Insight

Competition EO Further Blurs Independence of Agencies

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EXECUTIVE SUMMARY

- The Biden Administration's latest executive order (EO) is the broadest and most specific example in recent history of a president seeking certain policy outcomes from independent agencies.
- While previous recent administrations, notably the Obama and Trump Administrations, issued executive orders that sought actions from independent agencies, they were less direct in seeking specific policy outcomes.
- As the autonomy of independent agencies continues to be eroded by presidents, the likelihood of harmful economic uncertainty increases.

INTRODUCTION

President Biden's latest executive order (EO) is an economy-wide policy statement aimed at addressing perceived competitive abuses. The EO, "Promoting Competition in the American Economy," directs more than a dozen federal agencies, including independent agencies, to consider new regulations on business behavior.

While presidents attempting to motivate policy decisions at independent agencies is not new, the breadth and specificity of this EO represents a further blurring of these agencies' status, seeming to shift them from autonomous toward being under the control of the president. This analysis considers the impact of that blurring and its effect on the free market.

OVERVIEW OF THE EO

The EO is exceptional in its breadth and reach into certain sectors of the economy.

According to a White House fact sheet, it “includes 72 initiatives by more than a dozen federal agencies to promptly tackle some of the most pressing competition problems across our economy.” Virtually every major sector is affected, including technology, health care, financial services, and transportation.

While much of the order would lead to less market freedom, including new rules on Internet traffic, corporate mergers, and even the movement of goods, some elements could have pro-market effects – such as reducing occupational licensing requirements that can artificially suppress labor markets.

The EO directs certain executive agencies to “consider” issuing new rules to implement the president’s stated objectives. It also “encourages” independent agencies to take certain actions where they have jurisdiction. Notionally, however, these words have the same meaning – agencies across the federal government should act where possible to implement the EO’s specific policy goals.

THE BLURRY LINES OF INDEPENDENT AGENCY AUTONOMY

The reason independent agencies are encouraged, rather than directed, to consider regulatory actions is a nod to their independence that Congress granted when authorizing them. The leaders of independent agencies, which often consist of multi-member commissions, can typically only be removed for cause, whereas the heads of executive agencies serve at the pleasure of the president. This structure is intended to make independent agencies less politically motivated and to make their policies more durable.

Presidents meddling in the policy decisions of independent agencies is neither novel nor partisan. The new EO is modeled in part on an EO addressing competition issues signed by President Obama late in his presidential term, for instance. For his part, President Trump sought to crack down on social media companies through an independent agency, the Federal Communications Commission (FCC).

What is different about the Biden Administration’s EO is its breadth and specificity. The Obama Administration’s order “strongly encouraged” independent agencies “to act in accordance with” the EO, but it did not include any specific outcome it sought. Even the Trump Administration’s social media EO did not directly encourage the FCC to take an action. Rather, it directed the Department of Commerce (an executive department) to petition the FCC for a rule – a process available to every American.

By contrast, the Biden Administration’s EO asks independent agencies to explore regulatory remedies to achieve specific outcomes. The Federal Trade Commission is encouraged to pursue rules on the accumulation of data by technology companies and to prevent companies from restricting independent repair of their products. The FCC is encouraged to "restore Net Neutrality rules undone by the prior administration" and prevent Internet service providers from making exclusive deals with landlords that would in effect reduce options for tenants. Advocating for such specific outcomes, and across several independent agencies, appears to go beyond recent precedent by blurring the lines between the president's agenda and specific policies pursued by independent agencies.

ECONOMIC IMPLICATIONS

The debate about how much discretion the president has over independent agencies is longstanding. On one hand, the president is the chief executive and independent agencies are part of the executive branch. If the president's constitutional obligation is to enforce laws, then it stands to reason they should be able to exert some control over the decisions of independent agencies. It is for this reason that multiple Department of Justice (DOJ) opinions concluded it would be within the president's authority to extend the Office of Information and Regulatory Affairs' regulatory review process to independent agencies. If the president enforces the policy outcome, they should at least get a chance to make sure the policy is grounded in good regulatory and economic analysis.

On the other hand, Congress made these agencies independent for a reason, typically to insulate the issues under their jurisdiction from some degree of political influence. As the DOJ opinions mentioned above acknowledge, the ultimate policy decision is made by the agency. The economic benefit of this structure is that – theoretically – policies should be more durable, which improves certainly for businesses in the marketplace. That theory has been tattered somewhat in recent years, as some independent agencies have reversed their own policies, most notably with the FCC's Net Neutrality rules (which are due to be revised again under Biden's EO).

The Biden Administration's EO tatters that theory even further, however. By seeking independent agency action with such specificity, it opens the door to future administrations doing the same. The result will be increased economic uncertainty and because of more politicization at independent agencies.

CONCLUSION

The Biden Administration's latest EO treads new territory in the breadth and specificity of what it requests of independent agencies. The EO further blurs the independence of those agencies from the president by seeking specific policy outcomes on a host of competition issues. While there are good arguments for some increased presidential control over independent agencies, further erosion of their policy independence will lead to increased economic uncertainly that will be harmful. Since presidents have no incentive to cease this erosion, it is up to an increasingly marginalized Congress to take steps that clearly delineate the standing of independent agencies.