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DOJ Antitrust Division Withdraws Three Health Care Policy Statements, Signals Increased Focus on Competitor Information Sharing

On February 3, 2023, the Department of Justice Antitrust Division announced the withdrawal of its support for what it characterized as “outdated antitrust policy statements related to enforcement in healthcare markets.” Notably, DOJ’s focus in withdrawing from these three policy statements was on their guidance regarding information sharing among competitors. While the policy statements at issue concern the healthcare industry, companies in many sectors have relied on the statements when designing information sharing programs. DOJ signaled that it will be more aggressive about pursuing enforcement actions based on competitor information sharing in all industries.

The withdrawal of the three policy statements was previewed on February 2 by Principal Deputy Assistant Attorney General Doha Mekki at the GCR Live: Law Leaders Global conference in Miami. Mekki stated these policy statements “no longer reflect market realities” and that “we are no longer confident that the documents fully reflect . . . the full scope of the liability under the antitrust laws.” Mekki analogized that retaining the safety zones in these policy statements “would be like developing specifications for audio cassette tapes and applying them to digital streaming.”

Mekki’s comments about the policy statements were part of a broader speech in which she highlighted ways in which information exchanges among competitors could be anticompetitive and suggested that such exchanges would be an enforcement priority for DOJ going forward. Among other things, Mekki noted that DOJ would apply particular scrutiny to companies and industries with a history of engaging in anticompetitive information exchanges, and that such scrutiny would extend to merger investigations involving such companies and industries.

The three joint policy statements of the Antitrust Division and FTC from which DOJ has withdrawn are: (1) Antitrust Enforcement Policy Statements Issued for Health Care Industry (1993); (2) Statements of Antitrust Enforcement Policy in Health Care (1996); and (3) Statement of Antitrust Enforcement Policy Regarding Accountable Care Organization Participating in the Medicare Shared Savings Program (2011). DOJ has stated that it has no immediate plans to replace the policy statements. The FTC has not confirmed whether it will also withdraw these statements and for now, they remain posted to its public website.

While these policy statements address a variety of topics pertinent to the healthcare industry—including, for example, hospital mergers and joint ventures—they are perhaps most well-known and utilized for their guidance concerning information sharing. In particular, the 1993 and 1996 policy statements describe certain “safety zones” for information exchanges that DOJ perceived as unlikely to harm competition. Specifically, the 1996 policy statement provided that:

The Agencies will not challenge, absent extraordinary circumstances, provider participation in written surveys of (a) prices for health care services, or (b) wages, salaries, or benefits of health care personnel, if the following conditions are satisfied: (1) the survey is managed by a third-party (e.g., a purchaser, government agency, health care consultant, academic institution, or trade association); (2) the information provided by survey participants is based on data more than 3 months old; and (3) there are at least five providers reporting data upon which each disseminated statistic is based, no individual provider's data represents more than 25 percent on a weighted basis of that statistic, and any information disseminated is sufficiently aggregated such that it would not allow recipients to identify the prices charged or compensation paid by any particular provider.

Companies in many industries relied on these “safety zones” and the principles underlying them, and both agencies routinely referenced these “safety zones” in other guidance documents and policy statements including the DOJ and FTC’s joint Antitrust Guidance for Human Resource Professionals issued in October 2016, and the joint Antitrust Statement Regarding COVID-19 issued in March 2020. These more recent policy statements must now be read with the caveat that they no longer reflect DOJ’s enforcement intentions with respect to information exchanges.

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DOJ’s decision to withdraw these policy statements, with no immediate plans to replace them, signals that DOJ plans to increase its enforcement activities with respect to information exchanges going forward, within the healthcare industry and beyond. The elimination of previously identified “safety zones” also has the potential to create greater uncertainty for companies of all types regarding what types of information sharing among competitors will and will not give rise to antitrust concerns, and highlights the need for careful review of such arrangements to assess risk and ensure compliance with the law.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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