

No More Antitrust “Safety Zones” (Part II): FTC Follows DOJ’s Withdrawal of Antitrust Policy Statements in Health Care

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On July 14, 2023, the Federal Trade Commission joined action previously taken by the DOJ Antitrust Division in February 2023 and formally withdrew two longstanding antitrust enforcement policy statements directly affecting the health care industry and considered strong guidance across other sectors. Each of the policy statements had originally been issued jointly by the DOJ and FTC. With the DOJ’s withdrawal five months ago, the policies were considered effectively dead, and the FTC’s action of joining its sister agency now makes it official.

The withdrawn policy statements are the:

- Statements of Antitrust Enforcement Policy in Health Care (August 1996); and
- Statement of Antitrust Enforcement Policy Regarding Accountable Care Organizations Participating in the Medicare Shared Savings Program (October 2011).¹

The now-withdrawn statements and the clear “Safety Zones” they created had long been relied upon by businesses and practitioners far beyond the health care sector as broadly informative of the agencies’ thinking about competitor collaborations regardless of industry or sector. For example, the Safety Zone regarding competitors’ exchange of price and cost data had been especially influential in structuring industry data gathering and reporting commonly facilitated by trade associations and third-party data analytics companies. Similarly, the Safety Zone regarding joint purchasing arrangements among health care providers has been considered informative as to structuring group purchasing organizations (GPOs) and joint purchasing initiatives in a wide array of industries.

The FTC’s stated justifications for rescinding these policy statements largely echo the DOJ’s February 2023 announcement: the withdrawal of these statements “is the best course of action for promoting fair competition in health care markets,” particularly given “[m]uch of the statements are outdated and no longer reflect market realities in this important sector of the economy.”

In lieu of offering any new written policy, the FTC pointed instead to its “extensive record of enforcement action, policy statements, and competition advocacy in health care” as the source of “more up-to-date guidance to the public.” The FTC previewed that it would continue to evaluate mergers and conduct in health care markets that affect consumers on a case-by-case basis, relying on “general principles of antitrust enforcement and competition policy for all markets, including markets related to the provision of health care products and services.”

As we discussed in [our Competition Corner post](#) regarding the DOJ's withdrawal in February, antitrust regulators under the Biden administration have demonstrated a continued focus on overhauling longstanding (or, as they see it, outdated) competition policy, including by walking back guidance they see as inconsistent with or obstacles to their enforcement objectives. However, in several cases—including this one—important written policies that businesses have long relied upon to guide their antitrust compliance efforts have been withdrawn with no replacement policy promulgated. This has increased unpredictability and uncertainty, as businesses attempt to glean the permissibility of their conduct and potential transactions from reactionary, fact-specific enforcement actions, as opposed to the reasoned guidance and express “Safety Zones” that many had come to rely upon.

Winston & Strawn's antitrust teams have substantial experience in health care and beyond, dealing with issues such as information sharing and joint purchasing, and are available to help companies navigate these issues in light of the most up-to-date trends, decisions, and regulatory actions.

¶ The DOJ's February 2023 announcement also withdrew a third policy statement: the [Department of Justice and FTC Antitrust Enforcement Policy Statements in the Health Care Area \(September 1993\)](#). The FTC did not join the DOJ in formally withdrawing the 1993 Statements. While a curious difference between the agencies' statements of withdrawal, there is no indication that this reflects any substantive difference between the agencies or that the FTC considers the 1993 Statements to be still operative. Indeed, the 1993 Statements have long been recognized as superseded by later joint FTC–DOJ statements—a fact expressly stated in the 1996 Statements.^{See} 1996 Statements at 2.

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