

Competition EO: Initiatives Targeting Airlines and Transportation Industry

JULY 19, 2021

President Biden's [Executive Order Promoting Competition in the American Economy](#) targets several industries, among them the transportation industry. President Biden named the Department of Transportation, the Federal Maritime Commission, and the Surface Transportation Board as federal agencies to be involved in his wide-ranging new approach to antitrust enforcement and promoting competition.

Increased Scrutiny of Airline Practices and Consolidation

The most heavily targeted transportation sector in the Order is the aviation industry. With the stated goals of promoting transparency and protecting consumers, the administration wants to enhance consumers' access to airline flight information so that they might more easily choose from among a broader set of available flights. Consistent with the Order's general focus on reducing consolidation in several industries, the Order states the intent to increase consumers' access to new or lesser-known airlines. To accomplish these tasks, the Secretary of Transportation has been directed to fill any vacancies on the Advisory Committee for Aviation Consumer Protection and convene a meeting as soon as practicable. This committee is tasked with providing recommendations to the Secretary for improving and establishing additional aviation consumer protection programs. The Order states that the appointments should ensure fair representation of consumers, state and local interests, airlines, and airports.

In addition to those appointments, the Order also calls on the Transportation Secretary to ensure that marketing, advertising, and pricing practices, including fees, do not constitute unfair or deceptive practices or unfair methods of competition, as well as beginning to update the definitions of "unfair" or "deceptive" under the Department's regulatory authority in 49 U.S.C. § 41712 within 60 days. (These terms under Section 41712 were [first defined](#) by the Department near the end of the prior administration.) The Order further asks the Secretary to submit a report within 45 days on airlines' potential failures to refund flights cancelled because of the COVID-19 pandemic. The Order also suggests promulgation of new rules requiring airlines to refund baggage fees when luggage is delayed, as well as refunding other fees when airlines do not properly provide associated services. The Order proposes implementing new rules to increase transparency around fees within 90 days.

In addition to these consumer protection measures, the Order also seeks to address and decrease consolidation in the aviation industry. The President directs the Department to convene a working group to generally evaluate the

effectiveness of aviation programs, consumer protections, and Federal Aviation Administration rules within 30 days. The Secretary is also instructed to consider measures to support development of airports, increasing capacity gate access, and reducing congestion while implementing the airport competition plans required under 49 U.S.C. § 47106(f). The Order also calls on the Department to closely monitor developments in nascent industries such as drone delivery and “high-altitude long endurance operations” to ensure those markets stay competitive.

Competition in the Rail and Maritime Industries

President Biden also called for increased competition in the rail and maritime industries.

As for the railroads, the President asks the Chair of the Surface Transportation Board to promulgate rules in several shipping scenarios. The Order also asks the Board to consider strengthening regulations relating to reciprocal switching agreements in 49 U.S.C. § 11102(c), bottleneck rates, and interchange commitments. These changes would allow shippers more flexibility in switching carriers, including mid-route. The administration wants the Board to “vigorously” enforce on-time performance requirements found in the Passenger Rail Investment and Improvement Act of 2008, taking effect on July 1, 2021, to reinforce the preference for passenger rail. As for future rail mergers and acquisitions, the Order also asks the Chair to more closely consider whether proposed transactions would be consistent with the public interest under 49 U.S.C. §§ 11323-25 and whether the carrier has fulfilled its responsibilities under 49 U.S.C. § 24308.

The administration’s focus on the rail industry has potential to have immediate enforcement impact. Canadian National’s purchase of Kansas City Southern, an acquisition of nearly \$30 billion, is the first major rail merger this century. The merger would create the only Canada-to-Mexico rail network in North America, allowing for easy exporting of Canadian crude products to the U.S. Gulf Coast and refined products to Mexico. The acquisition is still pending and subject to review under the new rules promulgated by the Order. Given the consolidation of the rail industry, dropping from 33 major railroads in 1980 to just seven now, the merger has potential to be the first major acquisition blocked under the administration’s new enforcement policies. Because railroads are uniquely exempted from the nation’s antitrust laws, the Executive Order’s suggested rules will put the onus on the Surface Transportation Board to analyze the merger.

Lastly, as covered by our colleagues at [MaritimeFedWatch](#), the Order also calls for the Chair of the Federal Maritime Commission to enforce the prohibition of unjust and unreasonable practices regarding detention and demurrage pursuant to the Shipping Act and 85 Federal Regulation 29638. The Order further asks the Chair to request recommendations to improve detention and demurrage practices from the National Shipper Advisory Committee, and to consider further rulemaking to improve related practices and other Shipping Act prohibitions. Following the Order, the Federal Maritime Commission and Department of Justice’s Antitrust Division released a [Memorandum of Understanding](#) to facilitate communication and cooperation between the two agencies regarding the initiatives proposed by President Biden. Chairman Daniel Maffei [stated](#) that the FMC will “continually assess how the agency can improve its capacity to protect the integrity of the marketplace.”

Conclusion

The Order addresses several aspects of the transportation industry in-depth, while also promoting a broader attitude towards decreasing consolidation and increasing consumer choice. Given the consolidation in the transportation industry, it has potential to be one of the most targeted sectors as enforcement begins to take shape.

This article is part of our “Unpacking the Executive Order on Promoting Competition” series. Click [here](#) for other related articles. Please contact a member of the Winston & Strawn Antitrust/Competition Practice Group or your Winston relationship attorney for further information.

4 Min Read

Authors

[Jeffrey J. Amato](#)

[Brandon Duke](#)

[David A. Bujarski](#)

Related Locations

Houston

New York

Related Topics

Antitrust Intelligence

Executive Order on Competition

M&A

Related Capabilities

Antitrust/Competition

Antitrust Transactions

Mergers & Acquisitions

Infrastructure

Related Regions

North America

Related Professionals



[Jeffrey J. Amato](#)



[Brandon Duke](#)



David A. Bujarski

This entry has been created for information and planning purposes. It is not intended to be, nor should it be substituted for, legal advice, which turns on specific facts.