

# Competition EO: Practical Implications of Biden's Executive Order on Promoting Competition

AUGUST 31, 2021

On July 9, 2021, President Biden issued a comprehensive [Executive Order](#) on the promotion of competition in the U.S. economy, focused on specific industries and perceived antitrust challenges currently facing the nation. The Executive Order calls on more than a dozen federal agencies to take action through 72 different initiatives. The accompanying [Fact Sheet](#), issued on the same day as the Executive Order, indicates that “President Biden is taking decisive action to reduce the trend of corporate consolidation, increase competition, and deliver concrete benefits to America’s consumers, workers, farmers, and small businesses.”

The language of the Executive Order, when coupled with the Fact Sheet, suggests sweeping and decisive change in antitrust policy and priorities at the agency level. However, practically speaking, the Executive Order has limited immediate effect. The executive’s ability to unilaterally influence the policies and decisions of independent agencies is limited, and any actions taken could be subject to judicial review. Accordingly, whether President Biden is successful in implementing the change for which he strongly advocates rests in large part on the agencies’ ability to implement and defend new rules and guidelines.

## THE EXECUTIVE ORDER

The Executive Order rests on the premise that “[a] fair, open, and competitive marketplace has long been a cornerstone of the American economy, while excessive market concentration threatens basic economic liberties, democratic accountability, and the welfare of workers, farmers, small businesses, startups, and consumers.”<sup>1</sup> With recent consolidations across various industries, competition has been diminished, “denying Americans the benefits of an open economy and widening racial, income, and wealth inequality.”

With these goals in mind, the Executive Order articulates specific initiatives and recommendations to further these broad goals in each industry of focus. For example:

- Agriculture: calls for new rules on competition and lessened restrictions on third-party repair or self-repair.<sup>2</sup>
- Healthcare: calls on the FTC to ban so-called “pay-for-delay” agreements.<sup>3</sup>
- Banking: calls for revitalization of merger oversight, updates to the Bank Merger Competitive Review guidelines, and a report assessing the effects of large tech and non-banking firms in consumer finance markets on

competition.<sup>[4]</sup>

- Transportation: calls for marketing, advertising, and pricing practices that do not constitute unfair or deceptive practices or unfair methods of competition.<sup>[5]</sup>
- Labor markets: calls for bans or limitations on non-compete agreements in the private sector and rules to curtail the use of “unnecessary” occupational licensing requirements that may protect current employees and present barriers to new applicants.<sup>[6]</sup>
- Internet service: calls for preventing ISPs from making deals with landlords that limit tenants’ choices, requiring ISPs to report pricing and subscription rates to the FCC, limiting excessive early termination fees, and restoring net neutrality rules.<sup>[7]</sup>
- Tech: calls for new rules on surveillance and data-accumulation practices, unfair methods of competition on Internet marketplaces, and do-it-yourself repairs of devices and equipment.<sup>[8]</sup>
- Alcoholic Beverages: calls for updates to alcohol trade practice regulations and regulations that may “unnecessarily inhibit competition,” as well as a reduction of market barriers that impede access for smaller breweries, wineries, and distilleries.<sup>[9]</sup>

The Executive Order and Fact Sheet also outline ways in which the agencies should focus their enforcement efforts on key markets, including calling on the DOJ and FTC to enforce existing antitrust laws more aggressively and update their horizontal and vertical merger guidelines. In response to the Executive Order, FTC Chair Lina Khan and Acting Assistant Attorney General for the DOJ Antitrust Division Richard Powers issued a joint statement with promises to review their merger guidelines “with the goal of updating them to reflect a rigorous analytical approach consistent with applicable law.”<sup>[10]</sup>

## THE EXECUTIVE ORDER’S POTENTIAL REACH

The Executive Order suggests that the statutory basis for a “whole-of-government” reform rests on several industry-specific statutes, operating under the overarching Sherman Act and Clayton Act, that “independently charge of number of executive departments and agencies . . . to protect conditions of fair competition in one or more ways.” In other words, the Executive Order encourages the agencies to promulgate new rules and step up their enforcement to protect competition, but it does so under a pre-existing statutory scheme that does not require Congress to act.

This means that the significance and impact of the Executive Order likely rests on the invoked agencies’ success in promulgating new rules and revising existing rules and guidelines consistent with the Order. Such processes can take months, if not years. Even after the agencies have taken the time to conduct necessary analyses and draft proposed rules, many agencies require notice of proposed rule changes and a public comment period before a change can go into effect. The agencies would then need to address the public comments and make appropriate revisions to the proposed rules as drafted. Failure to engage meaningfully in this process risks a hastily drafted, contradictory, or ineffective rule that could be open to legal challenge.

Take for example FTC Chair Lina Khan’s efforts since her recent appointment. In June 2021, just a few days after assuming the Chair position, she announced that she would hold monthly public sessions to increase transparency of the FTC, the first of which would address scrapping a draft unfairness antitrust policy from 2015, speeding up rulemaking under Section 18 of the FTC Act, and approving a new enforcement policy that would authorize a single commissioner to approve the use of compulsory process for investigations into undefined industries or conduct.<sup>[11]</sup>

Section 18 outlines the process by which the FTC can promulgate rules without direct congressional authorization, through authority granted by the Magnuson-Moss Warranty Act. Under the acting chair who predated Khan, and now under Khan, the FTC has indicated a focus on streamlining the rulemaking process to “deliver effective deterrence for the novel harms of the digital economy and persistent old scams alike.”<sup>[12]</sup> During the July 1, 2021 open meeting, the FTC approved changes to the Rules of Practice under Section 18, issuing a statement afterwards that said the changes “show the FTC is turning the page on decades of self-imposed red-tape and returning to the

participatory and dynamic process for issuing Section 18 rules that Congress envisioned.”<sup>[14]</sup> The changes suggest a shift in approach and a meaningful effort to streamline future rulemaking processes. And already, the FTC voted at a July 21, 2021 meeting to issue a new policy statement on illegal repair restrictions imposed by manufacturers and sellers, which is in direct response to the Executive Order. A policy statement is by no means as complicated as a new or revised rule, but it suggests a speedier process is possible.

On the other hand, one cannot forget that rulemaking under the Magnuson-Moss authority is historically incredibly slow and bureaucratic. The FTC has completed only seven rulemaking changes under this scheme since 1975, when the Act was passed, and the average time to complete the rule change is six months. It’s possible that the July 1 vote to streamline the process will result in real change, but it remains to be seen how fast (or slow) the new process will be. And the Executive Order is unlikely to have any material impact in the meantime.

It should also be noted that the DOJ is also encouraged to make various rule and guideline changes under the Executive Order, some in conjunction with the FTC and some alone. But the DOJ Antitrust Division still has an acting head in Richard Powers, and it seems unlikely that the DOJ will make a meaningful effort to promulgate new or revised rules or guidance until it has an appointed Assistant Attorney General for Antitrust, and that may not happen for months.

The Executive Order also calls for action from agencies that have less experience in antitrust review and enforcement. For example, the Order asks the Surface Transportation Board (“STB”) to more closely evaluate whether proposed transactions in the rail industry would be consistent with public interest under 49 U.S.C. §§ 11323-25. In response, the STB Chairman issued a statement, which noted among other things that he has been “continually concerned with the significant consolidation in the rail industry” and that “while consolidation may be beneficial under certain circumstances, it has also created the potential for monopolistic pricing and reductions in service to captive rail customers.”<sup>[15]</sup>

This focus has called into question whether Canadian National’s proposed acquisition of Kansas City Southern will be permitted to move forward. The acquisition is still pending and would be subject to review under the new rules promulgated by the Executive Order. While the review is pending, Canadian National announced it planned to create a voting trust that would acquire Kansas City Southern and hold the railroad pending the STB’s review of the acquisition. The STB said it expects to issue a decision on Canadian National’s proposed voting trust by August 31,<sup>[15]</sup> so the shareholder vote on the voting trust has been delayed pending the STB’s decision. It seems unclear how the STB will vote—because this is the first major rail acquisition of the century, the STB’s current merger rules haven’t been previously tested. Regardless, the Executive Order’s focus on the rail industry shines a spotlight on antitrust concerns in an industry that has been uniquely excluded from antitrust laws, with the STB at the helm, instead of the DOJ or FTC as the agencies more experienced in merger review.

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The Executive Order represents a significant shift in many ways, and rule revisions meant to reflect that shift could conflict with longstanding antitrust principles. Take for example the Fact Sheet suggestion that consolidation in the shipping industry has resulted in 10 companies controlling 80% of the market—according to the Executive Order, that is a concentrated market, but according to the existing Horizontal Merger Guidelines, that would be considered unconcentrated. If the FTC, DOJ, and other agencies revise their rules and guidelines in a manner that conflicts with courts’ interpretation of antitrust law, those changes are likely to be subject to legal challenge.

Regardless of how long it takes and the number of legal challenges it faces, antitrust reform through revised rules and guidelines is coming. Savvy companies, particularly those in specifically called-out industries, should start planning now to ensure they are not caught flat-footed once the rules change and the agencies ramp-up enforcement as they are being empowered to do.

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.

<sup>11</sup> For a deeper dive into these initiatives, see *generally* *Competition EO Series*, Winston & Strawn LLP Competition Corner, <https://www.winston.com/en/competition-corner/index.html#/tids=1041923>.

<sup>12</sup> For further discussion of the Executive Order and the agricultural industry, see James F. Herbison and Gregory A. Wilkowski, *Competition EO: Initiatives Targeting the Agriculture Industry*, Winston & Strawn LLP Competition Corner (Aug. 30, 2021), <https://www.winston.com/en/competition-corner/competition-eo-initiatives-targeting-the-agriculture-industry.html>.

<sup>13</sup> For further discussion of the Executive Order and the healthcare industry, see *Competition EO: President Biden's Prescription for Antitrust Concerns in Healthcare and Life Sciences Industries*, Winston & Strawn LLP Competition Corner (July 21, 2021), <https://www.winston.com/en/competition-corner/competition-eo-president-bidens-prescription-for-antitrust-concerns-in-healthcare-and-life-sciences-industries.html>.

<sup>14</sup> For further discussion of the Executive Order and the banking industry, see Eva W. Cole, George E. Mastoris, and Zachary E. Sproull, *Competition EO: Eyes on Banking*, Winston & Strawn LLP Competition Corner (July 22, 2021), <https://www.winston.com/en/competition-corner/competition-eo-eyes-on-banking.html>.

<sup>15</sup> For further discussion of the Executive Order and the transportation industry, see Jeffrey J. Amato, Brandon W. Duke, and David A. Bujarski, *Competition EO: Initiatives Targeting Airlines and Transportation Industry*, Winston & Strawn LLP Competition Corner (July 19, 2021), <https://www.winston.com/en/competition-corner/competition-eo-initiatives-targeting-airlines-and-transportation-industry.html>.

<sup>16</sup> For further discussion of the Executive Order and labor markets, see Eva W. Cole et al., *Competition EO: Spotlight on Anticompetitive Concerns in Labor Markets*, Winston & Strawn LLP Competition Corner (July 16, 2021), <https://www.winston.com/en/competition-corner/competition-eo-spotlight-on-anticompetitive-concerns-in-labor-markets.html>.

<sup>17</sup> For further discussion of the Executive Order and the tech industry, see Susannah P. Torpey et al., *Competition EO: Technology Sector Expectations*, Winston & Strawn LLP Competition Corner (Aug. 26, 2021), <https://www.winston.com/en/competition-corner/competition-eo-technology-sector-expectations.html>.

<sup>18</sup> For further discussion of the Executive Order and the tech industry, see Susannah P. Torpey et al., *Competition EO: Technology Sector Expectations*, Winston & Strawn LLP Competition Corner (Aug. 26, 2021), <https://www.winston.com/en/competition-corner/competition-eo-technology-sector-expectations.html>.

<sup>19</sup> For further discussion of the Executive Order and the alcohol industry, see Eva W. Cole and Zachary E. Sproull, *Competition EO: Changing Tides in Beer, Wine, and Spirits Industries*, Winston & Strawn LLP Competition Corner (Aug. 16, 2021), <https://www.winston.com/en/competition-corner/competition-eo-changing-tides-in-beer-wine-and-spirits-industries.html>.

<sup>101</sup> Federal Trade Commission Press Release, *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* (July 9, 2021), [https://www.ftc.gov/news-events/press-releases/2021/07/statement-ftc-chair-lina-khan-antitrust-division-acting-assistant?utm\\_source=govdelivery](https://www.ftc.gov/news-events/press-releases/2021/07/statement-ftc-chair-lina-khan-antitrust-division-acting-assistant?utm_source=govdelivery).

<sup>111</sup> Federal Trade Commission Press Release, *FTC Announces Agenda for July 1 Open Commission* (June 25, 2021), <https://www.ftc.gov/news-events/press-releases/2021/06/ftc-announces-agenda-july-1-open-commission-meeting>.

<sup>122</sup> Federal Trade Commission Press Release, *FTC Acting Chairwoman Slaughter Announces New Rulemaking Group* (Mar. 25, 2021), <https://www.ftc.gov/news-events/press-releases/2021/03/ftc-acting-chairwoman-slaughter-announces-new-rulemaking-group>.

<sup>133</sup> Federal Trade Commission Press Release, *FTC Votes to Update Rulemaking Procedures, Sets Stage for Stronger Deterrence of Corporate Misconduct* (July 1, 2021), <https://www.ftc.gov/news-events/press-releases/2021/07/ftc-votes-update-rulemaking-procedures-sets-stage-stronger>.

<sup>144</sup> Surface Transportation Board Press Release, *Statement from STB Chairman Martin J. Oberman on Executive Order on Competition* (Jul. 9, 2021), <https://prod.stb.gov/news-communications/latest-news/pr-21-29/>.

<sup>155</sup> Surface Transportation Board Press Release, *Statement from Surface Transportation Board That It Anticipates Ruling on the CN and KCS Voting Trust Motion by August 31, 2021* (Aug. 10, 2021), <https://prod.stb.gov/news-communications/latest-news/pr-21-35/>.

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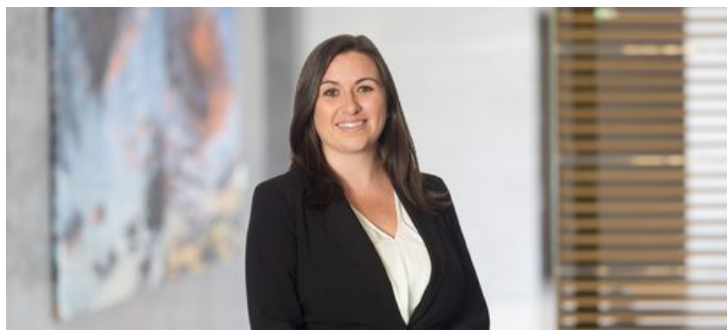
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