

ANTITRUST TRADE AND PRACTICE

President Biden Calls for Antitrust Enforcement To Combat Rising Inflation

President Biden has prioritized antitrust enforcement since the beginning of his term. He appointed progressive enforcers, Lina Khan and Jonathan Kanter, to positions in the Federal Trade Commission (FTC) and the Department of Justice (DOJ), respectively, and on July 9, 2021, he issued the Executive Order on Promoting Competition in the American Economy. Exec. Order No. 14,036, Fed. Reg. 36,987 (July 9, 2021). In the Executive Order, President Biden stated that “robust competition is critical to preserving America’s role as the world’s leading economy.” Id. at 36,987. He criticized consolidation and called upon the various executive departments and agencies to protect competition by exercising their regulatory authority with the



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ultimate goal of lowering consumer prices. Id. at 36,987-36,989.

President Biden recently renewed his focus on antitrust enforcement following the release of an October 2021 Consumer Price Index Report that showed 6.2% year-over-year inflation. Consumer Price Index Summary News Release, U.S. Bureau of Lab. Stat. (last modified Nov. 10, 2021). On Nov. 10, 2021, in response to the report, the President stated “[i]nflation hurts Americans[’] pocketbooks, and reversing this trend is a top priority for me.” Presidential Statement on the National Economy, 2021 Daily Comp. Pres. Doc. 943 (Nov. 10, 2021). Emphasizing that the magnitude of the reported price increases was largely caused by rising energy costs, the President

directed the National Economic Council to pursue means to reduce the costs of natural gas and asked the FTC to “strike back at any market manipulation or price gouging in this sector.” Id.

Following these remarks, President Biden wrote a letter to FTC Chair Khan asking her to investigate “mounting evidence of anti-consumer behavior by oil and gas companies.” Letter from President Joseph R. Biden to Chair Lina Khan, Chair, Fed. Trade Comm’n (Nov. 17, 2021). The President observed that the price of gas has risen despite a decrease in refined fuel costs and an increase in industry profits. According to the President, two of the largest oil and gas companies are on track to nearly double their 2019 net income and have plans to engage in stock buybacks and dividends. Id.

Responding to the President’s letter, FTC Commissioners Noah Phillips and Christine Wilson asked the Administration to share the evidence on which the Presi-

dent's assertions were based so that they might better investigate actions by oil and gas companies. David Shepardson and Diane Bartz, Republican FTC Commissioners Ask White House for Evidence on Gasoline Price Probe Request, Reuters (Nov. 23, 2021, 6:58 p.m. The FTC has yet to release information regarding further investigations or statements directly addressing President Biden's concerns.

The Biden Administration Targets Inflation in Meat Processing

The Biden Administration is particularly concerned with inflation in the meat processing industry calling it a "textbook example" of lack of competition hurting consumers, producers and the economy. Remarks by President Biden During a Virtual Meeting To Discuss Boosting Competition and Reducing Prices in the Meat-Processing Industry (Jan. 3, 2022). It has repeatedly claimed that consolidation in this sector, where only four large firms reportedly account for most of the beef, pork and poultry processing in the United States, has driven increases in meat prices. President Biden's approach here is indicative of his approach to combatting inflation in other industries.

During a virtual meeting with Attorney General Merrick Garland and Secretary of Agriculture Thomas Vilsack in January 2022, President Biden blamed a lack of competition

for local grocery price increases. Id. The President has said that his Administration intends to create fairer markets, to facilitate more opportunities for family farmers and ranchers, and ultimately to lower meat prices at grocery stores. First, the Administration intends to invest \$1 billion to expand domestic meat and poultry processing capacity, which it hopes will incentivize new and existing competitors to enter and expand in the market. Second, the Administration hopes to strengthen rules to protect farmers, ranchers and

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other producers. The Department of Agriculture (USDA), for example, is rewriting rules under the Packers and Stockyards Act to strengthen enforcement of the Act against unfair and deceptive practices. Third, according to the President, the U.S. government will "enforce existing competition laws vigorously and fairly." Id. President Biden emphasized that he is continuing the whole-of-government approach established in the Executive Order on Promoting Competition: the Secretary of Agriculture, the Attorney General, the Secretary of Labor and the FTC are "all there to make sure that antitrust

laws are enforced across the board." Id. Finally, the Administration aims to bring greater transparency to the meat processing industry with efforts by the Department of Agriculture and Congress, where a bipartisan group of senators are working on legislation to make cattle markets more transparent. Id.

Secretary Vilsack and Attorney General Garland also announced the launch of a centralized accessible portal, a joint initiative between the USDA and the DOJ that individuals can use to report potential antitrust violations. Id. Whistleblowers will be protected in many cases by employee and contractor anti-retaliation provisions passed by Congress. Id.

In short, the Administration intends to try to implement a multipronged approach to fighting inflation, including efforts to prevent industry consolidation and to increase competition as a means to lowering retail prices.

Criticisms of President Biden's Approach

Not everyone subscribes to the belief that antitrust enforcement can lower inflation. Some politicians and economists are skeptical that the President's efforts will impact prices in a meaningful way. Former Treasury Secretary Larry Summers challenged the President's approach, tweeting that "[t]he emerging claim that antitrust can combat inflation reflects 'science denial.'" Larry

Summers (@LHSummers), Twitter (Dec. 26, 2021, 5:21 p.m.). Summers argued the current Administration's approach is more likely to raise prices than lower them. For example, he stated that breaking up the meat packing industry could lead to reduced meat supply, causing even higher prices. His suggestion: The Administration should not pursue enforcement cases where it has little chance of success and instead should "reduce restrictions on entry into energy productions, scale back tariffs and anti-dumping actions and reduce regulatory delays that preclude capacity increases." *Id.*

Summers is not alone in his doubt. In a recent survey of 41 economists conducted by the University of Chicago's Booth School of Business, 75% of participants either "disagreed" or "strongly disagreed" with the statement that "[a]ntitrust interventions could successfully reduce US inflation over the next 12 months." The Chicago Booth School of Business, *Inflation, Market Power, and Price Controls*, IGM Forum (Jan. 11, 2022). Some participants felt that antitrust enforcement would be ineffective, given the length of time antitrust actions take. William Nordhaus of Yale University noted in his survey response, "Couldn't even get the case filed in 12 months." *Id.*

Antitrust Reforms in Congress

Despite the naysayers, many in Congress support more vigorous

antitrust enforcement. Sen. Elizabeth Warren (D-MA) advocates for using antitrust laws to break up big grocery chains to increase competition and lower prices. Elizabeth Warren (@SenWarren), Twitter (Jan. 7, 2022, 9:49 a.m.). In an interview with MSNBC, she applauded President Biden for targeting the meat processing industry because, she opined, the move would protect small businesses. *Id.* She also encouraged the FTC and DOJ to bring antitrust actions against the four largest meat processors to decrease consolidation.

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A key piece of bipartisan legislation making its way through Congress is the Ocean Shipping Reform Act of 2021, which passed in the House in early December. The bill, which is a response to complaints about high container rates and long shipping times, reportedly aims to reduce inflation by, among other things, eliminating an anti-trust exemption that currently permits ocean carriers to work together to set prices and manage routes. David Dayen, *The Inflation-Fighting Bill You Don't Know About*,

The American Prospect (Dec. 13, 2021).

Conclusion

President Biden is under pressure to combat rising inflation. After the President's comments in early January, the Bureau of Labor Statistics released the December Consumer Price Index showing that consumer prices rose 7% in 2021, the largest 12-month increase since June 1982. *Consumer Price Index News Release*, U.S. Bureau of Lab. Stat. (Jan 12, 2022.) President Biden remains optimistic that progress is being made to slow the rate of price increases. Nonetheless, the President added, "[t]his [CPI] report underscores that we still have more work to do, with price increases still too high and squeezing family budgets." Presidential Statement on the Bureau of Labor Statistics Consumer Price Index Report for December 2021, 2022 Daily Comp. Pres. Doc. 13 (Jan. 12, 2022). And with the support of the FTC, DOJ, USDA, the Department of Labor, and the Attorney General, increased antitrust enforcement in major sectors of the United States economy are likely to form an important part of that work for the remainder of this Administration.