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DOJ Withdrawal of Key Health Antitrust Guidance: Impact on Competitor Information Exchanges

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The Department of Justice (DOJ) Antitrust Division has withdrawn three antitrust enforcement policy statements specific to the health care industry. The policy statements, issued in 1993, 1996, and 2011 (collectively, Health Statements), addressed common competitor collaborations and practices and established "safety zones" of activities shielded from antitrust scrutiny. Notably, DOJ did not withdraw other guidelines that are not industry-specific, including the DOJ/Federal Trade Commission (FTC) *Antitrust Guidelines for Collaborations Among Competitors* and *Antitrust Guidance for Human Resources Professionals*.

The biggest impact of the Health Statements' withdrawal is the elimination of the antitrust safety zones. These set forth certain requirements for standard arrangements that, "absent extraordinary circumstances," the antitrust enforcement agencies would not have challenged. Parties to these common arrangements are now left without the apparent certainty and protection of the safety zones. In the DOJ's press release, Assistant Attorney General Jonathan Kanter stated: "The healthcare industry has changed a lot since 1993, and the withdrawal of that era's out of date guidance is long overdue. The Antitrust Division will continue to work to ensure that its enforcement efforts reflect modern market realities." By revoking the guidance rather than updating or replacing it, DOJ signals guidance may come through specific enforcement actions.

This article addresses a common industry practice—information exchanges—that the Health Statements covered and discusses practical considerations for these arrangements going forward.

Withdrawn Antitrust Safety Zone on Information Exchanges

The safety zone on information exchanges (Statement 6 of the 1996 Statements) stated that, in general, the agencies would not challenge an exchange of price or cost information (e.g., employee compensation) if the following three conditions were met:

1. The exchange is managed by a third-party (e.g., a trade association or consultant).
2. The information is more than three months old.
3. The exchange has five or more participants contributing data; no individual participant's data represents more than 25% of any statistic; and no individual participant's data can be identified.

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The DOJ cited changes in the health care landscape as the rationale for withdrawing the Health Statements, specifically indicating that they were "overly permissive" on information sharing. In a speech the day before the DOJ announcement, Principal Deputy Assistant Attorney General (DAAG) Doha Mekki stated that the safety zone factors "do not consider the realities of a transformed industry" and "understate the antitrust risks of competitors sharing competitively-sensitive information." DAAG Mekki explained that:

- Information exchanges managed by third-parties can have the same anticompetitive effects—and the use of a third-party can also enhance anticompetitive effects.
- New algorithms and artificial intelligence (AI) learning increase the competitive value of historical information (more than three months old) for certain products and services.
- Five or more participants does not guarantee that such an information exchange will not harm competition, especially when the participants exchanging the information collectively have a large share in the relevant market.

Thus, according to DAAG Mekki, "maintaining the safety zones would be like developing specifications for audio cassette tapes and applying them to digital streaming." DOJ is concerned that technological advances may allow companies and third-party entities greater capabilities to reverse engineer certain kinds of information in ways that facilitate coordination (e.g., using AI learning or complex algorithms to predict individual participants' future behavior based on historical data or disaggregate or unblind an individual participant's data).

Other Guidance and Practical Considerations

The Health Statements and the safety zones never had the force of law, but their withdrawal leads to greater uncertainty for health care organizations involved in information exchanges and other competitor collaborations. Health care organizations routinely rely on third-party studies of historical data from several market participants to evaluate how to price their products and services and ensure they are setting competitive prices, paying competitive prices for inputs and supplies, and offering competitive compensation and benefits to their employees. These surveys have also served as critical compliance tools. Many health care organizations exempt from federal income tax use surveys to demonstrate fair market value compensation and to safeguard against claims of private inurement and private benefit. Similarly, health care companies routinely use benchmarking studies to demonstrate fair market value compensation for compliance with fraud and abuse laws. The withdrawal of the statements removes clear guidance on how to do this lawfully and signals likely increased antitrust scrutiny of information exchanges and other forms of competitor collaborations in the health care space. The antitrust enforcement agencies are also increasingly focused on competition issues related to employee compensation and hiring (e.g., the FTC proposed rule banning noncompete agreements).

Despite the DOJ action, health care organizations can still exchange information—even with competitors—under certain conditions. The key antitrust concern with information exchanges is whether they can lead to unlawful agreements under Section 1 of the Sherman Act. Unlawful agreements include certain price-fixing and wage-fixing agreements, market allocations, and group boycotts.

The FTC/DOJ *Antitrust Guidelines for Collaborations Among Competitors*, which are not specific to any industry and have not been withdrawn, address information sharing. The guidelines recognize that information exchanges may be "reasonably necessary to achieve the procompetitive benefits of certain collaborations" and explain that the reasonableness "depends on the nature of information," The guidelines further state that:

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- The sharing of information on price, output, costs, or strategic plans is more likely to raise competitive concerns than the sharing of less sensitive information;
- The sharing of information on current and future plans is more likely to raise competitive concerns than the sharing of historical information; and
- The sharing of individual company data is more likely to raise concern than the sharing of aggregated data that does not identify individual companies.

The FTC/DOJ *Antitrust Guidance for Human Resources Professionals* addresses information exchanges regarding wages and other terms of employment. The guidance cautions against sharing sensitive employment information with competitors, providing that such exchanges "may be subject to civil antitrust liability when they have, or are likely to have, an anticompetitive effect" such as suppressing compensation. The agencies state that information exchanges may be permissible if:

- "A neutral third party manages the exchange;
- The exchange involves information that is relatively old;
- The information is aggregated to protect the identity of the underlying sources, and
- Enough sources are aggregated to prevent competitors from linking particular data to an individual source."

Health care organizations, with the assistance of antitrust counsel, should take time to reassess their information-sharing protocols and practices to consider their reasonableness in light of the nature of the information shared and the business purpose of that arrangement. Health care organizations would be wise to review their existing information exchanges, with an emphasis on ensuring that participation in information exchanges does not facilitate coordination because the information being exchanged could be disaggregated or unblinded to identify specific participants' data. Heightened focus should be given to the use of information shared or received and how it might impact pricing or compensation decisions. For health care organizations that provide cost and wage information to industry associations or other third-party intermediaries, it is likely prudent to reach out to these entities and inquire about their antitrust compliance protocols.

As a general guide, organizations may wish to consider several key questions when assessing proposed information exchanges:

Information Sharing Key Considerations

1. Whether there is a legitimate justification for the proposed information exchange (e.g., compliance with Stark Law exceptions requiring fair market value).

2. The amount and scope of information reasonably necessary to exchange in order to accomplish the legitimate purpose.

3. Whether the information is historical, current, or forward-looking.

4. The specific competitively-sensitive nature of the information disclosed and how it could be used to harm competition.

5. Who will receive and analyze the information (e.g., external consultant, clean team).

6. The scope, content, and form of the analyzed information (e.g., aggregated and deidentified).

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7. Who reasonably needs to see the analyzed information for the legitimate business purpose.

8. Whether the information exchange will result in analyzed information needed for a legitimate business purpose that is not available elsewhere.

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