

NAM Overview: Biden Administration Executive Order on Competition Policy

President Biden on July 9 signed an [executive order](#) directing federal agencies to consider policy changes that the White House believes will enhance competition and protect consumers. While the specific policy details will need to be drafted and implemented by the relevant agencies, ultimately the EO could have far-reaching impacts across a broad swath of the American economy—including key manufacturing sectors.

Critical components of the EO include the President's directives to federal agencies to:

- Challenge previously consummated mergers and review existing horizontal and vertical merger guidelines, which could endanger manufacturers' efforts to streamline business operations and enhance efficiency for consumers;
- Promulgate so-called "right to repair" regulations that could endanger consumers and harm manufacturers by exposing valuable intellectual property to competitors;
- Reinstate "net neutrality" limitations, subjecting dynamic and innovative broadband markets to the clumsy regulatory tools of a bygone era; and
- Develop a plan to "combat high prescription drug prices" and begin importing prescription drugs from Canada, threatening America's leadership in biopharmaceutical innovation and endangering patient access to life-saving therapies.

NAM President and CEO Jay Timmons released a [statement](#) responding to the executive order, noting that some of the actions highlighted in the EO are "solutions in search of a problem" that could "threaten to undo our progress by undermining free markets."

The NAM will be monitoring agencies' responses to and implementation of the provisions in the executive order in the coming months. Working with our members, we will engage where appropriate to support free markets and protect manufacturers' ability to lead the economic recovery from COVID-19.

Key Provisions

The executive order announces the Biden Administration's focus on excessive concentration and the effects of monopolies within labor markets, agricultural markets, broadband providers, Internet platform industries, healthcare markets (including insurance, hospital, and prescription drug markets), repair markets, and U.S. markets directly affected by foreign cartel activity.

The EO also creates a new White House Competition Council to coordinate the Administration's efforts. Additionally, the EO provides direction to a variety of federal agencies on specific actions they should take to address competition policy concerns in the following areas.

Antitrust

Though the EO announces a whole-of-government approach to competition policy, the agencies with direct jurisdiction over antitrust regulation and enforcement remain the Federal Trade Commission and the Department of Justice. As such, the executive order encourages the FTC and the DOJ to take broadly applicable steps to:

- Challenge previously consummated mergers under the Sherman Antitrust Act;
- Review and revise the existing vertical and horizontal merger guidelines; and
- Enforce the antitrust laws "fairly and vigorously."

The executive order also focuses on the impacts of competition policies on workers, encouraging the FTC and the DOJ to:

- Ban or limit non-compete agreements that restrict worker mobility;
- Ban unnecessary occupational licensing restrictions that make it difficult for workers to find jobs when moving to a new state; and
- Strengthen antitrust guidance to prevent employers from collaborating to reduce wages and benefits.

A number of individual industries are highlighted as areas of focus for future FTC and DOJ antitrust rulemaking, including data collection and surveillance by Internet platforms and unfair practices on Internet marketplaces. Specific to manufacturing, the EO encourages the FTC and DOJ to focus rulemaking efforts on:

- Restrictions on third-party repair or self-repair of items (i.e., “right to repair”); and
- Agreements in the prescription drug industry to delay the market entry of generic drugs or biosimilars (i.e., “pay for delay”).

Agriculture

The executive order highlights consolidation in the agriculture space and identifies provisions to ameliorate its impacts on both farmers and consumers. Specifically, the EO directs the Department of Agriculture to:

- Write new rules defining when meat can be labeled a “Product of USA;”
- Make it easier for farmers to bring claims against agricultural companies by reinforcing the USDA’s interpretation that it is not necessary to show industry-wide harm to establish a Packers and Stockyards Act violation;
- Classify certain recurrent practices in the livestock, meat, and poultry industries “unfair, unjustly discriminatory, or deceptive;” and
- Adopt anti-retaliation protections for farmers.

The EO also encourages the FTC to promulgate “right to repair” regulations to allow for do-it-yourself or independent repairs of tractors and other farm equipment and prevent manufacturers from using “proprietary repair tools, software, and diagnostics to prevent third-parties from performing repairs.”

Healthcare

In the healthcare space, the executive order would impact the biopharmaceutical, hospital, and health insurance sectors. It also includes a provision specific to over-the-counter hearing aids.

Of specific relevance to biopharmaceutical manufacturers, the EO:

- Directs the Department of Health and Human Services to issue a comprehensive plan within 45 days to combat high prescription drug prices and price gouging;
- Directs the Food and Drug Administration to work with states and tribes to import prescription drugs from Canada;
- Directs HHS to clarify and improve the approval framework for generic and biosimilar drugs and otherwise support the adoption of generics and biosimilars; and
- Encourages the FTC to ban “pay for delay” agreements.

Elsewhere in the healthcare space, the EO directs HHS to:

- Propose a rule to allow for over-the-counter sale of hearing aids;
- Enhance price transparency at hospitals and other healthcare providers and combat “surprise billing;” and
- Standardize the health insurance plan options on the National Health Insurance Marketplace.

Technology

The executive order focuses on “big tech” platforms as well as internet service providers and technology manufacturers.

With respect to broadband providers, the EO encourages the Federal Communications Commission to:

- Reinstates the Obama era “net neutrality” rules that were rescinded in 2017;
- Conduct spectrum auctions under new rules designed to avoid excessive concentration;
- Support the development and adoption of 5G Open Radio Access Network protocols and software;
- Create a new reporting requirement for providers to disclose prices and subscription rates to the FCC;
- Develop a “Broadband Nutrition Label” to enable consumer price and spec comparisons; and
- Prevent providers from charging excessive early termination fees or entering into deals with landlords to limit service in a given building.

The EO also highlights practices by cell phone manufacturers and other technology companies to limit the distribution of parts, diagnostics, and repair tools as evidence in support of “right to repair” regulations.

Transportation

The executive order addresses multiple transportation industry sectors, including rail, shipping, and airlines. Specifically, the EO:

- Encourages the Surface Transportation Board to take action on “competitive or reciprocal switching” in order to require railroad track owners to provide rights of way to both freight and passenger competitors;
- Encourages the Federal Maritime Commission to enhance enforcement on “detention and demurrage” and consider further rulemaking in order to protect American exporters from certain shipping charges and practices; and
- Directs the Department of Transportation to issue rules to require the refund of ancillary fees when the relevant services are not provided (e.g., baggage fees for late bags) and to require that baggage, change, and cancellation fees be clearly disclosed.

Other Industries

- The EO directs the Department of Defense to complete a review of the state of competition within the defense industrial base.
- The EO directs the FTC to address data collection and surveillance practices on Internet platforms and unfair competition on Internet marketplaces.
- The EO encourages the DOJ to update guidelines on bank mergers and the Consumer Financial Protection Bureau to issue rules allowing customers to download their banking data.