

Biden Executive Order and Policy Shifts Herald Era of Expanded Antitrust Enforcement

Administration signals greater competition enforcement that could imperil past mergers, impose new reporting obligations, and broadly targets technology, healthcare, and banking sectors.

The White House announced its antitrust priorities on Friday, July 9, in a broad executive order designed to address shortcomings the Biden Administration has identified in the last 40 years of antitrust enforcement. On Monday, July 12, Federal Trade Commission (FTC) Chair Lina Khan announced plans for an upcoming FTC meeting in which the Commission will consider rescinding a 25-year-old policy statement that governs the reportability of future mergers by settling companies. The Executive Order follows a flurry of activity at the FTC since Chairman Khan's confirmation on June 15, which collectively embrace several popular and bipartisan issues, while also seeking to firmly imprint the progressive critique of recent antitrust enforcement. These changes will further expand antitrust scrutiny going forward, consistent with changes practitioners are already seeing at the antitrust agencies.

The Executive Order

The Executive Order will likely result in the removal of policies and analytical frameworks that have governed antitrust enforcement, and regulatory efforts more broadly, for two generations. Instead, the Order seeks to introduce more flexible and less evidence-based frameworks, which are likely to reduce regulatory clarity for companies and increase enforcers ability to advance novel theories. Efforts to remove policy statements that were perceived to hinder enforcement were already underway before the Executive Order's announcement. President Biden's Executive Order is only the latest step in a broader antitrust initiative to "coordinate the federal government's response to the rising power of large corporations in the economy."

The Biden Administration is focused on merger enforcement — particularly in technology, healthcare, and banking — along with specific practices that affect workers' mobility and wages, such as non-competes in employment agreements. While the Executive Order does not change or modify existing antitrust law, it pushes federal agencies to implement the Administration's enforcement priorities and creates a new White House Competition Council to monitor the antitrust agencies' progress. The Executive Order is expected to lead to major initiatives and increased antitrust enforcement at the FTC and Department of Justice (DOJ).

Per the announcement, President Biden aims "to promote competition in the American economy, which will lower prices for families, increase wages for workers, and promote innovation and even faster

economic growth.” To meet this goal, the Executive Order focuses on specific sectors: technology, labor markets, healthcare and pharmaceuticals, transportation, agriculture, internet service, and banking and consumer finance. These sectors are among those emphasized by the FTC’s Democrat Commissioners and they have remained targets in a recent set of procedural initiatives to eliminate restrictions on the ability of the Chair to unilaterally initiate investigations in those sectors.

The Executive Order primarily focuses on certain sectors, however, the policy statement is wide-ranging and will affect most companies doing business in the US. The statement includes 72 proposed initiatives by several federal agencies, including initiatives that call for the FTC and DOJ “to enforce the antitrust laws vigorously.” Specifically:

- **Technology acquisitions are targeted.** The Executive Order places particular emphasis on acquisitions by “Big Tech,” announcing a policy of “greater scrutiny of mergers” with particular focus on internet platforms and the acquisition of nascent competitors, serial mergers, the accumulation of data, competition by “free” products, and the effect on user privacy. While Big Tech may be in the crosshairs, the potential ramifications for tech companies are significant. Policies implemented for the major platforms may be applied across the tech industry as the antitrust agencies look to prevent the creation of the next major platform. In addition, the Executive Order urges the FTC to establish rules on surveillance and the accumulation of data, as well as rules barring unfair methods of competition on internet marketplaces. These rules are likely to have an impact on companies of all sizes, including startups.
- **Labor issues at the forefront.** The Executive Order places particular focus on labor issues. First, the Order encourages the FTC to ban or limit employee non-compete arrangements. The goal of this directive is to increase economic mobility by making it easier for employees to change jobs. This effort builds on the DOJ’s recent efforts to challenge employee non-poach agreements as criminal antitrust violations. While labor non-competes are the focus of the Executive Order, companies considering business non-competes should continue to ensure that such agreements are narrowly tailored for a legitimate business purpose, particularly as the antitrust agencies have challenged multiple business non-competes in the last two years. The Executive Order also encourages the FTC to ban unnecessary occupational licensing requirements, which builds on FTC efforts in the prior administration to eliminate requirements that unnecessarily restricted job mobility, especially across state lines. The Order also encourages the FTC and DOJ to strengthen antitrust guidance regarding employers sharing with one another wage and benefit information. Collectively, these directives show that labor is a key focus of the Biden Administration’s antitrust enforcement efforts, as well as a topic of scrutiny in merger reviews by the antitrust agencies.
- **DOJ and FTC to refresh merger guidelines with a specific focus on hospital and banking mergers.** The Executive Order urges the FTC and DOJ to review and revise their merger guidelines. Shortly after the Executive Order was issued, the FTC and DOJ announced a plan to review the Horizontal Merger Guidelines, which were last issued by the Obama Administration in 2010. The announcement promised a “hard look” at current merger guidelines “to determine whether they are overly permissive.” Potential changes may include lowering the concentration thresholds for presumptively anticompetitive mergers, building out the nascent or potential competition prohibitions, and eliminating defenses, such as the efficiencies defense. The Executive Order specifically asks that the FTC and DOJ reconsider the agencies’ approach to hospital mergers, which are among the most active merger enforcement areas for the agencies, with public challenge or opposition to six hospital mergers since early 2020. The Order also targets banking and consumer finance by encouraging DOJ, along with the Federal Reserve, the Federal Deposit Insurance Corporation, and the Office of

the Comptroller of the Currency, to update guidelines on banking mergers to provide for greater scrutiny. The re-examination of the Horizontal Merger Guidelines may result in far less clarity for the public on how the antitrust agencies will review proposed mergers, while giving the agencies far more flexibility to find a merger problematic, though time will tell whether this is the case. The Horizontal Merger Guidelines have been cited repeatedly by courts when deciding merger challenges, rendering this clarity and flexibility particularly important.

- **No reverse payment patent settlements.** The Executive Order encourages an outright ban on so-called “pay for delay” agreements, as well as other initiatives focused on intellectual property issues. Such settlements have been repeatedly challenged by the antitrust agencies in the last 20 years and Congress has also considered introducing legislation to ban them.

Policy Changes at the FTC

For the past several decades, the antitrust agencies have aimed for transparency through guidelines and policy statements that are intended to provide the public and the business community with the analytical framework that the agencies use to review mergers and conduct, as well as implement remedies for violations. FTC Chairman Khan has signaled that, in addition to the Executive Order, there will be immediate changes adopted that pose practical implications:

- On July 1, the FTC withdrew the bipartisan Obama-era FTC statement on antitrust enforcement under Section 5 of the FTC Act. That policy statement had said that the FTC Act was consistent with and did not extend beyond the other antitrust laws. The withdrawal of this policy statement means that one should expect the FTC to look for enforcement actions — most likely in the tech and life sciences industries — that go beyond the legal limits imposed by the Sherman and Clayton Acts.
- In the next public Commission meeting on July 21, the FTC is slated to consider rescinding a 25-year-old policy implemented in the Clinton Administration. In the 1995 policy statement, the FTC said it would no longer require merger parties subject to a settlement order to affirmatively report and receive approval for all future acquisitions in the same industry. Since the policy was implemented, the Commission had selectively imposed such restrictions when facts dictated that these restrictions were necessary. Rescinding this policy could result in a significant shift for reporting obligations for companies that enter into a consent decree and then engage in follow-on acquisitions in the same space.

Critics of merger enforcement in the last several decades will likely cheer the removal of policy statements and guidelines viewed as restricting the power of the antitrust agencies. These changes, however, introduce uncertainty for businesses planning mergers or other actions that may raise competition issues. As evidence of this potential era of uncertainty, the Executive Order indicates that one forthcoming task will be to “challenge prior bad mergers that past administrations did not previously challenge.” Businesses should consider it imperative to stay in touch with their antitrust counsel as this sea change in Washington continues.

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