

Updates

February 07, 2023

DOJ Withdraws Healthcare Antitrust Policy Statements

The U.S. Department of Justice (DOJ), Antitrust Division, recently [withdrew](#) three sets of guidelines that had been relied upon heavily by the healthcare industry: the 1993 [Antitrust Enforcement Policy Statements Issued for the Health Care Industry](#); the 1996 Statements of Antitrust Enforcement Policy in Health Care; and the 2011 [Statement of Antitrust Enforcement Policy Regarding Accountable Care Organizations Participating in the Medicare Shared Savings Program](#).

Each of the three policy statements was originally issued jointly by the Antitrust Division and the Federal Trade Commission (FTC). Of the two agencies, the FTC has more recently taken the lead in investigating and litigating antitrust violations committed by healthcare providers. Significantly, the FTC has not yet made an announcement regarding whether it will continue to apply these guidelines.

In withdrawing these policy statements, the DOJ stated that "the healthcare landscape has changed significantly" in the 30 years since the first of these guidelines was issued. "As a result," it stated, "the statements are overly permissive on certain subjects, such as information sharing."

Background

Statement 6 of the 1996 Policy Statements addressed in particular the sharing of information (such as prices and salaries) among healthcare providers, establishing a "safety zone" for those exchanges that would not be challenged absent "extraordinary circumstances." The safety zone was met if the survey was managed by a third party, the information exchanged was at least three months old, there were at least five providers reporting data, and no individual provider's data represented more than 25% on a weighted basis of the statistics being reported. Statement 6 also made clear that information exchanges falling outside the safety zone would not necessarily be challenged, depending on the circumstances.

Interpretation

This decision clearly signals a more aggressive stance by the DOJ on information exchanges and perhaps other conduct covered by these withdrawn policy statements. At the very least, it introduces new uncertainty into federal antitrust positions relative to possibly anticompetitive conduct in the industry. With respect to provider information exchanges, given that the Antitrust Division's recent focus has been centered more on healthcare payors than on providers, it is hard to assess the likely impact of this announcement without knowing whether the FTC will follow the DOJ's lead.

It is possible that the DOJ withdrew these statements because it viewed them as hindering its current cases involving no-poach and wage-fixing agreements, many of which involve healthcare providers. The DOJ is taking the lead on those matters because they have been brought as criminal cases in the wake of the [agencies'](#)

[announcement](#) in 2016 that such agreements would be treated as *per se* offenses and prosecuted criminally.

Takeaways

For now, extra caution should be taken when undertaking any kind of exchange of competitively sensitive information, either directly or indirectly through a third party, with competitors. We will continue to monitor developments in this area.

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