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President Biden Announces New Price Fixing “Strike Force”: Government Continues Antitrust Crusade

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Earlier this month, President Biden announced the formation of a “Strike Force on Unfair and Illegal Pricing.” This strike force will be an interagency group co-chaired by the FTC and DOJ. President Biden stated the group will focus on industries including “prescription drugs, health care, food and grocery, housing, [and] financial services.” While the exact makeup of the strike force is not clear, it has been reported that FTC Chair Lina Khan and Jonathan Kanter, Assistant Attorney General in the DOJ’s Antitrust Division, will co-chair it.

The group is being formed on the heels of aggressive FTC and DOJ antitrust enforcement efforts. In March 2022, the DOJ announced it would again consider bringing criminal prosecutions for violations of Section 2 of the Sherman Act. This reflected a break in longstanding DOJ practice. For decades, the federal government prosecuted per se offenses under Section 1 of the Sherman Act but did not bring *criminal* prosecutions for violations of Section 2. In September 2022, the DOJ lived up to its word, and brought and settled the first criminal charges under Section 2 in nearly 50 years.

Meanwhile, the FTC has also stepped-up antitrust enforcement. In November 2022, the agency issued a policy statement expanding its interpretation of “unfair methods of competition” under Section 5 of the Federal Trade Commission Act. Earlier this year, the FTC provided a glimpse of how this expanded interpretation would look in practice.

Prescription drug and health care industries – specifically named in the President's most recent announcement – have been particularly scrutinized by the FTC of late. In February, the agency, joined by Health and Human Services, opened a period of public comment regarding proposed rules addressing market concentration among prescription drug wholesalers. The strike force announcement makes two times in as many months that the pharmaceutical industry has been the explicit focus of the government's antitrust enforcement.

President Biden's new strike force is another facet of the administration's scrutiny of pricing practices. It signals the government is ready to go beyond the FTC and DOJ efforts outlined above, opting for expanded, inter-agency enforcement against companies across a host of industries. While details of the makeup and mission of the strike force are limited so far, its announcement in conjunction with the President's State of the Union should put businesses and practitioners on notice. Companies in the named industries should pay particular attention and review their practices to ensure they are in close conformity with antitrust and competition rules. And practitioners should bear in mind the continued government focus on anticompetitive conduct when advising clients.

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