potential competitive benefits from vertical mergers. Commissioner Chopra further argued that a “status-quo ideological belief that vertical mergers are presumptively benign,” and both Commissioners asserted that overreliance on traditional defenses, such as the elimination of double marginalization, fails to capture the potential for a vertical merger to reduce actual and potential competition. Now that these Commissioners are in the majority, their earlier dissents provide a useful blueprint for the agencies’ likely paths on vertical merger review, and suggest increased agency scrutiny of traditional vertical defenses. Changes to the merger guidelines could include the removal of HHI screens, and as a result of recent decisions in vertical merger cases, increase the burden to establish barrier to entry and efficiencies defenses.

The Competition Order also “reaffirms that the United States retains the authority to challenge transactions whose previous consummation was in violation of” the antitrust laws. While it is well-established that the DOJ and FTC may challenge closed mergers, the agencies have rarely done so, and the Competition Order may signal greater interest and focus on consummated mergers going forward.

Strikingly, President Biden, in his [remarks](#) accompanying the issuance of the Competition Order, called the “philosophy of people like Robert Bork” “misguided,” sending clear signals that his Administration endorses a broad view of anticompetitive harm beyond its effect on consumer welfare. To the extent these comments signal a move away from the consumer welfare standard by the Administration, we would expect to see evidence of that in the upcoming agency actions following the Competition Order, including especially any changes made to the merger guidelines.

President Biden’s Executive Order builds on agency efforts to promote competition during the Obama Administration. In 2016, President Obama issued [Executive Order 13725](#) (EO 13725) “to protect American consumers and workers and encourage competition in the U.S. economy.” EO 13725 directed executive departments and agencies to use their existing authorities to identify and address barriers to competition.

## Creation of White House Competition Council

The Competition Order encourages agencies “to cooperate fully in the exercise of their oversight authority” and establishes a White House Competition Council (Council), chaired by the Assistant to the President for Economic Policy and Director of the National Economic Council, to “coordinate, promote, and advance Federal Government efforts to address overconcentration, monopolization, and unfair competition in or directly affecting the American economy,” including monitoring and coordinating the Competition Order’s implementation. Other Council members will include the Attorney General and a variety of cabinet secretaries.

The Chair of the Council may also invite the participation of independent agency heads, including the FTC, the Federal Communications Commission, the Federal Maritime Commission, the CFPB, and the Surface Transportation Board. The Council is set up so that the only direct participants from each agency are members of the President’s party. Notably, this party-specific staffing mirrors the intent behind the organizational structure of the Financial Stability Oversight Council and, as has been the case in financial regulation, will likely have a major impact on the Council’s future actions.

## Sector-specific priorities

President Biden introduced more than 70 sector-specific policy priorities in technology, Internet service, healthcare, banking and consumer finance, agriculture, transportation, and labor, which affect more than a dozen agencies. Below we provide an overview and preliminary assessment of some of the more notable among them.

### Technology

Within the technology sector, the Administration announced its policy to enforce “the antitrust laws to meet the challenges posed by new industries and technologies, including the rise of the dominant Internet platforms.”

#### Increased merger scrutiny

The Competition Order emphasizes the Administration’s concern with serial mergers and the acquisition of nascent competitors by large technology companies. For a further discussion on recent merger challenges concerning nascent competition, please see our client update, [“Recent merger challenges show DOJ and FTC focus on nascent competition.”](#)

#### User data, privacy, and unfair competition

The Competition Order also highlights the Administration's concern with respect to the aggregation of data, unfair competition in "attention markets" (i.e., industries that turn on user attention, such as online service providers), the surveillance of users, and the presence of network effects—all topics that are related to recent technology sector investigations. To limit the personal information that platforms gather from users, the Competition Order encourages the FTC to establish rules on unfair data collection and surveillance practices that may damage competition, consumer autonomy, and consumer privacy. In an effort to promote competition by small businesses, a likely nod to the DOJ's recent [complaint against Google](#) and concerns raised about other digital platforms, the Competition Order also encourages the FTC to establish rules to address unfair competition in major Internet marketplaces.

## Internet service

The Competition Order proposes specific initiatives to address several key issues relating to broadband services. The Competition Order encourages the FCC to prevent Internet Service Providers from making deals with landlords that limit tenants' choices. The Competition Order also encourages the FCC to revive the "Broadband Nutrition Label" and require providers to report prices and subscription rates to the FCC. In addition, the Competition Order encourages the FCC to limit "unjust" or "unreasonable" early termination fees to enable consumers to more easily switch providers. Perhaps most significantly, the Competition Order further encourages the FCC to adopt net neutrality rules "similar to" those that the Obama administration adopted in 2015.

All of those initiatives were either adopted or recommended during the Obama administration, and during the Trump administration they were either reversed or abandoned. It is therefore no surprise to see these issues arise again during the Biden administration. Of these recommendations, the restoration of net neutrality rules is likely to be the most impactful (assuming it is implemented). In 2015, the FCC imposed net neutrality rules by classifying Internet Service Providers as Title II carriers but also "forbearing" on a number of key topics, including rate regulation. It remains to be seen whether the FCC will seek to restore the 2015 net neutrality rules with the same forbearances or whether it will seek to go beyond the 2015 rules in certain areas that Internet Service Providers would likely view as significantly more burdensome.

The Competition Order encourages the FCC to conduct spectrum auctions under rules "that are designed to help avoid excessive concentration of spectrum," spectrum warehousing, and barriers to entry, as well as to provide continued support for 5G Open Radio Access Network (O-RAN) protocols for wireless network equipment.

## Healthcare

President Biden calls on executive agencies to take several steps to reduce healthcare prices and increase competition. Many of these calls are consistent with efforts by earlier administrations, and we expect that HHS, FDA, FTC, and DOJ staff will draw on their prior research and cooperation to facilitate the Competition Order's directives.

For example, the Competition Order directs HHS to undertake several measures to increase support for generic and biosimilar drugs, which provide low-cost options for patients. During the Trump Administration, the FDA and the FTC signed a [joint statement](#) to advance competition in the biologic marketplace, agreeing, among other things, to work together to deter behavior that impedes access to samples necessary to develop biosimilar drugs, and to address false or misleading statements about biosimilar drugs.

Similarly, the Competition Order encourages the FTC to examine rulemaking relating to "unfair" anticompetitive conduct or agreements in the prescription drug industries, including "pay for delay" agreements—in which brand-name drug manufacturers pay generic manufacturers to stay out of the market. Although the FTC has not issued a competition rulemaking regarding pay-for-delay agreements, the agency actively has challenged these agreements in court for several years, and it remains to be seen whether rulemaking is necessary.

The Competition Order also directs HHS to publish proposed rules to allow hearing aids to be sold over the counter. In 2017, the FTC, together with HHS, [explored](#) opportunities to increase consumer access to hearing aids, focusing on the need to provide consumers with truthful and non-misleading information about hearing health products and services. We expect that the HHS rulemaking will need to address similar issues.

The Competition Order likewise includes several additional directives that are in step with earlier efforts to address healthcare competition. The Competition Order directs HHS to support existing hospital price transparency initiatives, along with any new transparency initiatives required by the No Surprises Act, which addresses surprise hospital billing. Likewise, the Competition Order directs HHS to implement standardized options in the National Health Insurance Marketplace so that consumers can comparison shop more easily. The Competition Order also directs HHS to issue a comprehensive plan to combat high prescription drug prices and price gouging. Finally, the Competition Order directs the FDA to work with states and tribes to allow safe importation of prescription drugs from Canada.

While the Competition Order does not necessarily break new ground in terms of high-level policy proposals, it remains to be seen whether the respective agencies will go further than prior administrations to aggressively intervene in healthcare markets.

## Banking and consumer finance

The Competition Order encourages the DOJ, in consultation with federal banking regulators—the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, and the Office of the Comptroller of the Currency—to review current merger practices and adopt a plan “for the revitalization of merger oversight.” The Competition Order also encourages the CFPB to consider issuing rules to facilitate the portability of consumer financial transaction data, and to enforce prohibitions of unfair, deceptive, or abusive acts and practices “to ensure that actors engaged in unlawful activities do not distort the proper functioning of the competitive process or obtain an unfair advantage over competitors who follow the law.”

### Review of frameworks governing oversight of bank mergers

The Competition Order encourages the Attorney General, in consultation with the Chairman of the Federal Reserve, the Chairperson of the FDIC, and the Comptroller of the Currency to, within 180 days, “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 [(BHC Act)].”

At a minimum, the Competition Order should spur the DOJ to work with the banking agencies to finalize updates to the DOJ’s 1995 bank merger guidelines. This update had already been in the works under the Trump Administration, as last September the DOJ [requested comment](#) on potential updates to the guidelines in light of the many technological and competitive changes that have occurred since 1995. In particular, many had hoped that the DOJ would revise its guidelines to more fully include thrift and credit union deposits into the HHI calculation,<sup>1</sup> and to also account for competition faced from fintechs.

Along similar lines, in February 2021, Federal Reserve Governor Bowman [indicated](#) that the Federal Reserve was in the process of reviewing its approach to bank mergers, in particular to “specifically consider[] the unique market dynamics faced by small community banks in rural and underserved areas.” Of course, the direction of travel envisaged by the President Trump-era DOJ and by Governor Bowman is likely to be different from that envisaged by President Biden’s DOJ and banking agencies in response to the Competition Order. There is a sharp divergence of views about competition in the financial sector. The Competition Order reflects the views of those who believe that the dwindling, though still overall quite large, number of banks in the country reflects a declining state of competition. Of course, the banking sector feels differently as reflected in a [statement](#) by BPI in reaction to the Competition Order characterizing the banking industry as “among the most competitive, least concentrated industries in America.”

It is also possible that the Competition Order results in a more holistic review of the approach taken by the banking agencies in evaluating the statutory factors the agencies are required to consider under the Bank Merger Act and the BHC Act.<sup>2</sup> Such an approach would be consistent with comments made by Federal Reserve Governor Brainard in May 2021, in which Governor Brainard [noted](#) “increases in banking concentration in the \$250 to \$700 billion asset size category,” asserted that “common-sense safeguards have been weakened,” and suggested that “it might be helpful to undertake a broader review of [the Federal Reserve’s] framework, since we know from experience even noncomplex banks in this size range can pose risk to the financial system when they encounter financial distress.”

As with the Administration’s financial regulatory policy more broadly, the actions of the banking agencies in response to the Competition Order will depend in part on personnel in charge of those agencies. President Biden has yet to nominate a permanent head of the OCC, there is a vacancy on the Board of Directors of the FDIC,<sup>3</sup> and key decisions must be made by President Biden with respect to the Chair, Vice Chair, and Vice Chair for Supervision of the Federal Reserve all within or soon after the 180 days required for the review.

### Stronger role for the CFPB than the Prudential banking regulators

The Competition Order references the “pro-competition” jurisdiction and objectives of the CFPB, as set out in Section 1021 of the Dodd Frank Act. While Section 1021 describes the CFPB’s mandate to include ensuring “competitive” markets for consumer financial products and services, the broader reading of the Competition Order appears new. This interpretation, along with the Competition Order’s encouragement to the CFPB to use its expansive unfair, deceptive acts or practices (UDAAP) authority, leads us to believe that the CFPB will take the view that it has enhanced antitrust and competition powers. Should current FTC Commissioner Rohit Chopra be confirmed to lead the CFPB, we can expect him to exercise those powers. It is also notable that the CFPB is given a stronger seat at the Council table. While none of them are members, the CFPB—but not the banking regulators—is explicitly named as an agency that will be invited to

participate from time to time by the Chair where relevant to its statutory authority, which, as noted above, has been interpreted to include competition. Of course, the CFPB is limited to the examination and regulation of consumer financial products but that covers a wide swath of the financial sector.

The Competition Order encourages the CFPB to consider “commencing or continuing a rulemaking under section 1033 of the Dodd-Frank Act to facilitate the portability of consumer financial transaction data so consumers can more easily switch financial institutions and use new, innovative financial products.” Section 1033 of the Dodd-Frank Act requires the CFPB to issue rules governing how consumer financial services providers must make a consumer’s data collected or held by the service provider available to the consumer. This provision is generally viewed as an initial approach to open banking regulations, as have been pursued in the UK, EU, and other jurisdictions.

The CFPB [issued](#) an advance notice of proposed rulemaking on this subject in October 2020 and, before the release of the Competition Order, had said it was reviewing comments and assessing next steps.

## UDAAP enforcement

The Competition Order also encourages the CFPB to consider “enforcing the prohibition on [UDAAP] in consumer financial products or services pursuant to section 1031 of the Dodd-Frank Act so as to ensure that actors engaged in unlawful activities do not distort the proper functioning of the competitive process or obtain an unfair advantage over competitors who follow the law.” This is the first time that competition and UDAAP have been linked.

The scope of the CFPB’s UDAAP authority, and the CFPB’s approach to using that authority, has generated controversy since the enactment of the Dodd-Frank Act. In January 2020, the CFPB under Trump-appointed Director Kathleen Kraninger issued a policy statement setting out how the CFPB intended to apply the “abusive” element of the UDAAP definition<sup>4</sup> in supervision and enforcement matters. In March 2021, however, the CFPB under the leadership of President Biden’s designated Acting Director, Dave Uejio, [rescinded](#) this policy statement, saying that it “undermined deterrence and was contrary to the CFPB’s mission of protecting consumers.”

## Treasury report on nonbank entrants into consumer finance markets

The Competition Order directs the Secretary of the Treasury to, within 270 days, submit a report to the Chair of the White House Competition Council “assessing the effects on competition of large technology firms’ and other non-bank companies’ entry into consumer finance markets.”

There are many different ways in which Secretary Yellen could approach this report. It could touch on, for example, the competitive effects of new fintech entrants in payments, lending, and other financial service markets, including the pursuit by fintechs of ILC and other bank charters.

## Labor

In an effort to increase workers’ wages, workplace rights, and the freedom to change jobs, the Competition Order encourages the FTC (1) to curtail the unfair use of non-compete agreements and other agreements that “may unfairly limit worker mobility”; (2) to consider rules to address “unfair” occupational licensing restrictions that impede economic mobility; and (3) along with the DOJ, to consider whether to revise antitrust guidance to prevent employers from collaborating to suppress wages or reduce benefits by sharing wage and benefit information with one another. The Competition Order also directs the Treasury Secretary to work with several agencies to issue a report on the lack of competition in labor markets.

The Competition Order directly references the FTC’s and DOJ’s 2016 jointly issued [antitrust guidance for human resource professionals](#). That guidance was intended to “help protect workers against anticompetitive conduct,” “to educate HR professionals about how the antitrust laws apply to the employment arena,” and “to put firms on notice that the DOJ will proceed criminally against naked wage fixing and no poaching agreements.” For further information regarding this guidance, please see our client update, “[Antitrust Guidance for Human Resource Professionals and the Potential for Criminal Liability](#).”

The antitrust guidance for human resource professionals does not address non-compete agreements. Recent actions by the DOJ, however, highlight its shifting views and more aggressive approach toward anticompetitive agreements that affect workers. For example, earlier this year, the DOJ, for the first time, brought [criminal charges](#) against a company concerning its alleged use of no-poach agreements. Similarly, in 2020, in a [joint statement](#) with the FTC, the agencies announced that they were “on alert” for “agreements to lower wages or to reduce salaries or hours worked,” identifying non-compete agreements, along with no-poach and wage-fixing agreements, as areas of concern.

One likely result of the Competition Order is that it will lead to guidance from the DOJ and the FTC that specifically addresses non-compete agreements—which, like the merger guidelines, could again result in a revision of agency guidance arriving quickly on the heels of recent agency guidance during the Obama and Trump administrations. It also seems likely that the FTC and DOJ will revise the 2016 human resource guidance to further restrict the circumstances under which the sharing of information about the terms and conditions of employment is legal.

## Agriculture

The Competition Order includes several measures to promote competition in agricultural markets.

- The Competition Order directs the USDA to consider issuing new rules under the Packers and Stockyards Act, including to make it easier for farmers to bring and win claims, prohibit chicken processors from using unfair practices to determine the payment of chicken farmers, and adopt anti-retaliation protections for farmers who challenge practices.
- To improve American farmers and ranchers' ability to compete with foreign corporations, the Competition Order also directs the USDA to consider issuing new rules defining when meat can bear labels indicating that the product is of United States origin.
- The Competition Order directs the USDA to develop a plan to increase opportunities for farmers to access markets and receive a fair return, including supporting alternative food distribution systems like farmers markets and developing standards and labels so that consumers can choose to buy products that treat farmers fairly.
- The Competition Order encourages the FTC to address “unfair” manufacturer restrictions on purchasers' ability to use independent repair shops or repair equipment themselves.

## Transportation

The Competition Order announces several efforts to promote competition and consumer protection in air, rail, and shipping markets, with a particular focus on farmers, whom the President also emphasized in his remarks accompanying the Competition Order's issue.

- With regard to airlines, the Competition Order directs the DOT to publish proposed rules requiring the refund of baggage fees when baggage is “substantially” delayed, and the refund of other ancillary fees when passengers pay for a service that is not provided. It also directs the DOT to consider issuing rules to ensure that customers have information on ancillary fees—such as baggage, change, and cancellation fees—at the time of ticket purchase.
- With regard to rail services, the Competition Order encourages the Surface Transportation Board to consider commencing or continuing a rulemaking to strengthen regulations pertaining to reciprocal switching agreements; consider rulemakings pertaining to any relevant matters of competitive freight access, such as bottleneck rates and interchange commitments; ensure improved service on railways; and when examining whether railway mergers, acquisitions, and other transactions are consistent with the public interest, consider carriers' fulfillment of their responsibilities under applicable law.
- With regard to shipping, the Competition Order encourages the Federal Maritime Commission to vigorously enforce the prohibition of unjust and unreasonable practices in the context of detention and demurrage and to consider revised regulations relating to detention and demurrage practices.

Davis Polk will continue to monitor the Biden Administration's efforts to change the legal and regulatory landscape, since, despite the Competition Order's ambitious scope, only its implementation (and any subsequent litigation challenges) will fully reveal its effects on antitrust enforcement.

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

**D. Jarrett Arp**

+1 202 962 7150  
jarrett.arp@davispolk.com

**Arthur J. Burke**

+1 212 450 4352  
+1 650 752 2005  
arthur.burke@davispolk.com

**Ronan P. Harty**

+1 212 450 4870  
ronan.harty@davispolk.com

**Christopher Lynch**

+1 212 450 4034  
christopher.lynch@davispolk.com

**Howard Shelanski**

+1 202 962 7060  
howard.shelanski@davispolk.com

**Margaret E. Tahyar**

+1 212 450 4379  
margaret.tahyar@davispolk.com

*This communication, which we believe may be of interest to our clients and friends of the firm, is for general information only. It is not a full analysis of the matters presented and should not be relied upon as legal advice. This may be considered attorney advertising in some jurisdictions. Please refer to the firm's privacy notice for further details.*

- <sup>1</sup> Under the current approach, the federal banking agencies typically give thrift deposits a 50% weight, while credit union deposits are only included at all if certain conditions are met, and even then only typically at 50%. See FAQs, *How do the Federal Reserve and the U.S. Department of Justice, Antitrust Division, analyze the competitive effects of mergers and acquisitions under the Bank Holding Company Act, the Bank Merger Act and the Home Owners Loan Act?* (last updated 2014), <https://www.federalreserve.gov/bankinfo/competitive-effects-mergers-acquisitions-faqs.htm>; see also Michael S. Barr, Howell E. Jackson and Margaret E. Tahyar, Regulation of Bank Market Structure and Consolidation, in Michael S. Barr, Howell E. Jackson and Margaret E. Tahyar, *Financial Regulation: Law and Policy* (3<sup>rd</sup> ed. 2021).
- <sup>2</sup> The Competition Order refers to merger oversight in the context of “the factors enumerated in 12 U.S.C. 1828(c) and 1842(c).” These sections, of the Bank Merger Act and Section 3 of the BHC Act respectively, include factors related to competition, but also include, for example, factors related to managerial resources and financial stability. There are other statutes under which the banking agencies review bank mergers, including the Home Owners' Loan Act of 1933 and Section 4 of the BHC Act, but we assume this omission was unintentional.
- <sup>3</sup> In addition, two seats on the FDIC's board are currently filled by those in an acting capacity: the Acting Comptroller of the Currency and the Acting Director of the CFPB. Further still, the term of FDIC Director Gruenberg expired years ago, but Director Gruenberg is entitled to continue to serve, and has continued to serve, until his replacement is confirmed by the Senate.
- <sup>4</sup> Section 5(a) of the FTC Act prohibits “unfair or deceptive acts or practices,” and the banking agencies have the authority to bring enforcement actions on this basis, making the “abusive” aspect of the CFPB's UDAAP authority a key distinguishing feature.