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BLOG

No More Antitrust "Safety Zones": DOJ Withdraws Longstanding Health Care and Information Sharing Guidance with Implications Far Beyond Health Care Industry

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The Department of Justice's Antitrust Division announced on Friday, February 3, that it is withdrawing three longstanding policy statements providing guidance concerning its enforcement of the antitrust laws in the health care industry, a move that leaves significant uncertainty in its stead. Although focused on health care, the policy statements have long been relied upon as important guidance for competitor collaborations in other industries, particularly regarding sharing price- or cost-related information and joint purchasing. In a speech last week, Principal Deputy Assistant Attorney General Doha Mekki stated that DOJ has no plans to replace the tossed policies. The FTC, which, with DOJ, jointly enforces the antitrust laws and jointly issued the policy statements, has not yet revealed any intention to withdraw the policy statements.

The policy statements from 1993 and 1996 established antitrust "safety zones" for participants in the health care industry and provided other guidance addressing when federal antitrust regulators would not challenge conduct under antitrust laws. This guidance covered such topics as hospital mergers; hospital joint ventures involving high-tech or expensive equipment; information sharing between providers and health care services purchasers; hospital participation in price and cost information exchanges; joint purchasing arrangements among providers; and physician network joint ventures. DOJ also withdrew a 2011 policy that set forth an antitrust "safety zone" for accountable care organizations that are eligible for and intend (or have been approved) to participate in the Medicare Shared Savings Program.

According to a statement, DOJ determined that withdrawing these three sets of policy statements will promote competition and transparency in a health care landscape that is significantly different than when they were released, and that the statements are "overly permissive on certain subjects, such as information sharing." DOJ instead points to recent enforcement action and its advocacy on competition in health care markets as guidance, noting that it will be better able to evaluate mergers and conduct in health care markets using a case-by-case enforcement approach.

While guidance documents like the three policy documents, which now bear a "Withdrawn" header, are non-binding, they are important tools for industry participants to ensure they strike an appropriate balance between competition and collaboration. What's more, these policy statements have long been regarded as models for best practice by industries outside of health care in determining the guardrails around exchanging competitively sensitive information. The joint purchasing provisions and safe harbors have also been instructive for participants in markets outside of health care. As a result, DOJ's withdrawal casts uncertainty over conduct in more than just the health

care industry. Indeed, DOJ is aware that these policy statements have been relied upon by other sectors and that their withdrawal is certain to have effects across the board. Mekki noted in her speech that information exchanges have been increasingly scrutinized by enforcement authorities, pointing to recent settlements in the agriculture and broadcast television spaces.

In her speech, Mekki said that DOJ "is concerned" about whether some of the parameters of the safety zones around exchanges of competitively sensitive information are out of touch with how the industry operates today, pointing to the use of third-party intermediaries to facilitate such information exchanges as an example. "[E]xchanges facilitated by these intermediaries can have the same anticompetitive effect as direct exchanges among competitors," said Mekki. Also outdated is the implication in the policies that information older than three months is less likely to be competitively sensitive, given the advent and rise of complex algorithms that can be used to reverse-engineer pricing strategies that increase the competitive value of historical data, according to Mekki.

DOJ's broadened scrutiny of information exchanges in health care and beyond will not only be in the context of Sherman Act Section 1 conduct investigations—"[w]here the [DOJ] is presented with a proposed merger in an industry with a history of coordination or collusion, that context will play heavily in our evaluation of the transaction . . . [and] [m]erging parties will face an uphill battle convincing us that post-merger coordination or collusion is unlikely—even when mergers fall below the structural presumption," Mekki said, suggesting that regulators will consider such conduct in determining whether to challenge a deal as violating Section 7 of the Clayton Act.

This move by DOJ is the latest in a string of decisions by federal antitrust authorities over the last few years that have resulted in increased uncertainty about the application and enforcement of antitrust laws, as regulators have pulled established guidance and interpretations without replacement—e.g., FTC's withdrawals of vertical merger guidelines and guidance concerning the treatment of debt.

Takeaways

These recent moves by the federal antitrust agencies demonstrate a focus on overhauling longstanding (or, as they see it, outdated) competition policy by walking back guidance that is inconsistent with current enforcement objectives. As a result, businesses must rely increasingly upon reactionary *ad hoc* enforcement actions, as opposed to contemplated guidance and published safe harbors, to identify which kinds of conduct, activity, and deals are permissible, and which will be challenged.

Businesses that have relied upon DOJ's information sharing or joint purchasing guidance or any antitrust "safety zone" in the withdrawn policy statements—whether in health care or beyond—should take a renewed look at their practices to ensure that they do not carry undue antitrust risk. Winston & Strawn attorneys have deep experience in antitrust issues in health care, information sharing, and joint purchasing and are available to help companies navigate these issues.

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