



New Strike Force Targets Unfair & Illegal Pricing

On March 5, 2024, the White House announced plans to launch an interagency strike force to lower costs across the U.S. economy.¹ The Strike Force on Unfair and Illegal Pricing will be co-chaired by the Federal Trade Commission (FTC) and the Department of Justice (DOJ) and aims to strengthen the agencies' efforts to stop illegal corporate behavior that increases prices for Americans through deceptive, anti-competitive, unfair, and fraudulent business practices.²

While details are currently sparse, it has been announced that the strike force, on which various additional agencies will participate in addition to the FTC and DOJ, will focus its efforts "on key sectors where corporations may be violating the law and keeping prices high, including prescription drugs and health care, food and grocery, housing, financial services, and more."³ The strike force will focus primarily on enforcement, and will scrutinize multiple industries, including healthcare.⁴ The Department of Health and Human Services (HHS) is also expected to be a part of the strike force, focusing on enforcement actions related to the healthcare industry.⁵

The creation of this strike force is the latest step in the federal government's push (across two presidential administrations) to increase competition in the healthcare industry. In 2018, HHS, the Department of the Treasury, and the Department of Labor issued a 119-page report comprising over 50 recommendations to increase quality, decrease cost, and promote competition in healthcare.⁶ In 2021, President Biden issued an executive order to promote competition in the American economy.⁷ The executive order was designed to address issues the administration identified as contributing to harmful trends associated with decreased competition and corporate consolidation, which are ultimately harming American consumers.⁸ The executive order, which set forth 72 initiatives for multiple federal agencies, did not immediately establish requirements, but rather directed federal agencies to review issues and implement policies to reflect the administration's goals.⁹ Pursuant to the executive order, federal agencies have taken action over the past couple of years to lower healthcare and prescription drug costs for consumers as well as increase competition and safety in healthcare facilities.¹⁰ Some of these actions include:

- HHS and the Centers for Medicare & Medicaid Services (CMS) is currently collecting feedback on how the agencies can promote competition,

increase transparency, and identify the effects of vertical integration in Medicare Advantage (MA) markets.

- The FTC, DOJ, and HHS published a Request for Information (RFI) to receive feedback and examine the role of corporate influence and private equity in the healthcare industry.
- CMS released ownership data for Federally Qualified Health Centers (FQHCs) in an effort to promote competition and increase transparency.
- HHS published Medicare-certified nursing home ownership data, increasing transparency of and the ability to identify common owners and those that had a history of poor performance.
- HHS announced steps to crack down on nursing homes that put resident safety at risk, including a proposed rule that set minimum staffing levels to ensure a higher quality of life for residents.
- The Food and Drug Administration (FDA) and the U.S. Patent and Trademark Office (USPTO) announced increased scrutiny of pharmaceutical patents that resulted in higher prescription drug costs. The FDA and USPTO also began collaborating on ways to improve the patent system in order to increase access to affordable and safe prescription drugs.
- HHS enacted a rule cracking down on hospitals that failed to disclose their prices pursuant to Hospital Price Transparency requirements, including increasing nearly twentyfold the fine for hospitals that failed to report their prices.¹¹

Further, the executive order called for the formation of the White House's Competition Council, comprised of eight cabinet members and seven independent agencies, which "drives the Administration's whole-of-government effort to restore competition and coordinate progress on the Executive Order's 72 initiatives, delivering concrete benefits of increased competition to America's consumers, workers, farmers, and small businesses."¹² The announcement of the strike force is one of three new actions by the Competition Council to promote competition in the American economy.¹³

The announcement of the strike force also followed the appointment of Stacy Saunders on January 8, 2024, who will serve as the HHS's inaugural Chief Competition

Officer.¹⁴ In this newly-created role, Saunders will be responsible for identifying, coordinating, and elevating opportunities across HHS to promote competition in healthcare markets.¹⁵ The Chief Competition Officer will also play a role in working with the FTC and DOJ to address healthcare market concentration through reciprocal training programs, data-sharing, and the further development of additional healthcare competition policy initiatives.¹⁶

In a call with reporters, FTC Chair Lina Khan said that the FTC was “excited to be co-chairing the president’s new strike force on unfair and illegal pricing, which builds on the FTC’s far-reaching work to promote competition and tackle unlawful business practices that are inflating costs for Americans.”¹⁷ Assistant Attorney General for DOJ’s Antitrust Division, Jonathan Kanter, stated in the same briefing that the strike force will be a “new chapter in a fight against unfair and anticompetitive pricing.”¹⁸

On March 5, 2024, the U.S. Chamber of Commerce published a statement expressing their concerns with the strike force, and stated that “this effort by the Biden Administration to use regulatory agencies to micromanage how private businesses set prices will have the same result: shortages, fewer choices for consumers,

a weaker economy, and less jobs.”¹⁹ The statement also asserted that “the strike force will be led by two agencies that, for the past three years, have been openly hostile to market efficiencies — blatantly ignoring lower prices and better outcomes for consumers.”²⁰ While some have concerns with the announcement of the strike force, others view the announcement as simply a symbolic gesture.²¹ Stephen Calkins, a professor of law at Wayne State University and former general counsel of the FTC, stated that “this is an exercise in marketing, not competition promotion.”²² Calkins also mentioned that the “strike force” could be a bold term to catch the attention of the public.²³

Some policy experts believe that the strike force may not be effective, as there is not a set standard for determining if the price of a certain product is too high.²⁴ The FTC and DOJ have been able to bring enforcement actions in cases where companies engage in price-fixing or other anticompetitive actions, but price regulation has not been previously included in that scope.²⁵

Nevertheless, the development of an interagency strike force seems to be yet another indication of the federal government’s increasing focus on enhancing competition in the healthcare industry.

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