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COMPETITION POLICY IN THE BIDEN ADMINISTRATION: TRANSLATING CAMPAIGN POETRY INTO GOVERNING PROSE

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Thanks for that kind introduction and for the privilege of delivering this year’s Milton Handler Lecture. Thanks too to Arnold & Porter, my former home when not in government, for supporting this venerable tradition. This is personal for me on another level. Some years ago, Professor Handler invited a young academician — my mentor and dear friend Bob Pitofsky — to co-author and later become lead author of Handler’s ground-breaking casebook on trade regulation, an honor that Bob treasured throughout his distinguished career.

My assigned task tonight is to reflect on the Biden Administration’s approach to competition policy and enforcement as we approach the 2024 election. I welcome the opportunity. And look forward to hearing from the panel all that I got wrong.

I begin with the 2020 campaign, particularly the Democratic primary, where Senators Sanders and Warren took mainstream the debate that we in the antitrust silo have engaged in for years: Whether to continue to embrace, to modify, or to abandon Robert Bork’s Chicago School view that antitrust enforcement should play a very limited in our economy; that enforcers were more likely to screw things up than make them better; that markets generally were competitive and, to the extent they were not, were invariably self-correcting and could be counted on to ensure price, quality and innovation competition.[[1]](#footnote-2)

The progressives argued – in plain English (and that is a compliment) – that the model got it wrong: IO economists have been telling us for years that most markets are not perfectly competitive — not even close; that enforcement – actually, underenforcement – based on that erroneous assumption has led to increased concentration throughout the economy, contributed to the growing income gap between the super wealthy and the average worker, allowed tech platforms to monopolize their respective markets; and ignored how monopsony power — buyer power — suppressed labor and other forms of upstream competition.

Candidate Biden embraced that progressive view in the general election, and President Biden and his team from the outset undertook a fundamental rethinking of the role antitrust and competition policy can and should play in the American economy. They highlighted the deficiencies in the Chicago School’s hands-off approach to enforcement and challenged reliance on “the consumer welfare standard” – a phrase that today has achieved Rorschach inkblot status, subject to so many eye-of-the-beholder interpretations that the term today confuses more than clarifies.

Over three years ago, the Biden team began by asking two basic questions: Where is our economy not functioning competitively, and what tools can the federal government employ to address those problems?”

Last year’s Handler Lecturer, Professor Tim Wu, outlined that zero-based, fresh-look approach.[[2]](#footnote-3) For those not present last year – or with short term memory problems like mine – it is worth reading. Tim describes how the Biden Administration, from its early days, sought to identify structural and performance problems in our economy and specify actions the federal government needed to take to address them.

We antitrust practitioners tend to focus on litigation wins and losses, especially in looking at outcomes in this Administration where the leadership at both the FTC and the DOJ promised — the Wall Street Journal would say “threatened” — a more assertive approach to competition and consumer protection enforcement. I will discuss litigation in a few minutes. But that narrow lens misses a lot of what has gone on in these last three and a half years. I hope, tonight, to widen the aperture, pull back the camera, and assess more broadly the progress that has been made towards making markets work better.

Let’s start with Biden’s July 9, 2021 Executive Order on competition policy.[[3]](#footnote-4) His remarks that day began by embracing the progressive critique that “capitalism without competition isn’t capitalism; it’s exploitation,” and ended with the issuance of a far-reaching executive order listing specific tasks his administration would take and creating a Competition Council – consisting of agency heads across the federal government -- to ensure that making the economy work for everyone would be a core priority.

The “whole of government” rhetoric was not new.

What was different was that this EO identified specific issues and problem areas for agencies to address – individually and collectively – and set up the mechanisms to enforce it. Executive Orders full of promises are often issued. But accountability in executive orders is not always a feature.

Biden directed the new Competition Council to work closely with the National Economic Council, led at that time by Brian Deese and ably supported by Professor Wu; it would meet semi-annually with the President and report publicly on progress being made. Accountability, senior official involvement, and tackling head-on adverse economic consequences that flow from market imperfections distinguish this effort from those that preceded it.

The White House’s semi-annual readouts after each meeting reveal the breadth of the initiative, the active involvement of agency heads, and the progress being made – both by individual agencies and through inter-agency cooperation. The most recent meeting, held in March, included Secretaries Austin, Vilsack, and Becerra – as well as Chairs Bernstein, Khan, Rosenworcel, Gensler, AAG Kanter, and many others.[[4]](#footnote-5) Even discounting for some hyperbole, the readouts of that and prior meetings suggest that the federal government is accomplishing a lot. A few examples tell the story:

* Unprecedented efforts by the Consumer Financial Protection Bureau, the Department of Transportation, the FTC, the Antitrust Division and others to crack down on excessive and undisclosed junk fees charged across the economy. The problem is pervasive: we are nickeled and dimed by banks, credit card companies, concert, sports and other entertainment venues, landlords, airlines, and resorts;[[5]](#footnote-6)
* Attacking the monopsony power in the ag sector: The Agriculture Department using its long-languished authority under the Packers and Stockyards Act to ban abusive practices by processing companies that hurt growers and producers and, for the first time, referring abuses to the Antitrust Division for prosecution;[[6]](#footnote-7)
* The FCC pursuing rules to require internet providers to disclose monthly fees, prices, and internet speeds;[[7]](#footnote-8)
* Requiring airlines to make it easier for us to get our money back — rather than just airline credits — when flights are cancelled or significantly delayed.[[8]](#footnote-9)

In addition, what gets less attention — but is no less significant — is the under-the-radar interagency coordination and communication required by the Biden Executive Order.[[9]](#footnote-10) Examples include:

* The Surface Transportation Board working with the Antitrust Division to tackle railroad consolidation;[[10]](#footnote-11)
* Interagency cooperation agreements signed between the antitrust agencies and the NLRB, the Labor and Treasury Departments, and even the Federal Maritime Commission;[[11]](#footnote-12)
* Financial regulators and antitrust enforcers better coordinating on how best to address consolidation in the banking and credit card sectors;
* The FTC and DOJ collaborating with HHS in assessing the impact of ongoing consolidation in health care markets, including the competition risks associated with private equity roll-ups;
* The FTC and DOJ working in tandem to challenge anticompetitive behavior in labor markets, most recently the FTC’s challenge – supported by the DOJ – to Kroger’s proposed acquisition of Albertsons in part on the grounds that the merger would hurt competition for unionized workers.[[12]](#footnote-13)

These efforts may seem like small ball to some, but collectively they are targeting areas of the economy that are highly concentrated – and have been for a long time; where labor markets are not competitive due to non-compete clauses and no-poach understandings; and where consumers can’t access the information needed to make informed choices and, even where they can, lack competitive options.

The net result is resource-leveraging at the federal level on competition – and consumer protection – of a kind and quantity we have never seen before.

That same coordinated resource-leveraging characterizes the Biden enforcers’ relationship with state attorneys general in this Administration. Those relationships often face political, substantive, and tactical disagreements. But cooperation today, as reported by both federal and state enforcers, is at an all-time high. According to the National Association of Attorneys General (NAAG), during the Biden term federal and state enforcers have joined forces on at least 14 different cases and are coordinating closely on cases where they have filed separately. Most recently, 17 attorneys general are co-plaintiffs with DOJ in challenging Apple’s alleged monopolization of the smartphone market.[[13]](#footnote-14)

Another underappreciated aspect of the Biden enforcers’ approach to their respective jobs is their use of the bully pulpit – Teddy Roosevelt would love this – to educate the public, lawmakers, and the business community about areas where the economy is under-performing due to anticompetitive behavior, where markets aren’t working, and where changes in policy can address those problems.

Lina Khan and Jonathan Kanter appreciate the importance of publicly explaining — and, where necessary, defending — their actions. From appearances on 60 Minutes, Face the Nation, The Daily Show, Pod Save America, and CNBC; listening sessions in Silicon Valley, local communities, and rural America, even addressing the Federalist Society, Chair Khan and AAG Kanter have worked to drive home the importance of these pocketbook issues and build support for the actions needed to address them.

Take the FTC proposal to ban non-compete agreements. The agency’s hearings early in the Biden era and subsequent rule proposal spotlighted a pervasive practice limiting worker mobility across our economy — from minimum wage workers to highly skilled professionals. The comment period generated 26,000 largely favorable comments and led to the final rule issued last month banning most non-competes.[[14]](#footnote-15)

I appreciate that the now-final rule faces fierce legal challenges. The courts ultimately will sort that out. But while that plays out, look at the state level actions taken since the FTC first shined a spotlight on the issue early in this Administration.

Since 2022 alone, 16 states and the District of Columbia have enacted or strengthened restrictions on non-competes. Minnesota recently enacted a blanket ban. Some states adopted industry-specific restrictions, often focusing on the healthcare industry. Illinois prohibited non-compete agreements between nurses and nursing agencies in 2022; Maine banned non-competes for veterinarians in 2023; New Jersey will prohibit non-competes for domestic workers as of July 2024. The District of Columbia focused on wage thresholds to protect lower-income workers and prohibited non-competes for most workers earning less than $150,000.

This is not just a blue state phenomenon: Indiana, Iowa, South Dakota, and Tennessee recently added limitations on non-compete agreements in the healthcare industry.[[15]](#footnote-16)

The FTC’s strategic deployment of its previously oft-underutilized 6(b) study authority warrants mention as well. From exploring the potential adverse consequences of the horizontally and vertically concentrated PBM industry, looking at the nascent competitor acquisition strategies of dominant tech platforms, and proactively examining consolidation and joint ventures in the generative AI sector, the FTC is getting back to using that powerful provision of the FTC Act as Congress intended.

Turning to DOJ and FTC enforcement, it is too early to make definitive judgments about much of it. We will not see the results of the pending challenges to the dominant tech platforms — Facebook, Google search and ad tech, Amazon, and Apple — for years. But both agencies and their state attorneys general colleagues are doing the right thing by challenging the harms allegedly caused by big tech’s efforts to squash competition and maintain their persistent dominance. Note too that the legal underpinnings of these Section 2 challenges rely on current antitrust jurisprudence, not on novel and untested theories.

The agencies have won some and lost some merger challenges. Losing a merger challenge is not unique to this Administration. And the wins are significant. Successful challenges to the Northeast Alliance between American and Jet Blue,[[16]](#footnote-17) blocking Jet Blue’s efforts to eliminate Spirit, its ultra-low-cost rival,[[17]](#footnote-18) preventing consolidation among book publishers,[[18]](#footnote-19) and blocking Illumina’s effort to reacquire Grail and position itself to foreclose rivals developing cancer detection tests[[19]](#footnote-20) reinforces Section 7’s sometimes under-appreciated and under-applied focus on transactions that **risk** substantially lessening competition. While some critics see overreach in the losses, in the Meta Within[[20]](#footnote-21) and Microsoft Activision[[21]](#footnote-22) cases the legal theories underlying the preliminary injunction challenges seem sound. The losses mostly turn on the adequacy of the factual proof, not on an effort to dramatically rewrite merger jurisprudence.

It should be clear by now that I think this Administration is on the right path. I appreciate that Chicago School adherents, led by the Wall Street Journal editorial page and the Chamber of Commerce, vehemently disagree. They cite, for example, last year’s **proposed** revisions to the merger guidelines, which in style and substance differed significantly from prior iterations and risked losing the long-standing judicial embrace of the guidelines.[[22]](#footnote-23) But the critics ignore how the final version of those guidelines responded to constructive input from the legal and economic communities and produced a product that honored the basic analytical framework of prior iterations while identifying areas of potential concerns with M and A activity not previously addressed. That’s good government.

I need to wind this up and turn things over to Spencer and the panel. Allow me one final observation:

The saying that “politicians campaign in poetry but govern in prose” comes to mind.[[23]](#footnote-24) Both FTC Chair Lina Khan and Assistant Attorney General Kanter in their prior lives spoke passionately about the need to reject the tenets of the Chicago School and pursue a competition policy that recognized that imperfect competition and unaddressed consumer and worker harm characterized many markets. Some critics worried that their neo-Brandesian call to arms would produce a radical agenda that the courts would systematically reject. But the reality is that this Administration deserves credit for identifying areas where competition policy and enforcement could make a difference and taking actions that respected antitrust jurisprudence while invoking it to tackle the many areas of our economy where markets were not delivering the price, quality, and innovation competition we deserve. They translated the poetry of the progressive movement into the prose of competition policy and enforcement. That deserves to be recognized.

Thanks.

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