

President Biden's Competition Executive Order Breaks New Ground

By: Susan E. Dudley | July 14, 2021

In brief...

Executive orders are presidential documents that express policy and manage executive branch operations. President Biden has used executive orders aggressively in his first 6 months, and his most recent order on competition stands out in terms of its length, its prescriptiveness, and its application to independent regulatory agencies.

President Biden issued a sweeping [executive order](#) (E.O. 14036) last week aimed at promoting competition. I've written [elsewhere](#) about the merits of the order. This short commentary reviews the executive order vehicle itself and compares it to previous orders. The competition order diverges from past orders in its length, number of commands, and its application to independent regulatory agencies.

Executive Orders govern the executive branch.

[Executive orders](#) are [presidential directives](#) that express policy and [guide](#) executive branch actions, but they cannot impose obligations on, or grant rights to, parties outside of the executive branch of the federal government. They always include a “general provisions” section at the end with boiler plate language stating that a) implementation must be consistent with applicable law and appropriations, b) it does not affect the authority granted to agency heads or OMB’s administrative or budgetary authority, and c) it does not create any enforceable rights or benefits on parties outside the government.

Executive orders are numbered and published in the [Federal Register](#), and must cite to constitutional or legislative authority underlying them. Because they are designed to manage executive branch operations, presidents can issue them without public notice and comment or involvement from other branches of government. They can unilaterally revoke them, as well. For example, President Biden [revoked](#) dozens of President Trump’s orders in his first few days in office.

Despite these limitations, by directing agencies to take action—such as issuing regulations, modifying enforcement or procurement practices, prioritizing certain spending, etc.—they can be powerful tools not only for expressing policies but for effectuating them. While the orders themselves can be revoked

with the stroke of a pen, any regulations used to implement or overturn them are subject to the requirements of the Administrative Procedure Act as well as other statutory and executive requirements.

President Biden's latest order is notable in its length and prescriptiveness.

President Biden's competition order is almost 7,000 words and directs more than a dozen agencies to undertake 72 different initiatives, some of which are quite detailed and prescriptive. It uses "shall" 28 times, and provides specific direction for policy changes the president wants agencies to make.

My colleague Mark Febrizio used text analysis to see how the length and number of commands in this order compared to others (here's a [link](#) to the data). Using a sample of all executive orders issued since 1994, he found the mean word count was roughly 1,200 (median 890). "Shall" was used an average of 11.4 times (median of 7 times). Only 12 executive orders were longer and more prescriptive (as measured by the use of "shall") than E.O. 14036—three from President Obama, four from President Bush, and three from President Clinton. President Biden has already issued two other executive orders that surpass this latest order's total word count and usage of shalls.

The order may break new ground in its coverage of independent regulatory agencies.

In addition to directing agencies to undertake rulemaking, take enforcement actions, and prepare reports within designated time frames, the order creates a new White House Council on Competition to "work across agencies to provide a coordinated response to overconcentration, monopolization, and unfair competition in or directly affecting the American economy." It designates the Assistant to the President for Economic Policy (who also directs the National Economic Council) to serve as chair, and identifies several cabinet members and the Administrator of the Office of Information and Regulatory Affairs in OMB to serve on the Council. The order also envisions Council membership for several independent regulatory agencies, and directs the Chair to invite the heads of the Federal Trade Commission, Federal Communications Commission, Federal Maritime Commission, the Consumer Financial Protection Bureau, and the Surface Transportation Board to participate, "to the extent consistent with their respective statutory authorities and obligations."

The order does not direct, but rather "encourages" these independent regulatory agencies to take actions (including serving on the Council). Independent agencies are often headed by multi-member boards, and while presidents can appoint their members (with Senate confirmation) and designate one to serve as chair, [legal precedent](#) limits their ability to remove those appointees except for cause. Thus, past presidents have generally not applied executive orders to independent agencies. For example, President Clinton explicitly excluded independent agencies from his [E.O. 12866](#), which established procedures and policies governing regulatory analysis and review that remain in place today. (That order was almost as long as President Biden's competition order and used "shall" 92 times.) President Obama's [E.O. 13725](#) on promoting competition (which was a little over 1,000 words and used "shall" 11 times) included a clause that "[strongly encouraged](#)" independent agencies to comply.

President Biden uses similar overarching language in his order, but goes further with numerous initiatives targeting independent agencies. It “encourages” the Chair of the Federal Trade Commission, along with the Attorney General, to take several steps to implement President Biden’s “whole-of-government” approach to competition. The Federal Communications Commission is also “encouraged...to consider” adopting several regulations, including one to classify broadband service as a public utility. While the order avoids the more imperative word “shall” with respect to the independent agencies, the level of specificity in these encouragements may break new ground. In comparison, President Obama’s [E.O. 13579](#), “Regulation and Independent Regulatory Agencies”—which was viewed as a departure from past presidents’ reluctance to extend their orders to independent agencies—focused on procedural, rather than substantive directions. In contrast to Biden’s order encouraging specific rulemaking, Obama order said each independent regulatory agency “should develop and release to the public a plan” for periodically reviewing its regulations.

President Biden has issued [more executive orders](#) in his first few months in office than recent presidents, and this latest order, which may break new ground in its breadth and detail, may indicate he plans to make more muscular use of them to focus agencies on his top priorities.