

Progressive antitrust agenda gains momentum under Biden administration

With its recent executive order on competition law and the nominations of Jonathan Kanter and Lina Khan to lead the DOJ Antitrust Division and Federal Trade Commission, respectively, the Biden Administration is marching full steam ahead with its progressive antitrust priorities.

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Introduction

Throughout his campaign and since taking office, President Biden promised to increase and expand antitrust enforcement. After months of speculation about what form this promise would take, the direction of antitrust agenda, policy, and enforcement priorities under the new administration has now come into focus. With its recent nominees and policy announcements, the Biden Administration has charted the course for a sharp pivot in U.S. antitrust policy at the federal level and outlined a progressive antitrust agenda that may challenge decades of established practice.

The recent Executive Order on Promoting Competition in the American Economy (**Order**) and the nomination of Jonathan Kanter to the role of Assistant Attorney General (**AAG**) for Antitrust at the Department of Justice (**DOJ**) remove any significant doubt about the Biden Administration's embrace of the progressive antitrust movement and ideas. These moves come shortly after last month's surprise elevation of big tech opponent Lina Khan to Chair of the Federal Trade Commission (**FTC**) and the appointment of prominent progressive antitrust figures to advisory positions in the Biden White House. Taken as a whole, these moves presage significant changes, and uncertainty, in U.S. antitrust policy and enforcement practices in coming months and years.

Progressive Appointees

Many Biden Administration appointees both inside and outside the White House embody a new progressive approach to antitrust and are known for criticizing established antitrust policy and enforcement. Some appointees, including Khan and White House competition advisor Tim Wu, are prominent members of the “new Brandeis movement” of antitrust academia — a group originally focused on criticisms of the perceived failure of existing U.S. antitrust laws to curb the power of big tech companies.

Similarly, new DOJ AAG nominee Kanter, who has experience in both government and private practice, is a self-described “leading advocate in the effort to promote strong and meaningful antitrust enforcement.” In public comments, Kanter has voiced concerns about U.S. antitrust orthodoxy and the lack of monopoly enforcement actions brought by U.S. regulators. Kanter will be a significantly more progressive leader of the DOJ’s Antitrust Division than any of his predecessors this century.

The Executive Order

The Order, which was signed by President Biden on July 9, 2021, aims at reforming competition policy on a broad level, while also targeting certain industries across the American economy. In the Order, President Biden asks federal agencies—both competition agencies and the regulators of the individually targeted industries—to use their powers to increase competition and combat what the administration perceives as harms to individual consumers caused by the behavior of dominant companies in highly concentrated industries. In particular:

- The Order prompts the DOJ and FTC to action, urging them to challenge previously consummated mergers that may now be found to violate the antitrust laws, to place additional scrutiny on mergers, and generally to enforce antitrust laws vigorously.
- It singles out the markets for labor, healthcare, transportation, agriculture, internet service, technology, and banking and consumer finance for particular focus by competition regulators and other agencies.
- To coordinate implementation of the Order’s provisions it establishes the White House Competition Council, composed of the heads of various federal agencies and chaired by the Special Assistant to the President for Economic Policy and Director of the National Economic Council.

It should not be overlooked that the Order’s directives depend on the individual agencies, who are confined by established practices and procedures, for their implementation. Nonetheless, the signing of this Order is significant in several ways. First, it fulfils a campaign promise to use all aspects of the federal government to attack what the Biden Administration perceives as non-competitive and overly concentrated markets. Second, it suggests an approach to attacking concentration and competition limits through administrative action, at a time when courts have tended to limit antitrust legal actions. Finally, the signing occurred even though the two antitrust enforcement agencies remain somewhat in flux.



Industries Targeted

Labor

The Order directs the FTC to ban or limit non-compete agreements, to eliminate unnecessary occupational licensing restrictions, and to prevent employers from wage collusion to suppress pay or benefits. The Order does not suggest that all non-competes will be eliminated. However, we expect that certain types of non-compete agreements—particularly those signed by lower wage and non-management workers—will likely be targeted. It also directs the FTC and DOJ to consider effects on the labor market in their review of mergers to prevent monopsony conditions from arising.

Healthcare

The Order directs the Food and Drug Administration and Health and Human Services Administration to take measures to provide transparency and lower-cost options for patients, encouraging the agencies to facilitate the safe import of prescription drugs, to increase support for generic and biosimilar drugs, to combat price gouging for prescription drugs, and to support standardization of health insurance plan options. The Order further encourages the FTC to issue a rule to ban “pay-for-delay” agreements and to collaborate with the DOJ in revising the merger guidelines to recognize potential harms arising from hospital mergers.

Transportation

The Department of Transportation, the Surface Transportation Board, and the Federal Maritime Commission are directed to implement measures to guard against excessive transportation and shipping costs, and to issue rules for transparent disclosure of fees to airline customers.

Agriculture

The Order directs the Department of Agriculture to consider issuing new rules to increase market access opportunities for farmers, to adopt anti-retaliation provisions to protect the rights of farmers and ranchers who report unfair commercial practices, and to facilitate transparency in the labelling of agricultural products.

Internet Service

The Federal Communications Commission is encouraged to limit excessive early termination fees, to require clear disclosure and reporting of broadband plan costs, to end landlord exclusivity arrangements, and to restore the net neutrality rules invalidated by the previous administration.

Technology

In addition to encouraging increased scrutiny of mergers by dominant internet platforms, the Order prompts the FTC to establish rules to tackle concerns about the accumulation of personal data and to bar unfair methods of competition in internet marketplaces where companies compete on their own digital platforms. It also encourages the FTC to issue rules facilitating consumer use of independent repair shops and do-it-yourself repairs of devices and equipment.

Banking and Consumer Finance

The DOJ, Federal Reserve, and other federal banking agencies are encouraged to update their guidelines to provide a more robust framework for evaluating bank merger proposals. Separately, the Order encourages the Consumer Financial Protection Bureau to require banks to issue rules allowing customers to take their financial transaction data when they switch financial institutions.



Next Steps

The appointments and Order solidify the Biden Administration's embrace of the antitrust thinking of the progressive wing of the Democratic Party. They serve as an important guidepost for the policies of the new administration, signalling a much more progressive stance on antitrust issues compared to prior administrations. Individually these actions might be viewed as a public move to placate progressives. Taken as a whole, however, these actions represent a willingness on the part of the Biden Administration to drastically rethink and overhaul U.S. antitrust laws and enforcement policies.

The full impact of these developments remains to be seen. On the one hand, there is little question that the Biden Administration's antitrust appointees will aggressively pursue the directives of the Order, since much of the Order would seem consistent with the views these appointees have publicly taken in the past. On the other hand, the Order's implementation will take some time; most of its provisions require deliberate action by independent agencies. For instance, the Order encourages certain enforcement actions, but all enforcement actions will be heavily influenced by the agencies' non-partisan, career staff and will be subject to judicial review. Likewise, agency rulemakings, which the Order also encourages, are subject to mandated processes, such as a public comment period, and can be challenged in court. Any lasting changes will depend on the ability of the implementing agencies to put the directives into practice in a manner consistent with the Order and in a form which will survive legal challenge.

The Order itself therefore is not a mandate for immediate change and its success is not solely dependent on the zealotry of the administration's appointees.

Certain agencies and appointees have already begun to act on the Order; the FTC and DOJ issued statements indicating that they would immediately begin implementation, including a planned update to the merger review guidelines which were last updated a decade ago. Even before the Order, the FTC voted 3-2 along partisan lines to make it easier to develop rulemaking processes in competition. This rulemaking, if upheld by the courts, could provide significant guidance to companies about enforcement priorities. Along the same 3-2 partisan lines, the FTC voted to rescind a 2015 policy statement that constrained the agency's ability to stop anticompetitive business practices under Section 5 of the FTC Act. Most recently, in its second ever open meeting, the FTC unanimously backed a policy statement that promises to explore its powers to protect the right of consumers to repair devices. At the same meeting, commissioners also voted to rescind a 1995 policy statement that discouraged the FTC's use of prior notification provisions in settlements, again along 3-2 partisan lines.

The full impact of the Biden Administration's antitrust policies will come into even clearer focus once these proposals are implemented and the new approach to enforcement is tested in the courts. In the meantime, companies should expect extensive reviews of mergers, greater scrutiny of market practices, and more court cases to be brought.

Key points

The Biden Administration has embraced progressive ideas about antitrust and is elevating some of the most zealous advocates of those ideas to important roles where they can oversee their implementation.

President Biden's new Executive Order calls for a "whole-of-government" approach to competition policy, directing actions from more than a dozen U.S. federal agencies and encouraging a re-evaluation of established U.S. antitrust doctrine.

Implementation of the Order's directives will be rigorously pursued by the administration's antitrust appointees; however, institutional checks and balances and judicial review provide substantial guardrails against immediate drastic change.

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