

# Biden's Executive Order Reinvigorates Competition Policy

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On July 9, 2021, President Biden issued an [Executive Order on Promoting Competition in the American Economy](#), announcing his intent to reinvigorate antitrust enforcement throughout US industries with a special focus on certain markets including health care. The executive order and accompanying [fact sheet](#) cites research showing that hospitals in consolidated markets charge far higher prices than hospitals with several competitors and that hospital consolidation has left many areas, especially rural communities, without good options for convenient and affordable health care services. While the order does not institute tangible policy changes when it comes to health care consolidation, it illustrates the administration's focus on revitalizing competition across the country through a "whole of government" approach that encourages the federal agencies to leverage their knowledge, data, and resources in support of competition. In a recent [Milbank report](#), we highlighted the importance of federal and state coordination to address consolidation, and the new executive order represents a promising opportunity to enhance oversight.

## What Does the Order Do?

Unlike a legislative action, an order cannot grant new authority to federal agencies. Instead, it signals the administration's recognition of the harms of consolidation and readiness for action. The order urges vigorous enforcement of antitrust law and for agencies to use their existing powers to support competition. Specifically, the fact sheet accompanying the order "encourages the Justice Department [DOJ] and [the Federal Trade Commission] FTC to review and revise their merger guidelines to ensure patients are not harmed by such mergers" and affirms the authority of federal antitrust agencies to challenge transactions whose previous consummation

violated federal antitrust laws. It also directs the Department of Health and Human Services (HHS) to support existing hospital price transparency rules and to finish implementing bipartisan federal legislation to address surprise hospital billing. Perhaps most importantly, it creates a White House Competition Council to promote and coordinate the efforts of all federal agencies and to recommend new administrative action or legislation “to address overconcentration, monopolization, and unfair competition.”

**Action by Federal Agencies.** The federal agencies have heard the call. Shortly after the publication of the order, the FTC and DOJ issued a [joint statement](#) that said that they plan to jointly review their merger guidelines “with the goal of updating them to reflect a rigorous analytical approach consistent with applicable law.” Even before the publication of the order, the FTC, under its new chair, Lina Khan, began taking steps to redefine its power as a regulatory agency. On July 1, the FTC held its first open meeting and voted 3-2, along party lines, to pass [resolutions](#) calling for increased enforcement against purportedly unlawful mergers—both proposed and consummated—and to reinvigorate enforcement of the FTC Act.

In accordance with the order’s directive on price transparency, the HHS issued a [new proposed rule](#) to increase the penalty for hospitals that do not comply with the [Hospital Price Transparency Rule](#) to a maximum of \$2,007,500 per hospital annually. When Secretary Xavier Becerra [announced](#) the new proposed rule, he confirmed his support of the order, saying, “[n]o medical entity should be able to throttle competition at the expense of patients. I have fought anti-competitive practices before, and strongly believe health care must be in reach for everyone. With today’s proposed rule, we are simply showing hospitals through stiffer penalties: concealing the costs of services and procedures will not be tolerated by this Administration.” The order also encourages agencies to reevaluate “the influence of any of their respective regulations, particularly any licensing regulations, on concentration and competition,” which may give HHS the ability to reevaluate Medicare regulations, including reimbursement policies, to encourage competition.

**The White House Competition Council.** The greatest impact of Biden’s order is likely that it demands a “whole of government” competition policy to leverage the expertise from each federal agency and directs them to work collaboratively to

revitalize competition. The new White House Competition Council will be composed of the heads of many federal agencies, including the DOJ and HHS, and the director of the National Economic Council. This type of interagency collaboration has proven an effective tool to promote competition at the state level. For example, in Massachusetts, the Health Policy Commission is responsible for monitoring and reporting on health care cost trends. They have specific authority and expertise to analyze information collected by the Center for Health Information and Analysis (CHIA) to provide detailed Market Impact Reports to inform the attorney general's decisions on whether to challenge health care mergers as well as judges' decisions to grant or reject mergers.

HHS Secretary Becerra's successful challenges of anticompetitive behavior by large health care [providers](#) and [insurer mergers](#) during his time as the California attorney general should inspire and support similar actions by the FTC and DOJ. His expertise on the council will help the FTC and DOJ evaluate future health care mergers and assess whether completed mergers violate antitrust laws and should be unwound. Collectively, the prompt policy responses by the agencies signal an effort towards cohesive action by the federal government that may finally resolve the game of [antitrust whack-a-mole](#) that enforcers have been playing in health care markets.

## **The Need for Additional Funding and Support**

While the order and the responses from the FTC, DOJ, and HHS signal an intention to significantly increase oversight of rampant consolidation in health care, those actions require significant funding. Unfortunately, [funding](#) for the FTC and DOJ has decreased in relative dollars since 2010, despite a near doubling in merger filings. As Senator [Amy Klobuchar](#) points out in the [Competition and Antitrust Law Enforcement Reform Act of 2021](#), increased funding is critical to revising merger review guidelines, effectively reviewing proposed mergers, and challenging consummated mergers and anticompetitive practices by dominant health care entities.

Biden's order takes an aggressive approach to hospital consolidation and mobilizes federal agencies to work independently and collectively. If afforded greater funding support by Congress, the agencies could capitalize on the momentum of the directives to protect competitive markets. States can also leverage this opportunity by working collaboratively with federal antitrust enforcers and reevaluating their own policies, laws, and regulations to reinvigorate competition in health care markets to help ensure that all Americans have access to affordable health care services.