Overview
President Biden’s unprecedented Executive Order (EO) of July 9 calls for more vigorous enforcement of the antitrust laws and directs and/or encourages more than a dozen federal agencies to implement specific new regulatory policies and/or to implement the policies embraced in the EO, albeit without specific directions. The EO is intended to have a significant impact on numerous sectors of the economy, including technology, telecom, energy, agriculture, pharmaceuticals, banking and finance, and labor.

The EO creates a new inter-agency White House Competition Council and calls for a “whole-of-government approach” to address excessive concentration, abuses of market power, unfair competition, and the effects of monopoly and monopsony. The EO calls for all federal agencies to implement the policies it sets forth, and includes 72 specific initiatives to further those goals. This entire initiative is being pursued under existing statutory authority and as a result the Administration is not seeking additional authority from the Congress at this time.

In light of the number of agency actions that will be initiated by this EO, Steptoe is creating the Executive Order on Competition (EOC) Tracker, which will identify each of those initiatives and be a repository to monitor progress by each of the agencies directed or encouraged to take specific actions. Our EOC Tracker will also present a one-stop resource for relevant developments, by industry, as the EO is implemented. The EOC Tracker will be updated to reflect the latest developments and include analysis to provide perspective on the impact of the EO on individual industries.

Steptoe EOC Tracker
A comprehensive list of the initiatives, including those with and without specific deadlines, enumerated in the EO is located here.

Industry Developments and Agency Guidance
Antitrust Enforcement
Aviation
Banking and Financial Services
Energy
Health Care and Pharmaceuticals
Intellectual Property
Rail
Telecom

Antitrust Enforcement
President Biden’s unprecedented July 9, 2021, Executive Order 14036 represents a potential watershed moment in US...
The Department of Justice (DOJ) and Federal Trade Commission (FTC) are encouraged to review the horizontal and vertical merger guidelines, and FTC Chair Lina Khan and the Acting Assistant Attorney General for Antitrust Richard Powers have already issued a joint statement promising soon to "jointly launch a review of our merger guidelines with the goal of updating them to reflect a rigorous analytical approach consistent with applicable law." With regard to merger and acquisition activity, the EO also "reaffirms that the United States retains the authority to challenge transactions whose previous consummation was in violation of the [antitrust laws]."

The EO also asks the FTC to consider rulemaking to address "persistent and recurrent practices that inhibit competition" in areas such as:

- unfair data collection and surveillance processes
- unfair competition in major Internet marketplaces
- unfair occupational licensing restrictions
- unfair anticompetitive restrictions on third-party repair or self-repair of items
- unfair anticompetitive prescription drug industry conduct or agreements, including agreements to delay the market entry of generics and biosimilars
- unfair tying or exclusionary practices in the brokerage or listing of real estate
- any other unfair industry-specific practices that substantially inhibit competition

The FTC is also asked to consider rulemaking to curtail the "unfair use of non-compete clauses" and other contractual provisions that may unfairly limit worker mobility, as well as to consider working with the Department of Justice to consider revising the Antitrust Guidance for Human Resource Professionals.

In addition to being asked to work with the FTC, the Department of Justice is encouraged, together with other relevant agencies, to consider revisions to the Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments, and to adopt a plan for the revitalization of merger oversight under the Bank Merger Act and the Bank Holding Company Act.

The initiatives set forth in the Executive Order, combined with the appointments of Lina Khan as FTC Chair, Jonathan Kanter as Assistant Attorney General in charge of the Antitrust Division, and Tim Wu to the National Economic Council, are the latest and strongest indications that the Biden Administration is committed to the most vigorous enforcement of the antitrust laws since prior to the election of President Reagan.

Aviation

The EO includes several directives to the Secretary of Transportation, which include:

- Appointing or reappointment of members to the Advisory Committee on Aviation Consumer Protection to evaluate consumer protection programs. (The President has already implemented these appointments and reappointments on July 14, 2021, choosing Maury Healey, the Attorney General of Massachusetts, to chair the Committee.)
- Promoting enhanced transparency and consumer safeguards relative to:
  - access to flight information
  - addressing unfair or deceptive practices or unfair methods of competition in advertising, marketing, or ancillary fees
- Reporting with respect to airline refunds to the White House Competition Council
- Initiating a rulemaking on the refund of airline fees when bags are delayed or other services not provided. (This was already done on July 9, 2021, at about the same time the EO was issued.)
- Initiating a rulemaking to amend the definitions of "unfair" and "deceptive" practices, adopted by the Trump Administration, in the Department of Transportation (DOT) aviation consumer protection rules
- Picking up where the Obama Administration left off, 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
- With respect to airline competition matters, the EO requires that the Secretary of Transportation take steps to provide consumers with more flight options at better prices and improved service, while expanding competitive opportunities and market entry. The mandate includes requirements that:
  - A working group be set up within DOT to evaluate existing FAA programs and rules
  - The Attorney General be consulted on enhancing coordination between DOJ and DOT with respect to airline competition issues
  - Consideration be given to measures to support airport development and other steps that would increase airport capacity and market opportunities for airlines
- With respect to the emergence of new aerospace technologies, DOT is encouraged to take action to facilitate innovation to foster US market leadership, and to promote competition and resist monopolization. Vigilant oversight over market participants is also encouraged.
Banking and Financial Services

The President’s EO on competition cites the Bank Merger Act and the Banking Holding Company Act of 1956 to “ensure that Americans have choices among financial institutions and to guard against excessive market power.” To do so, the EO encourages the Attorney General, in consultation with the Chairman of the Board of Governors of the Federal Reserve System, the Chairperson of the Board of Directors of the Federal Deposit Insurance Corporation and the Comptroller of the Currency to “review current practices and adopt a plan, not later than 180 days after the date of this order.”

The EO “encourages” the Director of the Consumer Financial Protection Bureau (CFPB), consistent with pro-competition objectives state in section 1021 of Dodd Frank, to consider commencing or continuing a rulemaking under section 1033 of the Dodd Frank Act to facilitate the portability of consumer financial transaction data so consumers can more easily switch financial institutions and use new, innovative financial products; and enforcing 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 to ensure that those engaged in unlawful activities don’t “the proper functioning of the competitive process or obtain an unfair advantage over competitors who follow the law.”

The EO cites the Dodd Frank Act as an “industry-specific fair competition and anti-monopolization laws that often provide additional protections.” The EO specifically mentions the Department of the Treasury, the Federal Reserve System, the Securities and Exchange Commission, the Federal Deposit Insurance Corporation, the Commodity Futures Trading Commission, and the CFPB as “agencies that administer such or similar authorities.” This is part of the “Whole-of-Government Competition Policy” that “is necessary to address overconcentration, monopolization, and unfair competition in the American economy.” The EO also expects agency cooperation as it relates to “Oversight, Investigation, and Remedies.”

The EO requires the Secretary of the Treasury to “submit a report to the Chair of the White House Competition Council, not later than 270 days after the date of this order, assessing the effects on competition of large technology firms’ and other non-bank companies’ entry into consumer finance markets.”

Energy

The EO mentions the Federal Energy Regulatory Commission (FERC) as one of the agencies directed to carry out the policies embraced in the EO, although it says nothing specific about energy. Our views:

- Utilities considering M&A activity should put special emphasis on likely DOJ Antitrust Division and FTC review, as the antitrust enforcement agencies may have more influence on FERC, and FERC may not rely as heavily as in the past on its own merger analysis methods;
- FERC may feel empowered to pressure utilities not currently in RTOs to join them, or to impose new conduct requirements designed to mitigate vertical market power;
- To the extent the FTC and DOJ succeed in imposing antitrust remedies upon big tech platforms, some of the underlying policies and results could spill over to utility networks. This could affect how utilities operate and the ability of big tech to compete with utilities going forward. Hence, utilities should closely monitor developments in those areas;
- State regulators may be less enthusiastic about such policies: utilities should consider actions at the state level to expand their contacts with and beneficial services for consumers to be positioned to succeed as new competitive threats emerge;
- Antitrust compliance will be increasingly important; and
- The importance of FERC compliance will continue to grow, as FERC Enforcement may be emboldened by this EO to broaden its reach. For example, affiliate rules may now have an added antitrust angle

Health Care and Pharmaceuticals

The EO includes several provisions specifically targeting the healthcare industry. While several of these proposals are vague, taken together the EO is poised to have a significant impact on hospitals and the pharmaceutical industry.

The EO states that, “hospital consolidation has left many areas, particularly rural communities, with inadequate or more expensive healthcare options,” and that, “Americans are paying too much for prescription drugs…too often, patent and other laws have been misused to inhibit or delay — for years and even decades — competition from generic drugs and biosimilars, denying Americans access to lower-cost drugs.” In an attempt to address the concerns described in the previous statement, the EO establishes a new policy aimed at combatting, “the excessive concentration of industry, the abuses of market power, and the harmful effects of monopoly and monopsony — especially as these issues arise in labor markets, agricultural markets, Internet platform industries, healthcare markets (including insurance, hospital, and prescription drug markets).”

To combat these perceived market failures, the EO:
• Urges DOJ and FTC to conduct additional oversight of mergers pursuant to that policy, adjusting their guidelines to that effect. The EO is vague, merely encouraging the two agencies to "review the horizontal and vertical merger guidelines and consider whether to revise those guidelines" in light of the administration's newly established policy.

• Directs the Department of Health and Human Services (HHS) to bolster price transparency rules and address surprise billing, as required by the No Surprises Act. This provision applies to hospitals, insurers and other providers.

• Directs the Food and Drug Administration (FDA) to work with states to import drugs from Canada, directs HHS to increase support for generic drugs and issue a plan to combat high drug prices, and urges the FTC to ban "pay for delay" arrangements in which a drug manufacturer pays to prevent the release of a generic drug.

• Directs HHS to issue, within 120 days, proposed rules to allow hearing aids to be sold over the counter, without the intervention or referral of a doctor or specialist.

• In an attempt to increase choice in the health insurance market, directs HHS to make the National Health Insurance Marketplace more user-friendly by adjusting plan options to fit a more standardized and comparable format.

Due to the relatively vague instructions given to agencies within the EO, the full impact of the EO is not immediate. Steptoe will be closely monitoring developments within these agencies in the coming days, weeks, and months, and will be posting updates on the EOC Tracker.

Intellectual Property

The EO repeatedly recognizes that the goal of incentivizing innovation by granting intellectual property rights is often in tension with serving that same goal through competition. To that end, the EO directs several agencies to examine policies and practices that affect intellectual property both directly and indirectly. Several of these directives cut across industries, while others are narrowly focused on particular industries. And several are open-ended directives to evaluate practices that inhibit competition generally beyond those enumerated in the EO. Below, we have identified several highlights of the EO’s implications for intellectual property.

• Encourages DOJ and the Department of Commerce to revise the agencies’ Policy Statement on Remedies for Standards-Essential Patents subject to Voluntary F/RAND Commitments, among other considerations at the intersection of intellectual property and antitrust generally and in the standard-setting process in particular.

• Encourages both the FTC and the FDA to evaluate ways the patent system might be used to unjustifiably delay generic drug and biosimilar competition and to identify strategies for addressing those concerns.
  ○ The FTC in particular is encouraged to evaluate agreements to delay the market entry of generic drugs or biosimilars. So-called “pay-for-delay” agreements were the subject of the Supreme Court’s opinion in FTC v. Actavis, 570 U.S. 136 (2013).

• Encourages the Secretary of Agriculture to evaluate ways the patent system might be used to reduce competition in the markets for seeds and other inputs to the agriculture industry and to identify strategies for addressing those concerns.

• Encourages the Secretary of Health and Human Services to evaluate ways to lower prescription drug costs by facilitating importation from Canada pursuant to Section 804 of the Food, Drug, and Cosmetics Act.
  ○ Particularly in view of the Supreme Court’s decision in Impression Prods. Inc. v. Lexmark Int’l, Inc., 581 U.S. __, 137 S. Ct. 1523 (2017), owners of intellectual property rights in prescription drugs may wish to evaluate the impact that increased cross-border importation might have on their distribution chain and pricing.

• Encourages the FTC to consider issuing rules concerning restrictions on “third-party repair or self-repair.” The EO draws attention to agricultural equipment in particular, though this directive could also reach consumer technology including cell phones and printers.
  ○ Regulation along these lines could lead to provisions that require companies to allow consumers, suppliers, and even competitors better visibility to the inner workings of their products. Companies seeking to develop compatible tools, such as through reverse engineering, should be sure to comply with intellectual property laws and contractual obligations that might restrict that conduct.

• Encourages the FTC to evaluate means to “curtail the unfair use of non-compete clauses” and other similar limitations on worker mobility.
  ○ Non-compete clauses are often helpful means of protecting trade secrets. Any limitation on the use of those provisions, therefore, could impact not only companies seeking to protect their trade secrets, but also companies seeking to avoid trade secret misappropriation when hiring new employees from their competitors.

• Encourages the CFPB to consider rules that “facilitate the portability of consumer financial transaction data.”
  ○ Such data are unlikely to be protected by copyright law or other traditional intellectual property regimes, but regulations on data portability could create consumer rights akin to intellectual property rights.

Rail

The EO encourages the Chair of the Surface Transportation Board (STB or Board) to work with the rest of the Board, an independent agency, in order "to further competition in the rail industry and to provide accessible remedies for shippers," to take the following actions:
Consider the following actions:

- 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;
  - In 2016, the STB proposed rules that would force railroads to reciprocally switch traffic in certain circumstances, but the Board has not issued final rules and that rulemaking proceeding is currently dormant.
- 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 the EO, which emphasize the promotion of competition;
  - The STB has a long history of rulemakings and decisions in these substantive areas. Most recently, in 2019, the Board’s Rate Reform Task Force issued a report making certain recommendations related to competitive access issues, amongst other topics. While the Board has addressed other aspects of the report through rulemakings, it has not yet instituted rulemakings regarding the competitive access issues raised by the report.
- To 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, and further the work of the passenger rail working group formed to ensure that the STB will fully meet its obligations; and
  - Congress has tasked the STB with enforcing certain standards related to passenger rail service.
- 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, consider a carrier’s fulfillment of its responsibilities under 49 U.S.C. 24308 (relating to Amtrak’s statutory rights).
  - The STB is currently considering a number of mergers and acquisitions proposed by large railroads.

**Telecom**

The EO encourages the Federal Communications Commission (FCC) to adopt a set of seven new and former regulations related to preserving the Open Internet, facilitating 5G innovation, promoting competition, and protecting consumers.

- Most notably, the EO encourages the FCC to adopt the so-called Net Neutrality or Open Internet rules that were in force until 2018. Specifically, by restoring "the net neutrality rules undone by the prior administration," the Executive Order seeks to prevent Internet Service Providers from "discriminatorily slowing down Internet access."
- The EO seeks to facilitate 5G innovation by supporting Open Radio Access Networks (O-RAN or Open RAN) through the development and adoption of standards, protocols, and software.
- To facilitate competition, the EO encourages the FCC to conduct future spectrum auctions under rules designed to avoid excessive concentration of spectrum. This should encourage new entrants or smaller operators to participate in spectrum auctions and build their networks.
- To protect consumers, the EO proposes four major initiatives:
  - It would have broadband service providers display a broadband consumer label providing clear, concise, and accurate information regarding provider prices and fees, performance, and network practices.
  - It would have broadband service providers regularly report broadband price and subscription rates to the FCC, which would disseminate that information to the public to improve price transparency and ensure a functioning market.
  - It encourages the FCC to prohibit unjust or unreasonable early termination fees for end-user communications contracts.
  - It calls on the FCC to prevent landlords and cable and Internet service providers from inhibiting tenants’ choices among providers, expanding the Commission’s previous actions against exclusive contracts for multiple dwelling units.
Practices
Antitrust/Competition
Energy
Financial Services
Government Affairs & Public Policy
Intellectual Property: Overview
Internet, Telecom & Media
Labor & Employment
Transportation
Executive Order on Competition Tracker

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