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DOJ to Health Care Industry: There Are No Antitrust Safety Zones

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The Justice Department's Antitrust Division (DOJ) recently withdrew its support from three joint policies with the Federal Trade Commission (FTC), each of which created antitrust safety zones for the health care industry. The DOJ's withdrawal from these statements reintroduces uncertainty in several areas where the health care industry had relied on its guidance.

The withdrawn statements are:

- The 1993 policy statement with safety zones for certain types of mergers, participation in exchanges of price and cost information, and joint purchasing agreements.
- The 1996 statements that clarified and expanded the 1993 safety zones and provided additional guidance for clinical integration and other types of multi-provider networks, as well as guidance on conduct that fell outside the safety zones; and
- A 2011 policy that created a safety zone for accountable care organizations.

The DOJ stated that it does not intend to replace the withdrawn statements with new guidance. Instead, the Antitrust Division will use "a case-by-case enforcement approach [that] will allow the Division to better evaluate mergers and conduct in health care markets that may harm competition." Although expected to withdraw the statement, the FTC has not yet done so, which would require a majority vote by FTC Commissioners.

In its press release announcing the withdrawal, DOJ acknowledged that "the health care landscape has changed significantly" since these statements were issued, and "[a]s a result, the statements are overly permissive on certain subjects, such as information sharing."

Implications on Information Exchanges

The DOJ specifically called out its statements about information exchanges as "no longer serv[ing] their intended purpose of providing encompassing guidance to the public …." In a speech at an antitrust conference the day before the statements were withdrawn, Principal Deputy Assistant Attorney General Doha Mekki argued that information exchanges permitted under these statements could enable price- and wage-fixing, given changing health care market realities and the greater use of algorithms and de-anonymization techniques.

Previously, these statements permitted information exchanges among competitors as long as (1) the exchange was managed by a third party, (2) the data was more than three months old, and (3) the data consisted of information that was anonymized and aggregated, with the report including data from at least five participants and with no single participant representing more than 25 percent of the total data.

What can we expect from the DOJ's new "case-by-case" approach? Ultimately, we can anticipate new enforcement challenges by the agency. In the meantime, health care providers should consult with counsel to develop and implement best practices to minimize antitrust risk when sharing information among competitors.

Overall Impact on Competitor Collaborations

The impact of the DOJ's withdrawal from these polices will, of course, become clearer through enforcement actions. The move, however, sends an unmistakable signal to the health care industry: Tread with care. Transactions and other collaborations previously shielded by the safety zones will now have to be re-evaluated to understand any actual potential impact on competition.

The purpose of the policy statements was to provide guidance and certainty, to guard against deterring beneficial collaborations. The withdrawal of the statements reintroduces uncertainty in a number of areas, including financial and clinical integration efforts, and sharing of patient data between co-owned health care providers and payers.

Takeaways

We will continue to monitor statements and actions by both the DOJ and FTC on these policy statements and their implications for the health care industry. In the meantime, consult with counsel with any questions concerning specific information exchanges or disclosures, joint ventures or payer contracting involving clinical integration, or joint purchasing/joint-buying efforts. Parties should be aware of the DOJ's heightened interest in areas covered by these statements and work with counsel to follow best practices and avoid antitrust risk.

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