

# Executive Order on Competition (EOC) Tracker

*Key Deadlines & Agency Activities*

# Recent Agency Developments – updated January 21, 2022

- On October 19, consistent with the EO, the FDA [issued a proposed rule](#) to improve access and reduce the cost of hearing aid technology by establishing a new category of over-the-counter hearing aids.
- On November 17, 2021, HHS, DOL, and Treasury released an [interim final rule](#) requiring health insurance issuers and plans to report specific information on prescription drug and health coverage costs. The rule implements one of the key transparency provisions included in the Consolidated Appropriations Act and mandates disclosures on the most dispensed drugs, costliest drugs, greatest expenditures increase, and any rebates/other fees provided by manufacturers to PBMs, among others. The data will support the EO's goals for additional price transparency by informing a biannual public report produced by the Departments detailing prescription drug pricing trends and how such costs affect premiums and out of pocket costs.
- On November 19, 2021, HHS released [details](#) on a new advisory committee mandated by the No Surprises Act to provide recommendations to the Departments of Health and Human Services, Labor, and Treasury on consumer protections for balance billing and excess charges for ground ambulance services.
- Consistent with Biden's EO and to improve the consumer experience in selecting a health plan, on December 28, 2021, HHS introduced a [proposed rule](#) requiring issuers in the Federal and State-facilitated Marketplaces to offer standardized plans options for every product network, metal, and plan classification to allow consumers to better compare plan options.
- Consistent with Biden's EO and to further promote competition in health care, on January 1, 2022, HHS introduced [new federal protections](#) against surprise medical bills for consumers. These protections are implemented under the No Surprises Act, which “ban surprise billing in private insurance for most emergency care and many instances non-emergency care.”

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# Recent Agency Developments – updated January 21, 2022

- According to a fall 2021 [report](#) issued by DOT on pending rulemakings:
  - DOT plans to issue a [final rule](#) requiring refunds of checked baggage fees when bags are delayed or lost and fees for other ancillary services when those services are not provided. A final rule will be forthcoming later this year.
  - DOT is working on a [rulemaking](#) on revising its aviation consumer protection rules on unfair and deceptive practices. A final rule may be issued soon.
  - DOT is now working on a [notice of proposed rulemaking](#) on disclosure of ancillary fees, including "baggage fees," "change fees," and "cancellation fees" at the time of ticket purchase. A rulemaking proposal could be issued in the second half of 2022.
  - DOT is working on preparing a [notice of proposed rulemaking](#) on airline ticket refunds and consumer protections. A proposed rulemaking may be issued in the first quarter of 2022.

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# Recent Agency Developments – updated January 21, 2022

- On December 28, 2021, the Surface Transportation Board issued a [Notice of Hearing](#) regarding reciprocal switching regulations.
  - The hearing is scheduled to be held on March 15 and 16, 2022. These dates are subject to change as an extension request has been filed in the proceeding.
  - In 2016, the Board issued a [Notice of Proposed Rulemaking \(NPRM\)](#) and proposed new regulations under which the Board would exercise its statutory authority to require rail carriers to establish switching arrangements in certain circumstances.
  - In the July 9, 2021, Executive Order 14036, “Executive Order on Promoting Competition in the American Economy,” President Biden encouraged the STB to commence or continue a rulemaking pertaining to reciprocal switching.
  - The hearing will address the Board’s 2016 NPRM, any new developments, and other relevant matters.

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# Recent Agency Developments – updated January 21, 2022

- President Biden held a [roundtable event on January 3, 2022](#) (transcript [here](#)), to discuss ongoing steps the administration is taking to increase competition in the meat and poultry supply chain.
- On January 3, 2022, the Department of Justice and the Department of Agriculture, acting pursuant to the Executive Order on Competition, issued a [joint statement of shared principles and commitments](#) regarding competition in agriculture. Specifically, the joint statement expressed a commitment to prioritize matters affecting competition in agriculture, and announced that they would develop within 30 days a centralized, accessible process for farmers, ranchers, and growers to submit complaints about potential violations of the antitrust laws and the Packers and Stockyards Act. The agencies pledged to work together to address complaints, and to vigorously enforce the laws that protect agricultural firms.

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# Recent Agency Developments – updated January 21, 2022

- On December 17, 2021, the Department of Justice Antitrust Division issued a [press release requesting public comments](#) on how the Division should revise the 1995 Bank Merger Competitive Review Guidelines. President Biden’s July 2021 Executive Order on Competition had called for the Department of Justice, in consultation with Department of the Treasury, Federal Reserve Board, and Federal Deposit Insurance Corporation, to adopt a plan for the revitalization of merger oversight under the Bank Merger Act and the Bank Holding Company Act. In general, the request seeks comments on “whether bank merger review is currently sufficient to prevent harmful mergers and whether it accounts for the full range of competitive factors appropriate under the laws.” More specifically, the Division’s [Public Comments Topics & Issues Guide](#) requests input on the information and data that banks should submit with their merger applications and on whether and how the Division should include non-traditional banks in its competitive effects analysis. Comments on the Banking Guidelines should be emailed to [ATR.BankMergers@usdoj.gov](mailto:ATR.BankMergers@usdoj.gov) and must be received no later than February 15, 2022.

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## Recent Agency Developments – updated January 21, 2022

- DOJ announced in December 2021 that it is requesting public comment on an updated [draft policy statement](#) on standards-essential patents (SEP). The December 6, 2021 draft statement was issued pursuant to the EO on Promoting Competition in the American Economy of July 9, 2021. The draft statement seeks to modify a policy statement issued in December 2019, which modified a previous policy statement issued in January 2013. Each policy statement provides guidance on when and how SEP holders who have voluntarily committed to make available a license for a patent on fair, reasonable, and non-discriminatory (FRAND) terms should be entitled to relief for violations. The December 2021 draft statement steps back from the 2019 statement, which favored SEP holders and suggests a return toward the more neutral position of the 2013 guidance. It also outlines a framework to guide parties in their negotiation of FRAND terms. For additional analysis, please click [here](#).

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# Agency Developments – updated September 30, 2021

- On August 6, 2021, the FCC [announced](#) Raleigh, North Carolina and Boston, Massachusetts as innovation zones to test the integration of Open RAN networks.
- On September 7, 2021, the FCC issued a [Public Notice](#) requesting an update to the record on issues raised in the 2019 *Improving Competitive Broadband Access to Multiple Tenant Environments Notice of Proposed Rulemaking*, including but not limited to (1) revenue sharing agreements; (2) exclusive wiring arrangements, including sale-and-leaseback arrangements; and (3) exclusive marketing arrangements. FCC GN Docket No. 17-142.
- On September 9, 2021, DOT issued a report to the White House Competition Council in response to a requirement in Executive Order 14036. The report describes DOT's progress in its investigatory and enforcement activities to address the failure of airlines to provide timely refunds for flights cancelled as a result of the COVID-19 pandemic. The full report can be found [here](#).
- Consistent with the Executive Order, the DOJ [brought a lawsuit](#) in federal court in Boston against an alliance agreement between American Airlines and JetBlue. DOT put its review of the agreement on hold pending the DOJ lawsuit. This lawsuit is evidence of enhanced antitrust enforcement and coordination between the Department of Justice and the Department of Transportation to ensure competition in air transportation.

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# Agency Developments – updated September 30, 2021 (cont.)

- On September 15, 2021, by a 3-2 party lines vote, the FTC [withdrew its approval](#) of the Vertical Merger Guidelines that were issued jointly with DOJ last year and the FTC’s Vertical Merger Commentary. A [statement](#) issued by Chair Lina Khan and the two other Democratic Commissioners criticized the 2020 Vertical Merger Guidelines as including “unsound economic theories” that are “unsupported by the law or market realities,” in particular in their consideration of potential efficiencies including the elimination of double marginalization (EDM). The two Republican Commissioners released a [Dissenting statement](#) criticizing the Commission for reducing transparency in favor of “an amorphous bureaucratic fog” that “threatens to chill legitimate merger activity and undermine attempts to rebuild our economy in the wake of the pandemic.” The Chair’s statement announced that the FTC and DOJ are reviewing their approach to vertical mergers, and that the FTC will assess potential market structure-based presumptions or screens for non-horizontal mergers, assess what types of remedies are appropriate for non-horizontal mergers, and assess the harms that can arise from non-horizontal mergers, including looking to provide guidance on how the FTC will analyze a merger’s impact on labor markets.
- On September 15, 2021, Acting Assistant Attorney General Richard Powers of the Antitrust Division released a [DOJ statement](#) that did not withdraw the DOJ’s adoption of the Vertical Merger Guidelines, but that did announce that the DOJ is collaborating with the FTC to update the 2020 Guidelines. In particular, the DOJ statement enumerated several considerations DOJ staff have identified as warranting consideration for revision, including whether the existing Vertical Merge Guidelines “create confusion as to the merging parties’ burden to establish that the elimination of double marginalization is verifiable, merger specific, and will likely be passed through to consumers.”
- On September 22, 2021, FTC Chair Khan sent a [memorandum](#) to staff and her fellow commissions in what appears to be an attempt to build support for her vision of an expanded role for the agency. She describes the need to take a “holistic” approach to identifying harms and to focus on “power asymmetries” and “root causes rather than looking at one-off effects”. Among policy priorities, she lists the need to address “rampant consolidation and the dominance that it has enabled across markets” as the top priority.

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# Agency Developments – updated August 26, 2021

- On July 14, 2021, DOT appointed two new members to the Advisory Committee on Aviation Consumer Protection, including Massachusetts Attorney General Maura Healey, who was named Chair of the Committee and John Breyault, who is with the National Consumers League, to be the consumer representative on the Committee. A link to the announcement of these appointments and to the reappointment of two other committee members can be found [here](#).
- DOT initiated a rulemaking proceeding to consider rules requiring airlines to refund fees for delayed baggage and for ancillary services not provided. The rulemaking notice and proposed rules, published in the Federal Register on July 21, 2021, can be found [here](#).

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## Agency Developments – updated July 23, 2021

- On July 21, 2021, the FTC unanimously adopted a [policy statement regarding repair restriction imposed by manufacturers and sellers](#), consistent with the EO's directive to evaluate such restrictions. The FTC indicated that it will devote more enforcement resources to combat practices by manufacturers that impede third-party and self repair—previously a low priority. In describing this new priority, the FTC referred to a 2019 report titled [“Nixing the Fix”](#) that identified several practices that could unjustifiably restrict competition for repair services. Several of the practices that the FTC highlighted in its policy statement include: overbroad assertion of patent and trademark rights; use of technical measures—such as software locks or digital rights management—or legal measures—such as end-user license agreements—to prevent access to technology beyond what is necessary to protect underlying intellectual property rights; and limiting the availability of inputs to the repair process such as replacement parts, software tools, or service manuals.

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## Agency Developments – updated July 23, 2021 (cont.)

- Consistent with the new priority placed on repair restrictions, the FTC policy statement stated that it would step up enforcement of the Magnuson-Moss Warranty Act and its implementing regulations by, among other things, potentially filing suits for injunctive relief, closely monitoring private litigation to determine whether the Commission to investigate or to file an amicus brief, and by exploring rulemaking. The Commission also stated that it would scrutinize repair restrictions for unlawful tying arrangements, refusals to deal, exclusive dealing, or exclusionary design provisions that may violate the Sherman Act or Section 5 of the Federal Trade Commission Act, and would review “any material claims made to purchasers and users” for deceptive acts or practices that could violate Section 5 of the Federal Trade Commission Act.
- The FTC’s increased focus on the “right to repair” serves as a warning that companies should review their policies and practices regarding third-party and user repairs, including striving for precision in developing their strategies for protecting their intellectual property, to ensure an adequate balance between protection and compliance with competition laws. This also may portend opportunities for those who wish to offer repair services that were otherwise restricted by overbroad protective measures.

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# Key Deadlines for Agency Activities

To jump to deadlines for a specific date, please click on the text in the boxes below.

[August 9, 2021](#)

[August 23, 2021](#)

[September 7, 2021](#)

[October 7, 2021](#)

[November 8, 2021](#)

[January 5, 2022](#)

[March 7, 2022](#)

[April 5, 2022](#)

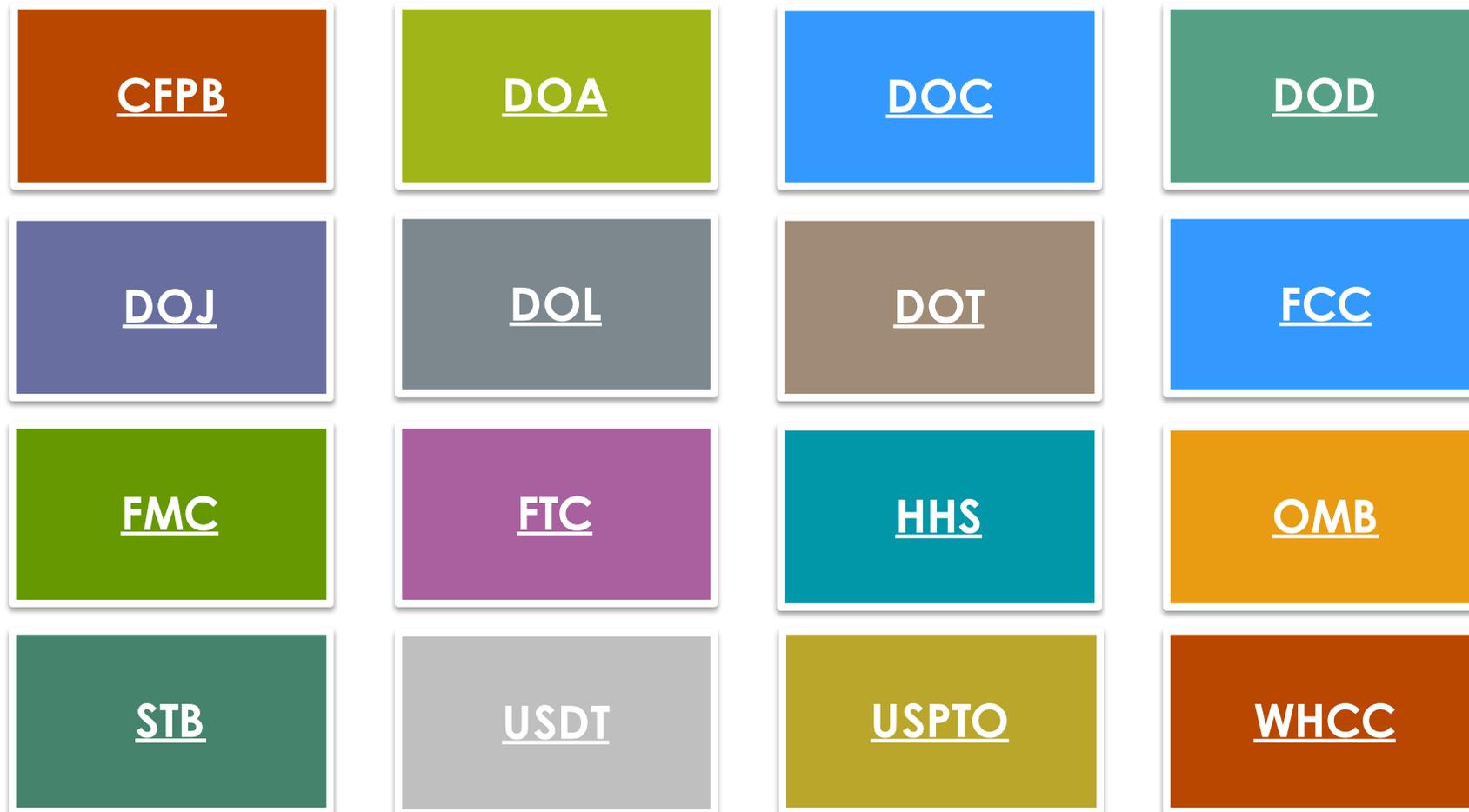
[May 5, 2022](#)

[July 11, 2022](#)

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# Agency Activities

To jump to activities for a specific agency, please click on the text in the boxes below.



# August 9, 2021

## White House Competition Council (WHCC)

- Members of the Council shall designate, not later than 30 days after the date of this order, a senior official within their respective agency or office who shall coordinate with the Council and who shall be responsible for overseeing the agency's or office's efforts to address overconcentration, monopolization, and unfair competition; § 4(h)

## Department of Transportation (DOT)

- Appoint or reappoint members of the Advisory Committee for Aviation Consumer Protection to ensure fair representation of consumers, State and local interests, airlines, and airports with respect to the evaluation of aviation consumer protection programs and convene a meeting of the Committee as soon as practicable; § 5(m)(i)(A) ([click here to view recent developments & analysis](#))
- Convene a working group within the Department of Transportation to evaluate the effectiveness of existing commercial aviation programs, consumer protections, and rules of the Federal Aviation Administration; § 5(m)(ii)(A)

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## Department of Transportation (DOT)

- Submit a report to the Chair of the White House Competition Council, on the progress of the Department of Transportation's investigatory and enforcement activities to address the failure of airlines to provide timely refunds for flights cancelled as a result of the COVID-19 pandemic § 5(m)(i)(C) ([click here](#) to view recent developments & analysis)
- Publish for notice and comment a proposed rule requiring airlines to refund baggage fees when a passenger's luggage is substantially delayed and other ancillary fees when passengers pay for a service that is not provided; § 5(m)(i)(D) ([click here](#) to view recent developments & analysis)

## Department of Health and Human Services (HHS)

- Submit a report to the Assistant to the President for Domestic Policy and Director of the Domestic Policy Council and to the Chair of the White House Competition Council, with a plan to continue the effort to combat excessive pricing of prescription drugs and enhance domestic pharmaceutical supply chains, to reduce the prices paid by the Federal Government for such drugs, and to address the recurrent problem of price gouging; § 5(p)(iv)
- ***through the Food and Drug Administration (FDA)***  
write a letter to the Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office enumerating and describing any relevant concerns of the FDA; § 5(p)(vi)

September 7, 2021

## Department of Transportation (DOT)

- Start development of proposed amendments to the Department of Transportation's definitions of "unfair" and "deceptive" in 49 U.S.C. 41712; § 5(m)(i)(E) ([click here to view recent developments and analysis](#))

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## Department of Transportation (DOT)

- Consider initiating a rulemaking to ensure that consumers have ancillary fee information, including "baggage fees," "change fees," and "cancellation fees," at the time of ticket purchase; § 5(m)(i)(F) ([click here](#) to view recent developments and analysis)

## Department of Health and Human Services (HHS)

- Publish for notice and comment a proposed rule on over-the-counter hearing-aids to promote the wide availability of low-cost hearing aids; § 5(p)(i) ([click here to view recent developments & analysis](#))

## Department of Justice (DOJ)

- *in consultation with Department of the Treasury and Federal Trade Commission*  
Submit a report to the Chair of the White House Competition Council addressing the current market structure and conditions of competition in the markets for beer, wine, and spirits, including an assessment of any threats to competition and barriers to new entrants; § 5(j)

## Department of Justice (DOJ)

- ***in consultation with Department of the Treasury, Federal Reserve Board, and Federal Deposit Insurance Corporation***  
Adopt a plan for the revitalization of merger oversight under the Bank Merger Act and the Bank Holding Company Act; § 5(e)  
([click here](#) view recent developments & analysis)

## Department of Agriculture (DOA)

- Submit a report to the Chair of the White House Competition Council, with a plan to promote competition in the agricultural industries and to support value-added agriculture and alternative food distribution systems; § 5(i)(iii)

## Department of Defense (DOD)

- Submit to the Chair of the White House Competition Council, a review of the state of competition within the defense industrial base, including areas where a lack of competition may be of concern and any recommendations for improving the solicitation process § 5(s)(ii)
- Submit a report to the Chair of the White House Competition Council, on a plan for avoiding contract terms in procurement agreements that make it challenging or impossible for the Department of Defense or service members to repair their own equipment, particularly in the field; § 5(s)(iii)

## Department of the Treasury (USDT)

- ***in consultation with Department of Justice, Department of Labor, and Federal Trade Commission***  
Submit a report to the Chair of the White House Competition Council on the effects of lack of competition on labor markets; § 5(v)(i)

## Department of the Treasury (USDT)

- *through the Alcohol and Tobacco Tax and Trade Bureau*

Consider (i) initiating a rulemaking to update trade practice regulations, (ii) rescinding or revising any regulations of the beer, wine, and spirits industries that may unnecessarily inhibit competition, and (iii) reducing any barriers that impede market access for smaller and independent brewers, winemakers, and distilleries; § 5(k)

April 5, 2022

## Department of the Treasury (USDT)

- 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; § 5(v)(ii)

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## Department of Agriculture (DOA)

- ***in consultation with Federal Trade Commission***

Submit a report to the Chair of the White House Competition Council on the effect of retail concentration and retailers' practices on the conditions of competition in the food industries and on grants, loans, and other support that may enhance access to retail markets by local and regional food enterprises; § 5(i)(iv)

## Department of Commerce (DOC)

- ***in consultation with Department of Justice and Federal Trade Commission***  
Conduct a study, including by conducting an open and transparent stakeholder consultation process, of the mobile application ecosystem, and submit a report to the Chair of the White House Competition Council, regarding findings and recommendations for improving competition, reducing barriers to entry, and maximizing user benefit with respect to the ecosystem; § 5(r)(iii)

# Consumer Financial Protection Bureau (CFPB)

## No Deadline

- Commence or continue 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; § 5(t)(i)
- Enforce the prohibition on unfair, deceptive, or abusive acts or practices 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; § 5(t)(ii)

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# Department of Agriculture (DOA)

## January 5, 2022

- Submit a report to the Chair of the White House Competition Council, with a plan to promote competition in the agricultural industries and to support value-added agriculture and alternative food distribution systems; § 5(i)(iii)

## May 5, 2022

- ***in consultation with Federal Trade Commission***  
Submit a report to the Chair of the White House Competition Council on the effect of retail concentration and retailers' practices on the conditions of competition in the food industries and on grants, loans, and other support that may enhance access to retail markets by local and regional food enterprises; § 5(i)(iv)

# Department of Agriculture (DOA) (cont.)

## No Deadline

- Consider initiating a rulemaking or rulemakings under the Packers and Stockyards Act to strengthen the Department of Agriculture's regulations concerning unfair, unjustly discriminatory, or deceptive practices and undue or unreasonable preferences, advantages, prejudices, or disadvantages, with the purpose of furthering the vigorous implementation of the law established by the Congress in 1921 and fortified by amendments. § 5(i)
- Provide clear rules that identify recurrent practices in the livestock, meat, and poultry industries that are unfair, unjustly discriminatory, or deceptive and therefore violate the Packers and Stockyards Act;
- Reinforce the long-standing Department of Agriculture interpretation that it is unnecessary under the Packers and Stockyards Act to demonstrate industry-wide harm to establish a violation of the Act and that the "unfair, unjustly discriminatory, or deceptive" treatment of one farmer, the giving to one farmer of an "undue or unreasonable preference or advantage," or the subjection of one farmer to an "undue or unreasonable prejudice or disadvantage in any respect" violates the Act;
- Prohibit unfair practices related to grower ranking systems — systems in which the poultry companies, contractors, or dealers exercise extraordinary control over numerous inputs that determine the amount farmers are paid and require farmers to assume the risk of factors outside their control, leaving them more economically vulnerable;

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# Department of Agriculture (DOA) (cont.)

## No Deadline

- Update the appropriate definitions or set of criteria, or application thereof, for undue or unreasonable preferences, advantages, prejudices, or disadvantages under the Packers and Stockyards Act; and
- Adopt, to the greatest extent possible and as appropriate and consistent with applicable law, appropriate anti-retaliation protections, so that farmers may assert their rights without fear of retribution;
- Ensure consumers have accurate, transparent labels that enable them to choose products made in the United States, consider initiating a rulemaking to define the conditions under which the labeling of meat products can bear voluntary statements indicating that the product is of United States origin, such as "Product of USA"; § 5(i)(ii)
- ***in consultation with the Under Secretary of Commerce for Intellectual Property, Director of the United States Patent and Trademark Office*** Submit a report to the Chair of the White House Competition Council, enumerating and describing any relevant concerns of the Department of Agriculture and strategies for addressing those concerns across intellectual property, antitrust, and other relevant laws. § 5(i)(v)

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# Department of Agriculture (DOA) Developments & Analysis

- President Biden held a [roundtable event on January 3, 2022](#) (transcript [here](#)), to discuss ongoing steps the administration is taking to increase competition in the meat and poultry supply chain.
- On January 3, 2022, the Department of Justice and the Department of Agriculture, acting pursuant to the Executive Order on Competition, issued a [joint statement of shared principles and commitments](#) regarding competition in agriculture. Specifically, the joint statement expressed a commitment to prioritize matters affecting competition in agriculture, and announced that they would develop within 30 days a centralized, accessible process for farmers, ranchers, and growers to submit complaints about potential violations of the antitrust laws and the Packers and Stockyards Act. The agencies pledged to work together to address complaints, and to vigorously enforce the laws that protect agricultural firms.

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# Department of Commerce (DOC)

July 11, 2022

- ***in consultation with Department of Justice and Federal Trade Commission***  
Conduct a study, including by conducting an open and transparent stakeholder consultation process, of the mobile application ecosystem, and submit a report to the Chair of the White House Competition Council, regarding findings and recommendations for improving competition, reducing barriers to entry, and maximizing user benefit with respect to the ecosystem; § 5(r)(iii)

## No Deadline

- ***and Department of Justice***  
Consider whether to revise their position on the intersection of the intellectual property and antitrust laws, including by considering whether to revise the Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments issued jointly by the Department of Justice, the United States Patent and Trademark Office, and the National Institute of Standards and Technology on December 19, 2019. § 5(d) ([click here for recent developments & analysis](#))
- ***acting through the National Institute of Standards and Technology***  
Consider initiating a rulemaking to require agencies to report to NIST, on an annual basis, their contractors' utilization activities, as reported to the agencies under 35 U.S.C. 202(c)(5); § 5(r)(i)
- ***acting through the National Institute of Standards and Technology***  
Consider not finalizing any provisions on march-in rights and product pricing in the proposed rule "Rights to Federally Funded Inventions and Licensing of Government Owned Inventions," 86 Fed. Reg. 35 (Jan. 4, 2021); § 5(r)(ii)

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# Department of Commerce (DOC) Developments & Analysis

- DOJ announced in December 2021 that it is requesting public comment on an updated [draft policy statement](#) on standards-essential patents (SEP). The December 6, 2021 draft statement was issued pursuant to the EO on Promoting Competition in the American Economy of July 9, 2021. The draft statement seeks to modify a policy statement issued in December 2019, which modified a previous policy statement issued in January 2013. Each policy statement provides guidance on when and how SEP holders who have voluntarily committed to make available a license for a patent on fair, reasonable, and non-discriminatory (FRAND) terms should be entitled to relief for violations. The December 2021 draft statement steps back from the 2019 statement, which favored SEP holders and suggests a return toward the more neutral position of the 2013 guidance. It also outlines a framework to guide parties in their negotiation of FRAND terms. For additional analysis, please click [here](#).

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# Department of Defense (DOD)

**January 5, 2022**

- Submit to the Chair of the White House Competition Council, a review of the state of competition within the defense industrial base, including areas where a lack of competition may be of concern and any recommendations for improving the solicitation process § 5(s)(ii)
- Submit a report to the Chair of the White House Competition Council, on a plan for avoiding contract terms in procurement agreements that make it challenging or impossible for the Department of Defense or service members to repair their own equipment, particularly in the field; § 5(s)(iii)

## **No Deadline**

- Ensure that the Department of Defense's assessment of the economic forces and structures shaping the capacity of the national security innovation base pursuant to section 889(a) and (b) of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021 (Public Law 116-283, 134 Stat. 3388) is consistent with the policy set forth in section 1 of this order; § 5(s)(i)

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# Department of Health and Human Services (HHS)

## August 23, 2021

- Submit a report to the Assistant to the President for Domestic Policy and Director of the Domestic Policy Council and to the Chair of the White House Competition Council, with a plan to continue the effort to combat excessive pricing of prescription drugs and enhance domestic pharmaceutical supply chains, to reduce the prices paid by the Federal Government for such drugs, and to address the recurrent problem of price gouging; § 5(p)(iv)
- ***through the Food and Drug Administration (FDA)***  
write a letter to the Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office enumerating and describing any relevant concerns of the FDA; § 5(p)(vi)

## November 8, 2021

- Publish for notice and comment a proposed rule on over-the-counter hearing-aids to promote the wide availability of low-cost hearing aids; § 5(p)(i) ([click here to view recent developments & analysis](#))

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# Department of Health and Human Services (HHS) (cont.)

## No Deadline

- Support existing price transparency initiatives for hospitals, other providers, and insurers along with any new price transparency initiatives or changes made necessary by the No Surprises Act (Public Law 116-260, 134 Stat. 2758) or any other statutes; § 5(p)(ii) ([click here to view recent developments & analysis](#))
- Ensure that Americans can choose health insurance plans that meet their needs and compare plan offerings, implement standardized options in the national Health Insurance Marketplace and any other appropriate mechanisms to improve competition and consumer choice; § 5(p)(iii) ([click here to view recent developments & analysis](#))
- Continue to promote generic drug and biosimilar competition, as contemplated by the Drug Competition Action Plan of 2017 and Biosimilar Action Plan of 2018 of the Food and Drug Administration (FDA) to lower the prices of and improve access to prescription drugs and biologics; § 5(p)(v) ([click here to view recent developments & analysis](#))
- Clarify and improve the approval framework for generic drugs and biosimilars to make generic drug and biosimilar approval more transparent, efficient, and predictable, including improving and clarifying the standards for interchangeability of biological products; § 5(p)(v)(A)
- Support biosimilar product adoption by providing effective educational materials and communications to improve understanding of biosimilar and interchangeable products among healthcare providers, patients, and caregivers; § 5(p)(v)(B)
- Continue to update the FDA's biologics regulations to clarify existing requirements and procedures related to the review and submission of Biologics License Applications by advancing the "Biologics Regulation Modernization" rulemaking (RIN 0910-A114) to facilitate the development and approval of biosimilar and interchangeable products; § 5(p)(v)(C)

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# Department of Health and Human Services (HHS) (cont.)

- ***and the Federal Trade Commission***  
Identify and address any efforts to impede generic drug and biosimilar competition, including but not limited to false, misleading, or otherwise deceptive statements about generic drug and biosimilar products and their safety or effectiveness; § 5(p)(v)(D)
- Support the market entry of lower-cost generic drugs and biosimilars, continue the implementation of the law widely known as the CREATES Act of 2019 (Public Law 116-94, 133 Stat. 3130), by:
  - (A) promptly issuing Covered Product Authorizations (CPAs) to assist product developers with obtaining brand-drug samples;
  - support the market entry of lower-cost generic drugs and biosimilars, continue the implementation of the law widely known as the CREATES Act of 2019 (Public Law 116-94, 133 Stat. 3130), by:
  - (B) issuing guidance to provide additional information for industry about CPAs; § 5(p)(vii)(A)-(B)
- ***through the Centers for Medicare and Medicaid Services***  
Prepare for Medicare and Medicaid coverage of interchangeable biological products, and for payment models to support increased utilization of generic drugs and biosimilars; § 5(p)(viii)
- ***with States and Indian Tribes***  
Propose to develop section 804 Importation Programs in accordance with the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (Public Law 108-173, 117 Stat. 2066), and the FDA's implementing regulations; § 5(q)

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# Department of Health & Human Services (HHS)

## Developments & Analysis

- On October 19, consistent with the EO, the FDA [issued a proposed rule](#) to improve access and reduce the cost of hearing aid technology by establishing a new category of over-the-counter hearing aids.
- On November 17, 2021, HHS, DOL, and Treasury released an [interim final rule](#) requiring health insurance issuers and plans to report specific information on prescription drug and health coverage costs. The rule implements one of the key transparency provisions included in the Consolidated Appropriations Act and mandates disclosures on the most dispensed drugs, costliest drugs, greatest expenditures increase, and any rebates/other fees provided by manufacturers to PBMs, among others. The data will support the EO's goals for additional price transparency by informing a biannual public report produced by the Departments detailing prescription drug pricing trends and how such costs affect premiums and out of pocket costs.
- On November 19, 2021, HHS released [details](#) on a new advisory committee mandated by the No Surprises Act to provide recommendations to the Departments of Health and Human Services, Labor, and Treasury on consumer protections for balance billing and excess charges for ground ambulance services.
- Consistent with Biden's EO and to improve the consumer experience in selecting a health plan, on December 28, 2021, HHS introduced a [proposed rule](#) requiring issuers in the Federal and State-facilitated Marketplaces to offer standardized plans options for every product network, metal, and plan classification to allow consumers to better compare plan options.
- Consistent with Biden's EO and to further promote competition in health care, on January 1, 2022, HHS introduced [new federal protections](#) against surprise medical bills for consumers. These protections are implemented under the No Surprises Act, which “ban surprise billing in private insurance for most emergency care and many instances non-emergency care.”

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# Department of Justice (DOJ)

## November 8, 2021

- ***in consultation with Department of the Treasury and Federal Trade Commission***  
Submit a report to the Chair of the White House Competition Council addressing the current market structure and conditions of competition in the markets for beer, wine, and spirits, including an assessment of any threats to competition and barriers to new entrants; § 5(j)

## January 5, 2022

- ***in consultation with the Department of Labor, Department of the Treasury, and Federal Trade Commission***  
Submit a report to the Chair of the White House Competition Council on the effects of lack of competition on labor markets; § 5(v)(i)
- ***in consultation with Department of the Treasury, Federal Reserve Board, and Federal Deposit Insurance Corporation***  
Adopt a plan for the revitalization of merger oversight under the Bank Merger Act and the Bank Holding Company Act; § 5(e) ([click here](#) view recent developments & analysis)

## July 11, 2022

- ***in consultation with Department of Commerce and Federal Trade Commission***  
Conduct a study, including by conducting an open and transparent stakeholder consultation process, of the mobile application ecosystem, and submit a report to the Chair of the White House Competition Council, regarding findings and recommendations for improving competition, reducing barriers to entry, and maximizing user benefit with respect to the ecosystem; § 5(r)(iii)

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# Department of Justice (DOJ) (cont.)

## No Deadline

- ***and Federal Trade Commission***  
Review the horizontal and vertical merger guidelines and consider whether to revise those guidelines. § 5(c) ([click here to view recent developments & analysis](#))
- Consider whether to revise the Antitrust Guidance for Human Resource Professionals of October 2016. § 5(f)
- ***and Department of Commerce***  
Consider whether to revise their position on the intersection of the intellectual property and antitrust laws, including by considering whether to revise the Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments issued jointly by the Department of Justice, the United States Patent and Trademark Office, and the National Institute of Standards and Technology on December 19, 2019. § 5(d) ([click here to view recent developments & analysis](#))
- ***in consultation with the Department of Transportation***  
Consult with the Attorney General regarding means of enhancing effective coordination between the Department of Justice and the Department of Transportation to ensure competition in air transportation and the ability of new entrants to gain access; § 5(m)(ii)(B) ([click here to view recent developments & analysis](#))

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# Department of Justice (DOJ) Developments & Analysis

- Consistent with the Executive Order, the DOJ [brought a lawsuit](#) in federal court in Boston against an alliance agreement between American Airlines and JetBlue. DOT put its review of the agreement on hold pending the DOJ lawsuit. This lawsuit is evidence of enhanced antitrust enforcement and coordination between the Department of Justice and the Department of Transportation to ensure competition in air transportation.
- On September 15, 2021, Acting Assistant Attorney General Richard Powers of the Antitrust Division released a [DOJ statement](#) that did not withdraw the DOJ's adoption of the Vertical Merger Guidelines, but that did announce that the DOJ is collaborating with the FTC to update the 2020 Guidelines. In particular, the DOJ Statement enumerated several considerations DOJ staff have identified as warranting consideration for revision, including whether the existing Vertical Merge Guidelines “create confusion as to the merging parties’ burden to establish that the elimination of double marginalization is verifiable, merger specific, and will likely be passed through to consumers.”

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## Department of Justice (DOJ) Developments & Analysis (cont.)

- On December 17, 2021, the Department of Justice Antitrust Division issued a [press release requesting public comments](#) on how the Division should revise the 1995 Bank Merger Competitive Review Guidelines. President Biden's July 2021 Executive Order on Competition had called for the Department of Justice, in consultation with Department of the Treasury, Federal Reserve Board, and Federal Deposit Insurance Corporation, to adopt a plan for the revitalization of merger oversight under the Bank Merger Act and the Bank Holding Company Act. In general, the request seeks comments on “whether bank merger review is currently sufficient to prevent harmful mergers and whether it accounts for the full range of competitive factors appropriate under the laws.” More specifically, the Division's [Public Comments Topics & Issues Guide](#) requests input on the information and data that banks should submit with their merger applications and on whether and how the Division should include non-traditional banks in its competitive effects analysis. Comments on the Banking Guidelines should be emailed to [ATR.BankMergers@usdoj.gov](mailto:ATR.BankMergers@usdoj.gov) and must be received no later than February 15, 2022.

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## Department of Justice (DOJ) Developments & Analysis (cont.)

- On January 3, 2022, the Department of Justice and the Department of Agriculture, acting pursuant to the Executive Order on Competition, issued a [joint statement of shared principles and commitments](#) regarding competition in agriculture. Specifically, the joint statement expressed a commitment to prioritize matters affecting competition in agriculture, and announced that they would develop within 30 days a centralized, accessible process for farmers, ranchers, and growers to submit complaints about potential violations of the antitrust laws and the Packers and Stockyards Act. The agencies pledged to work together to address complaints, and to vigorously enforce the laws that protect agricultural firms.

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## Department of Justice (DOJ) Developments & Analysis (cont.)

- DOJ announced in December 2021 that it is requesting public comment on an updated [draft policy statement](#) on standards-essential patents (SEP). The December 6, 2021 draft statement was issued pursuant to the EO on Promoting Competition in the American Economy of July 9, 2021. The draft statement seeks to modify a policy statement issued in December 2019, which modified a previous policy statement issued in January 2013. Each policy statement provides guidance on when and how SEP holders who have voluntarily committed to make available a license for a patent on fair, reasonable, and non-discriminatory (FRAND) terms should be entitled to relief for violations. The December 2021 draft statement steps back from the 2019 statement, which favored SEP holders and suggests a return toward the more neutral position of the 2013 guidance. It also outlines a framework to guide parties in their negotiation of FRAND terms. For additional analysis, please click [here](#).

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# Department of Labor (DOL)

**January 5, 2022**

- ***in consultation with the Department of Justice, Department of the Treasury, and Federal Trade Commission***

Submit a report to the Chair of the White House Competition Council on the effects of lack of competition on labor markets; § 5(v)(i)

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# Department of Transportation (DOT)

## August 9, 2021

- Appoint or reappoint members of the Advisory Committee for Aviation Consumer Protection to ensure fair representation of consumers, State and local interests, airlines, and airports with respect to the evaluation of aviation consumer protection programs and convene a meeting of the Committee as soon as practicable; § 5(m)(i)(A) ([click here to view recent developments & analysis](#))
- Convene a working group within the Department of Transportation to evaluate the effectiveness of existing commercial aviation programs, consumer protections, and rules of the Federal Aviation Administration; § 5(m)(ii)(A)

## August 23, 2021

- Submit a report to the Chair of the White House Competition Council, on the progress of the Department of Transportation's investigatory and enforcement activities to address the failure of airlines to provide timely refunds for flights cancelled as a result of the COVID-19 pandemic § 5(m)(i)(C) ([click here to view recent developments & analysis](#))
- Publish for notice and comment a proposed rule requiring airlines to refund baggage fees when a passenger's luggage is substantially delayed and other ancillary fees when passengers pay for a service that is not provided; § 5(m)(i)(D) ([click here to view recent developments and analysis](#))

## September 7, 2021

- Start development of proposed amendments to the Department of Transportation's definitions of "unfair" and "deceptive" in 49 U.S.C. 41712; § 5(m)(i)(E) ([click here to view recent developments and analysis](#))

## October 7, 2021

- Consider initiating a rulemaking to ensure that consumers have ancillary fee information, including "baggage fees," "change fees," and "cancellation fees," at the time of ticket purchase; § 5(m)(i)(F) ([click here to view recent developments and analysis](#))

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# Department of Transportation (DOT) (cont.)

## No Deadline

- Promote enhanced transparency and consumer safeguards, as appropriate and consistent with applicable law, including through potential rulemaking, enforcement actions, or guidance documents, with the aims of:
  - (1) enhancing consumer access to airline flight information so that consumers can more easily find a broader set of available flights, including by new or lesser known airlines; and
  - (2) ensuring that consumers are not exposed or subject to advertising, marketing, pricing, and charging of ancillary fees that may constitute an unfair or deceptive practice or an unfair method of competition; § 5(m)(i)(B) ([click here to view recent developments and analysis](#))
- ***in consultation with the Department of Justice***  
Consult with the Attorney General regarding means of enhancing effective coordination between the Department of Justice and the Department of Transportation to ensure competition in air transportation and the ability of new entrants to gain access; § 5(m)(ii)(B) ([click here to view recent developments & analysis](#))
- Consider measures to support airport development and increased capacity and improve airport congestion management, gate access, implementation of airport competition plans pursuant to 49 U.S.C. 47106(f), and "slot" administration; § 5(m)(ii)(C)
- Given the emergence of new aerospace-based transportation technologies, such as low-altitude unmanned aircraft system deliveries, advanced air mobility, and high-altitude long endurance operations . . .
  - (A) facilitate innovation that fosters United States market leadership and market entry to promote competition and economic opportunity and to resist monopolization, while also ensuring safety, providing security and privacy, protecting the environment, and promoting equity; and
  - (B) provide vigilant oversight over market participants. § 5(m)(iii)

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# Department of Transportation (DOT) Developments & Analysis

- On July 14, 2021, DOT appointed two new members to the Advisory Committee on Aviation Consumer Protection, including Massachusetts Attorney General Maura Healey, who was named Chair of the Committee and John Breyault, who is with the National Consumers League, to be the consumer representative on the Committee. A link to the announcement of these appointments and to the reappointment of two other committee members can be found [here](#).
- DOT initiated a rulemaking proceeding to consider rules requiring airlines to refund fees for delayed baggage and for ancillary services not provided. The rulemaking notice and proposed rules, published in the Federal Register on July 21, 2021, can be found [here](#).
  - According to a fall 2021 [report](#) issued by DOT on pending rulemakings, DOT plans to issue a [final rule](#) requiring refunds of checked baggage fees when bags are delayed or lost and fees for other ancillary services when those services are not provided. A final rule will be forthcoming later this year.
- On September 9, 2021, DOT issued a report to the White House Competition Council in response to a requirement in Executive Order 14036. The report describes DOT's progress in its investigatory and enforcement activities to address the failure of airlines to provide timely refunds for flights cancelled as a result of the COVID-19 pandemic. The full report can be found [here](#).
- Consistent with the Executive Order, the DOJ [brought a lawsuit](#) in federal court in Boston against an alliance agreement between American Airlines and JetBlue. DOT put its review of the agreement on hold pending the DOJ lawsuit. This lawsuit is evidence of enhanced antitrust enforcement and coordination between the Department of Justice and the Department of Transportation to ensure competition in air transportation.

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# Department of Transportation (DOT)

## Developments & Analysis (cont.)

- According to a fall 2021 [report](#) issued by DOT on pending rulemakings:
  - DOT plans to issue a [final rule](#) requiring refunds of checked baggage fees when bags are delayed or lost and fees for other ancillary services when those services are not provided. A final rule will be forthcoming later this year.
  - DOT is working on a [rulemaking](#) on revising its aviation consumer protection rules on unfair and deceptive practices. A final rule may be issued soon.
  - DOT is now working on a [notice of proposed rulemaking](#) on disclosure of ancillary fees, including "baggage fees," "change fees," and "cancellation fees" at the time of ticket purchase. A rulemaking proposal could be issued in the second half of 2022.
  - DOT is working on preparing a [notice of proposed rulemaking](#) on airline ticket refunds and consumer protections. A proposed rulemaking may be issued in the first quarter of 2022.

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# Department of the Treasury (USDT)

## November 8, 2021

- ***in consultation with Department of Justice and Federal Trade Commission***  
Submit a report to the Chair of the White House Competition Council addressing the current market structure and conditions of competition in the markets for beer, wine, and spirits, including an assessment of any threats to competition and barriers to new entrants; § 5(j)

## January 5, 2022

- ***in consultation with Department of Justice, Department of Labor, and Federal Trade Commission***  
Submit a report to the Chair of the White House Competition Council on the effects of lack of competition on labor markets; § 5(v)(i)
- ***in consultation with Federal Reserve, Federal Deposit Insurance Corporation, and Department of Justice***  
Adopt a plan for the revitalization of merger oversight under the Bank Merger Act and the Bank Holding Company Act; § 5(e)

## March 7, 2022

- ***through the Alcohol and Tobacco Tax and Trade Bureau***  
Consider (i) initiating a rulemaking to update trade practice regulations, (ii) rescinding or revising any regulations of the beer, wine, and spirits industries that may unnecessarily inhibit competition, and (iii) reducing any barriers that impede market access for smaller and independent brewers, winemakers, and distilleries; § 5(k)

## April 5, 2022

- 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; § 5(v)(ii)

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# Federal Communications Commission (FCC)

## No Deadline

- Adopt through appropriate rulemaking "Net Neutrality" rules similar to those previously adopted under title II of the Communications Act of 1934 (Public Law 73-416, 48 Stat. 1064, 47 U.S.C. 151 et seq.), as amended by the Telecommunications Act of 1996, in "Protecting and Promoting the Open Internet," 80 Fed. Reg. 19738 (Apr. 13, 2015); § 5(l)(i)
- Conduct future spectrum auctions under rules that are designed to help avoid excessive concentration of spectrum license holdings in the United States, so as to prevent spectrum stockpiling, warehousing of spectrum by licensees, or the creation of barriers to entry, and to improve the conditions of competition in industries that depend upon radio spectrum, including mobile communications and radio-based broadband services; § 5(l)(ii)
- Provide support for the continued development and adoption of 5G Open Radio Access Network (O-RAN) protocols and software, continuing to attend meetings of voluntary and consensus-based standards development organizations, so as to promote or encourage a fair and representative standard-setting process, and undertaking any other measures that might promote increased openness, innovation, and competition in the markets for 5G equipment; § 5(l)(iii) ([click here to view recent developments & analysis](#))

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# Federal Communications Commission (FCC) (cont.)

## No Deadline

- Prohibit unjust or unreasonable early termination fees for end-user communications contracts, enabling consumers to more easily switch providers; § 5(l)(iv)
- Initiate a rulemaking that requires broadband service providers to display a broadband consumer label, such as that as described in the Public Notice of the Commission issued on April 4, 2016 (DA 16–357), so as to give consumers clear, concise, and accurate information regarding provider prices and fees, performance, and network practices; § 5(l)(v)
- Initiate a rulemaking to require broadband service providers to regularly report broadband price and subscription rates to the Federal Communications Commission for the purpose of disseminating that information to the public in a useful manner, to improve price transparency and market functioning; § 5(l)(vi)
- Initiate a rulemaking to prevent landlords and cable and Internet service providers from inhibiting tenants' choices among providers. § 5(l)(vii) ([click here to view recent developments & analysis](#))

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# Federal Communications Commission (FCC)

## Developments & Analysis

- On August 6, 2021, the FCC [announced](#) Raleigh, North Carolina and Boston, Massachusetts as innovation zones to test the integration of Open RAN networks.
- On September 7, 2021, the FCC issued a [Public Notice](#) requesting an update to the record on issues raised in the 2019 *Improving Competitive Broadband Access to Multiple Tenant Environments Notice of Proposed Rulemaking*, including but not limited to (1) revenue sharing agreements; (2) exclusive wiring arrangements, including sale-and-leaseback arrangements; and (3) exclusive marketing arrangements. FCC GN Docket No. 17-142.

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# Federal Maritime Commission (FMC)

## No Deadline

- Enforce the prohibition of unjust and unreasonable practices in the context of detention and demurrage pursuant to the Shipping Act, as clarified in "Interpretive Rule on Demurrage and Detention Under the Shipping Act," 85 Fed. Reg. 29638 (May 18, 2020); § 5(o)(i)
- Consider further rulemaking to improve detention and demurrage practices and enforcement of related Shipping Act prohibitions. § 5(o)(iii)

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# Federal Trade Commission (FTC)

## November 8, 2021

- ***in consultation with Department of Justice and Department of Transportation***  
Submit a report to the Chair of the White House Competition Council addressing the current market structure and conditions of competition in the markets for beer, wine, and spirits, including an assessment of any threats to competition and barriers to new entrants; § 5(j)

## January 5, 2022

- ***in consultation with Department of Justice, Department of Labor, and Department of the Treasury***  
Submit a report to the Chair of the White House Competition Council on the effects of lack of competition on labor markets; § 5(v)(i)

## May 5, 2022

- ***in consultation with Department of Agriculture***  
Submit a report to the Chair of the White House Competition Council on the effect of retail concentration and retailers' practices on the conditions of competition in the food industries and on grants, loans, and other support that may enhance access to retail markets by local and regional food enterprises; § 5(i)(iv)

## July 11, 2022

- ***in consultation with the Department of Commerce and the Department of Justice***  
Conduct a study, including by conducting an open and transparent stakeholder consultation process, of the mobile application ecosystem, and submit a report to the Chair of the White House Competition Council, regarding findings and recommendations for improving competition, reducing barriers to entry, and maximizing user benefit with respect to the ecosystem; § 5(r)(iii)

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# Federal Trade Commission (FTC) (cont.)

## No Deadline

- Consider working with the rest of the Commission to exercise the FTC's statutory rulemaking authority under the Federal Trade Commission Act to curtail the unfair use of non-compete clauses and other clauses or agreements that may unfairly limit worker mobility. § 5(g)
- Consider working with the rest of the Commission to exercise the FTC's statutory rulemaking authority, as appropriate and consistent with applicable law, in areas such as:
  - (i) unfair data collection and surveillance practices that may damage competition, consumer autonomy, and consumer privacy;
  - (ii) unfair anticompetitive restrictions on third-party repair or self-repair of items, such as the restrictions imposed by powerful manufacturers that prevent farmers from repairing their own equipment; ([click here to view recent developments & analysis](#))
  - (iii) unfair anticompetitive conduct or agreements in the prescription drug industries, such as agreements to delay the market entry of generic drugs or biosimilars;
  - (iv) unfair competition in major Internet marketplaces;
  - (v) unfair occupational licensing restrictions;
  - (vi) unfair tying practices or exclusionary practices in the brokerage or listing of real estate; and
  - (vii) any other unfair industry-specific practices that substantially inhibit competition. § 5(h)
- ***and Department of Health and Human Services***  
Identify and address any efforts to impede generic drug and biosimilar competition, including but not limited to false, misleading, or otherwise deceptive statements about generic drug and biosimilar products and their safety or effectiveness; § 5(p)(v)(D)
- ***and Department of Justice***  
Review the horizontal and vertical merger guidelines and consider whether to revise those guidelines. § 5(c) ([click here to view recent developments & analysis](#))
- ***and Department of Justice***  
Consider whether to revise the Antitrust Guidance for Human Resource Professionals of October 2016. § 5(f)

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# Federal Trade Commission (FTC) Developments & Analysis

- On July 21, 2021, the FTC unanimously adopted a [policy statement regarding repair restriction imposed by manufacturers and sellers](#), consistent with the EO's directive to evaluate such restrictions. The FTC indicated that it will devote more enforcement resources to combat practices by manufacturers that impede third-party and self repair—previously a low priority. In describing this new priority, the FTC referred to a 2019 report titled [“Nixing the Fix”](#) that identified several practices that could unjustifiably restrict competition for repair services. Several of the practices that the FTC highlighted in its policy statement include: overbroad assertion of patent and trademark rights; use of technical measures—such as software locks or digital rights management—or legal measures—such as end-user license agreements—to prevent access to technology beyond what is necessary to protect underlying intellectual property rights; and limiting the availability of inputs to the repair process such as replacement parts, software tools, or service manuals.
- Consistent with the new priority placed on repair restrictions, the FTC policy statement stated that it would step up enforcement of the Magnuson-Moss Warranty Act and its implementing regulations by, among other things, potentially filing suits for injunctive relief, closely monitoring private litigation to determine whether the Commission to investigate or to file an amicus brief, and by exploring rulemaking. The Commission also stated that it would scrutinize repair restrictions for unlawful tying arrangements, refusals to deal, exclusive dealing, or exclusionary design provisions that may violate the Sherman Act or Section 5 of the Federal Trade Commission Act, and would review “any material claims made to purchasers and users” for deceptive acts or practices that could violate Section 5 of the Federal Trade Commission Act.
- The FTC's increased focus on the “right to repair” serves as a warning that companies should review their policies and practices regarding third-party and user repairs, including striving for precision in developing their strategies for protecting their intellectual property, to ensure an adequate balance between protection and compliance with competition laws. This also may portend opportunities for those who wish to offer repair services that were otherwise restricted by overbroad protective measures.

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# Federal Trade Commission (FTC) Developments & Analysis (cont.)

- On September 15, 2021, by a 3-2 party lines vote, the FTC [withdrew its approval](#) of the Vertical Merger Guidelines that were issued jointly with DOJ last year and the FTC's Vertical Merger Commentary. A [statement](#) issued by Chair Lina Khan and the two other Democratic Commissioners criticized the 2020 Vertical Merger Guidelines as including “unsound economic theories” that are “unsupported by the law or market realities,” in particular in their consideration of potential efficiencies including the elimination of double marginalization (EDM). The two Republican Commissioners released a [Dissenting statement](#) criticizing the Commission for reducing transparency in favor of “an amorphous bureaucratic fog” that “threatens to chill legitimate merger activity and undermine attempts to rebuild our economy in the wake of the pandemic.” The Chair’s statement announced that the FTC and DOJ are reviewing their approach to vertical mergers, and that the FTC will assess potential market structure-based presumptions or screens for non-horizontal mergers, assess what types of remedies are appropriate for non-horizontal mergers, and assess the harms that can arise from non-horizontal mergers, including looking to provide guidance on how the FTC will analyze a merger’s impact on labor markets.
- On September 15, 2021, Acting Assistant Attorney General Richard Powers of the Antitrust Division released a [DOJ statement](#) that did not withdraw the DOJ’s adoption of the Vertical Merger Guidelines, but that did announce that the DOJ is collaborating with the FTC to update the 2020 Guidelines. In particular, the DOJ statement enumerated several considerations DOJ staff have identified as warranting consideration for revision, including whether the existing Vertical Merge Guidelines “create confusion as to the merging parties’ burden to establish that the elimination of double marginalization is verifiable, merger specific, and will likely be passed through to consumers.”
- On September 22, 2021, FTC Chair Khan sent a [memorandum](#) to staff and her fellow commissions in what appears to be an attempt to build support for her vision of an expanded role for the agency. She describes the need to take a “holistic” approach to identifying harms and to focus on “power asymmetries” and “root causes rather than looking at one-off effects”. Among policy priorities, she lists the need to address “rampant consolidation and the dominance that it has enabled across markets” as the top priority.

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# Office of Management and Budget (OMB)

## No Deadline

- ***through the Administrator of OIRA***

Incorporate into its recommendations for modernizing and improving regulatory review required by President Biden's Memorandum of January 20, 2021 (Modernizing Regulatory Review), the policies set forth in section 1 of this order, including consideration of whether the effects on competition and the potential for creation of barriers to entry should be included in regulatory impact analyses; § 5(u)

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# Surface Transportation Board (STB)

## No Deadline

- Consider commencing or continuing a rulemaking to strengthen regulations pertaining to reciprocal switching agreements pursuant to 49 U.S.C. 11102(c), if the Chair determines such rulemaking to be in the public interest or necessary to provide competitive rail service; § 5(n)(i) ([click here to view recent developments & analysis](#))
- Consider rulemakings pertaining to any other relevant matter of competitive access, including bottleneck rates, interchange commitments, or other matters, consistent with the policies set forth in section 1 of this order; § 5(n)(ii)
- Ensure that passenger rail service is not subject to unwarranted delays and interruptions in service due to host railroads' failure to comply with the required preference for passenger rail, vigorously enforce new on-time performance requirements adopted pursuant to the Passenger Rail Investment and Improvement Act of 2008 (Public Law 110-423, 122 Stat. 4907) that will take effect on July 1, 2021, and further the work of the passenger rail working group formed to ensure that the Surface Transportation Board will fully meet its obligations; § 5(n)(iii)
- Consider a carrier's fulfillment of its responsibilities under 49 U.S.C. 24308 (relating to Amtrak's statutory rights) in the process of determining whether a merger, acquisition, or other transaction involving rail carriers is consistent with the public interest under 49 U.S.C. 11323-25; § 5(n)(iv)

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# Surface Transportation Board (STB) Developments & Analysis

- On December 28, 2021, the Surface Transportation Board issued a [Notice of Hearing](#) regarding reciprocal switching regulations.
  - The hearing is scheduled to be held on March 15 and 16, 2022. These dates are subject to change as an extension request has been filed in the proceeding.
  - In 2016, the Board issued a [Notice of Proposed Rulemaking \(NPRM\)](#) and proposed new regulations under which the Board would exercise its statutory authority to require rail carriers to establish switching arrangements in certain circumstances.
  - In the July 9, 2021, Executive Order 14036, “Executive Order on Promoting Competition in the American Economy,” President Biden encouraged the STB to commence or continue a rulemaking pertaining to reciprocal switching.
  - The hearing will address the Board’s 2016 NPRM, any new developments, and other relevant matters.

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# United States Patent and Trademark Office (USPTO)

## No Deadline

- *with the Department of Agriculture, in consultation with the Under Secretary of Commerce for Intellectual Property*

Submit a report to the Chair of the White House Competition Council, enumerating and describing any relevant concerns of the Department of Agriculture and strategies for addressing those concerns across intellectual property, antitrust, and other relevant laws. § 5(i)(v)

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# White House Competition Council (WHCC)

**August 9, 2021**

- Members of the Council shall designate, not later than 30 days after the date of this order, a senior official within their respective agency or office who shall coordinate with the Council and who shall be responsible for overseeing the agency's or office's efforts to address overconcentration, monopolization, and unfair competition; § 4(h)

## **No Deadline**

- Coordinate, promote, and advance Federal Government efforts to address overconcentration, monopolization, and unfair competition in or directly affecting the American economy, including efforts to:
  - (i) implement the administrative actions identified in this order;
  - (ii) develop procedures and best practices for agency cooperation and coordination on matters of overlapping jurisdiction, as described in section 3 of this order;
  - (iii) identify and advance any additional administrative actions necessary to further the policies set forth in section 1 of this order; and
  - (iv) identify any potential legislative changes necessary to further the policies set forth in section 1 of this order. § 4(b)

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