

ALERT

Biden Administration Signals Tech and Telecom Priorities in EO on Competition

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On July 9, 2021, President Biden issued the Executive Order on Promoting Competition in the American Economy (EO). The EO seeks to establish a “whole-of-government” effort to promote competition in the U.S. economy, featuring 72 initiatives involving more than a dozen federal agencies, including the Federal Communications Commission and Federal Trade Commission (FCC and FTC, respectively). The EO also establishes a Council within the Executive Office of the President (EOP) to monitor and support implementation of these initiatives. In the related Fact Sheet, the White House notes that the EO is intended to “reduce the trend of corporate consolidation, increase competition, and deliver concrete benefits to America’s consumers, workers, farmers, and small businesses.”

Through the EO, the Biden Administration identifies what it would like as priority items for agencies responsible for oversight of the tech and telecom industries. Although the EO tees up several initiatives, it does not go into detail on how such initiatives should be implemented. Agencies will therefore have broad discretion to pursue the President’s priorities, making it important for interested stakeholders to engage with regulators.

The EO includes recommendations to independent agencies like the FCC and FTC. Such action creates an appearance of predetermination, which could be raised in an appeal for judicial review of any final agency action. It is notable that FCC and FTC leadership participated in the EO’s announcement and issued supportive statements. Acting FCC Chairwoman Rosenworcel’s statement can be found [here](#), and FTC Chairwoman Kahn’s statement with Department of Justice (DOJ) Antitrust leadership can be found [here](#).

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FTC and Consumer Protection
Telecom, Media & Technology
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Even with support of leadership, acting on many of these initiatives will require a Democratic majority. Although the FTC is at its full complement with the swearing in of Chairwoman Kahn in June, the FCC continues to operate with only four Commissioners who are divided politically.

Initiatives the President Intends to Improve the Market for Business

Restoring Obama-Era Net Neutrality Rules

Section 5(l)(i) of the EO encourages the Chair of the FCC to adopt net neutrality rules similar to the rules adopted in the *2015 Open Internet Order* during the Obama Administration, which were subsequently repealed in 2017 during the Trump Administration.

With certain exceptions, the 2015 net neutrality rules—a detailed Wiley summary of which is available here—generally prohibited broadband Internet access service (BIAS) providers from (1) blocking lawful content, applications, services, or non-harmful devices; (2) throttling Internet traffic on the basis of content, application, service, or use of a non-harmful device; (3) engaging in paid prioritization; and (4) otherwise unreasonably interfering with or disadvantaging consumers or edge providers.

The EO confirms what was largely expected already, that adopting a regime similar to the 2015 net neutrality rules—or perhaps one that expands upon them, like California’s 2018 net neutrality statute or New York’s low-income broadband bill—would be a priority for President Biden, and presumably the Democratic-led FCC.

Improving Auction Rules to Avoid Spectrum Concentration

Section 5(l)(ii) of the EO encourages the FCC to avoid “excessive concentration” of spectrum in future spectrum auctions. It cites the need to avoid spectrum warehousing and to promote competition in the mobile communications and radio-based broadband services markets.

Encouraging Competition in the 5G Market

Section 5(l)(iii) of the EO encourages the FCC to support the development and adoption of Open Radio Access Network protocols and software for 5G—a matter that has seen interest from the FCC under the current and prior Administration. The EO further calls for continued engagement by the FCC in voluntary and consensus-based standards development organizations, as well as for the continued pursuit of measures to promote competition in the 5G equipment market.

Enacting “Right-to-Repair” Rules

Section 5(h)(ii) of the EO encourages the FTC to exercise its statutory rulemaking authority to address what the EO characterizes as “unfair anticompetitive restrictions on third-party repair or self-repair of items.” The White House Fact Sheet makes clear that the EO’s “right-to-repair” provision is targeted in part at cell phone manufacturers and other technology companies that it claims “impose restrictions on self and third-party repairs” including by “restricting the distribution of parts, diagnostics, and repair tools.”

The EO's discussion of "right-to-repair" issues comes on the heels of an FTC announcement on May 6, 2021, that it had submitted a report to Congress on device "repair restrictions," which the agency defined as "any practice that has the effect of limiting consumers' ability to repair products that they own." The report advocated for "ways to expand consumers' repair and maintenance options," and included a discussion of potential FTC rulemaking in this area.

Studying the Mobile App Ecosystem

Section 5(r)(iii) of the EO directs the Secretary of Commerce, in consultation with the Attorney General and the Chair of the FTC, to conduct a study of the mobile application ecosystem. The study must include input from interested stakeholders collected through open consultation. The Secretary of Commerce will submit a report on the study's findings together with recommendations for improving competition, reducing barriers to entry, and maximizing user benefit with respect to the mobile application ecosystem to the Chair of the White House Competition Council.

Ending Landlord Exclusivity Arrangements

Section 5(l)(vii) of the EO encourages the FCC to initiate a rulemaking to prohibit exclusivity arrangements between landlords and Internet service providers. These arrangements, according to the Biden Administration, prevent entry of competing broadband providers and result in higher prices for consumers.

Providing "Vigilant Oversight" of the Emerging UAS Market

Section 5(m)(iii)(B) of the EO directs the Secretary of Transportation to "provide vigilant oversight" over new aerospace-based transportation technologies, including unmanned aircraft systems (UAS). Such oversight should bear in mind the dangers of "early monopolization" in and "new air traffic control problems" from emerging services such as low-altitude UAS deliveries.

Evaluating Tech Firms in Consumer Finance

Section 5(v)(ii) of the EO directs the Secretary of the Treasury to submit a report to the Chair of the White House Competition Council on "the effects on competition of large technology firms' and other non-bank companies' entry into consumer finance markets."

Initiatives the President Intends to Improve the Market for Consumers

Establishing New Rules on Accumulation of Data

Citing increased collection and use of customer data by businesses, the White House calls on the FTC to adopt rules governing such practices. Specifically, Section 5(h)(i) encourages the FTC to establish rules to curb what it characterizes as "unfair data collection and surveillance practices that may damage competition, consumer autonomy, and consumer privacy."

The EO's approach builds on the recent FTC decision to create a new rulemaking group within the FTC's Office of the General Counsel (as we noted here) and, as discussed earlier this year, there are indications that the FTC may initiate rulemakings related to data use, privacy, and manipulation of data platforms. Doing so would represent a significant shift for the FTC, which has previously relied primarily on its enforcement rather than its rulemaking authority to address privacy and data-related issues.

Increasing Broadband Price Transparency

Section 5(l)(v) of the EO encourages the FCC to require Internet service providers to display a "broadband consumer label." The goal of such a label, according to the EO, is to provide consumers with "clear, concise, and accurate information regarding provider prices and fees, performance, and network practices." The White House asserts in the Fact Sheet that such a label would improve consumers' ability to compare options for broadband services.

Both Section 5(l)(v) of the EO and the Fact Sheet refer to the FCC's efforts during the Obama Administration to develop a "Broadband Nutrition Label" to serve as a safe harbor format for BIAS providers seeking to comply with the enhanced transparency requirements adopted by the FCC as part of its *2015 Open Internet Order*. During the Trump Administration, the FCC eliminated the broadband label safe harbor when it adopted the *Restoring Internet Freedom Order*.

In addition to a broadband consumer label, the White House supports requiring Internet service providers to report pricing information to the FCC. Section 5(l)(vi) of the EO encourages the FCC to initiate a rulemaking proceeding to require Internet service providers to regularly report broadband price and subscription rates "for the purpose of disseminating that information to the public in a useful manner." The EO contemplates that such reporting would improve price transparency and market competition.

Banning "Excessive" Early Termination Fees

Section 5(l)(iv) of the EO encourages the FCC to consider prohibiting unreasonable early termination fees for end-user communications contracts. The Fact Sheet explains that this endeavor is meant to allow consumers to switch providers easily and compare the costs of different providers more accurately. Early termination fees were the subject of regulatory scrutiny in the past, as state and federal regulators and courts considered the issue, including as it relates to rate regulation.

Requiring Airlines to Provide Refunds for Wi-Fi Connectivity Issues

The EO tasks the Secretary of Transportation with regulating the airline industry to achieve what the EO considers the improvement of competition and protection of consumers. In pursuit of those goals, Section 5(m)(i)(D) of the EO directs the Transportation Secretary to initiate a rulemaking proceeding to require airlines to refund "ancillary fees when passengers pay for a service that is not provided." Although the EO does not mention in-flight WiFi services by name, the White House Fact Sheet identifies WiFi and in-flight entertainment system fees as examples of fees that should be refunded if service is not provided.

Enabling the Portability of Consumer Financial Data

Section 5(t)(i) of the EO encourages the Consumer Financial Protection Bureau to commence a rulemaking to facilitate the portability of consumer financial transaction data (e.g., by allowing customers to download their banking data and transfer to another financial services provider). By increasing data portability, the White House seeks to make it easier for consumers to transition between financial institutions and to use innovative financial products.

Initiatives the President Intends to Improve the Market for Workers

The EO cites what it characterizes as barriers to competition in the labor markets, which the President concludes drive down wages and dignity in the workplace for workers. Section 5(f) of the EO encourages the FTC and DOJ to prevent employers from collaborating to suppress wages or reduce benefits by strengthening antitrust guidance. Additionally, Section 5(g) of the EO encourages the FTC to use its rulemaking authority “to curtail the unfair use of non-complete clauses and other clauses or agreements that may unfairly limit worker mobility.”

Although the EO does not call on the FCC specifically to help improve competition in the labor markets, it is conceivable that a Biden Administration FCC might condition future merger approvals on the provision of certain worker protections. Charged with examining whether a proposed transaction would serve “the public interest, convenience, and necessity”—the FCC has great latitude as it reviews mergers involving the transfer of control or assignment of FCC licenses. The FCC, in approving the New Charter merger (FCC 16-59), took the position during the Obama Administration that it is appropriate to “consider[] employment-related issues such as job creation, commitments to honor union bargaining contracts, and efficiencies resulting from workforce reduction” as part of its public interest analysis. During the Trump Administration, the FCC likewise acknowledged its authority to impose job-related conditions, while declining to do so in the T-Mobile/Sprint merger (FCC 19-103). And Commissioner Carr has recently proposed banning all devices made using certain forced labor from FCC equipment authorization.

Establishment of White House Competition Council

Section 4 of the EO establishes a White House Competition Council (the Council) within the EOP. The Council will identify additional administrative actions and legislative changes intended to address “overconcentration, monopolization, and unfair competition” in the U.S. economy. As described in Section 3 of the EO, the Council will also develop best practices for cooperation and coordination when agencies have overlapping jurisdictions.

The President for Economic Policy and Director of the National Economic Council will serve as Chair of the Council. Other members of the Council include the Attorney General and the Secretaries of Treasury, Defense, Agriculture, Commerce, Labor, Health and Human Services, and Transportation. The Chair may invite the FTC and FCC Chairs to participate in matters involving their respective statutory authorities and obligations. Members of the Council are directed to appoint a senior official within their agency to coordinate with the Council and oversee efforts to address unfair competition.

Conclusion

Through the lens of competition, the White House signals which regulatory and enforcement matters it wants to see near the top of the agendas of the FCC, FTC, and other federal agencies. The EO—although broad in scope—does not in many instances specify how agencies should pursue the Administration’s various initiatives. Indeed, it would be difficult to do so given the status of the FCC and FTC as independent agencies that typically are not directed to take action under EOs.

As constitutional scholars and White House lawyers have explained, “past and present executive orders...do not apply to independent agencies,” observing that President Barack Obama “suggested that independent agencies ‘should’ follow [some orders but] pointedly avoided the word ‘shall.’”^[1] There is therefore great opportunity to educate and inform regulators, including by identifying potential legal and policy objections, before they begin to put pen to paper implementing initiatives to promote competition in the U.S. economy.

For more information for employers or the international trade aspects of the EO, click the links below:

- [Employment](#)
- [International Trade](#)

[1] C. Sunstein and A. Vermeule, *Presidential Review: The President’s Statutory Authority over Independent Agencies*, https://www.law.georgetown.edu/georgetown-law-journal/wp-content/uploads/sites/26/2021/03/Sunstein_Vermeule_Presidential-Review-The-Presidents-Statutory-Authority-over-Independent-Agencies.pdf.