

ALERT

President Biden Issues EO Targeting Anticompetitive Practices in Container Shipping and Other U.S. Industries

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On July 9, 2021, President Biden announced an Executive Order (EO) designed to expand the federal government's response to "overconcentration, monopolization, and unfair competition" in a wide range of U.S. industries. Targeted industries include agriculture, information technology, pharmaceuticals, healthcare, telecommunications, financial services, and container shipping. The EO recognizes that foreign monopolies and state-owned or state-sponsored firms play a significant role in much of this unfair competition. The order also encourages vigorous enforcement of U.S. antitrust law, including retroactive challenges to transactions that have already occurred but may have violated the law.

Under the Biden Administration's "Whole-of-Government" approach, the EO identifies more than a dozen departments and agencies that have the authority to investigate and resolve anticompetitive practices, and it instructs the U.S. Department of Justice and Federal Trade Commission to vigorously enforce antitrust laws to enhance and protect market competition. The EO also establishes a White House Competition Council to coordinate the interagency efforts.

The Administration cites various Congressional acts, including U.S. antitrust laws, as a basis for instructing federal agencies and departments to protect conditions of fair competition. The EO identifies four primary strategies for facilitating competitiveness: (1) policing unfair, deceptive, and abusive business practices, (2) resisting consolidation and overseeing mergers, acquisitions, and joint ventures, (3) promulgating rules that promote competition and encourage entry of new competitors, and (4) compelling disclosure of

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information to promote transparency. The EO instructs listed agencies to adopt rules that promote competition and rescind rules that create barriers to market entry.

The EO specifically identifies the global container shipping industry as a key area of unfair competition. The Federal Maritime Commission (FMC) has been instructed to address these practices through three broad actions under the Shipping Act of 1984: (1) vigorously enforcing the prohibition of unjust and unreasonable practices of detention and demurrage, (2) requesting recommendations from the National Shipper Advisory Committee on ways to improve detention and demurrage practices, (3) and conducting further rulemaking to improve detention and demurrage practices.

The EO will likely support FMC's ongoing investigations into container bottlenecks and shipping alliances and lead to additional actions against companies participating in anticompetitive activities. In March 2020, FMC initiated a separate fact finding to resolve cargo delivery disruptions and, in November 2020, expanded its investigation to include anticompetitive practices of the three major shipping alliances. The FMC has also initiated an informal review of the role Chinese monopolies may play in the unavailability of shipping containers. This informal review is consistent with the recent EO's general recognition that foreign monopolies and state-owned companies often contribute to unfair competition, which is especially relevant to the container shipping industry where state-owned China COSCO Shipping Corporation Limited and its affiliates and subsidiaries dominate much of the market.

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