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President Biden's New Strike Force on Unfair and Illegal Pricing

By: Carl Hittinger and Ayanna Brown

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On March 5, President Joe Biden launched the strike force on unfair and illegal pricing (strike force) for the purpose of implementing policies in his July 9, 2021, "Executive Order on Promoting Competition in the American Economy." The strike force on unfair and illegal pricing is co-chaired by the Department of Justice (DOJ) and the Federal Trade Commission (FTC) with the goal to "strengthen interagency efforts to root out and stop illegal corporate behavior that hikes prices on American families through anti-competitive, unfair, deceptive or fraudulent business practices." Some of the key sectors the strike force has vowed to focus on are housing, prescription drugs and healthcare, food and grocery, and financial services.

The strike force's launch is to continue the efforts of the president's Competition Council, which was established "to work across agencies to provide a coordinated response to overconcentration, monopolization, and unfair competition in or directly affecting the American economy." During the last seven months, the Competition Council, which consists of the secretaries of various departments (e.g., agriculture, commerce, labor), has proposed and finalized certain efforts targeted at eliminating high prices and other anti-competitive conduct. More specifically, the FTC and DOJ recently finalized updated merger guidelines to help promote competition, the FTC finalized a rule to ban auto dealers from using bait-and-switch tactics to deceive consumers and from charging hidden junk fees, and the FTC and the U.S. Department of Health and Human Services (HHS) launched a probe into anti-competitive behavior by group purchasing organizations and drug wholesalers that may contribute to generic drug shortages. By the sixth meeting, the Competition Council intends to announce three new actions that promote competition and lower costs, and to release a new report showing that the administration's work to eliminate junk fees will save Americans more than $20 billion each year.

The president's strike force also seems to continue the efforts of the procurement collusion strike force (PCSF) led by the Antitrust Division of the Department of Justice that began in 2019 with the goal of combating antitrust crimes in government procurement and funding such as price fixing, bid rigging and customer market allocation. As of Oct. 1, 2023, the PCSF has opened more than 100 investigations, achieved over 50 guilty pleas and trial convictions, and recovered more than $65 million in fines and restitution.

Despite the new strike force's somewhat duplicative efforts at attacking anti-competitive conduct and high prices, critics doubt whether the strike force will be able to produce significant results across the various key sectors. One critique put forth by a high-ranking officer from the U.S. Chamber of Commerce suggests, "the strike force is an attempt to return to the failed policy of government price controls which President Nixon tried 50 years ago," leading to shortages, high inflation and economic stagnation. Another sceptic questioned whether the courts and agencies will be able to determine when prices are appropriate and how to target them when excessive due to the language of the Sherman Antitrust Act focusing only on addressing competition rather than limiting high prices. In addition to the critiques, some in Congress do not appear to be in line with putting a large amount of resources into antitrust regulation. On March 6, the House of Representatives passed a "consolidated budget bill containing six separate appropriation bills including $45 million in cuts to the Department of Justice Antitrust Division … and it's expected to soon pass in the Senate."

Regardless of what potential obstacles stand in the way, Biden remains steadfast in his mission to attack high prices and other anti-competitive conduct. Indeed, on March 7, at Biden's State of the Union address, he said, "Look, too many corporations raise prices to pad their profits, charging more and more for less and less. That's why we're cracking down on corporations that engage in price gouging and deceptive pricing, from food to health care to housing." These are some of the key sectors that the strike force intends to focus on. Therefore, companies with businesses in the key sectors should expect that the strike force will be actively pursuing those who are not adhering to fair competition and pricing laws and, in the meantime, would be prudent to ramp up compliance efforts to navigate this Drake Passage of antitrust convergence.

Stay tuned.

Carl W. Hittinger *is a senior partner and serves as Baker & Hostetler's antitrust and competition practice national team leader and is the litigation group coordinator for the firm's Philadelphia office. He concentrates his practice on complex commercial and civil rights trial and appellate litigation, with a particular emphasis on antitrust and unfair competition matters, including class actions. His experience also includes a judicial clerkship with U.S. District Chief Judge Emeritus Louis C. Bechtle of the Eastern District of Pennsylvania. He can be reached at 215-564-2898 or chittinger@bakerlaw.com.*

Ayanna Brown *is an associate in the firm's Houston office in its litigation group. Her practice spans across antitrust and competition, restructuring and bankruptcy, products liability and toxic tort, health care and other commercial litigation matters. Before joining the firm, Brown served as a legal extern for the U.S. Attorney's Office for the Northern District of Texas and a judicial intern for Judge Martin Hoffman in the 68th Civil District Court. She can be reached at 732-328-0035 or ajbrown@bakerlaw.com.*

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