



ALERTS

DOJ Antitrust Update Generates Uncertainty Surrounding Information Sharing And Transactions In The Healthcare Industry

February 8, 2023

Highlights

The Department of Justice's Antitrust Division rescinded three "outdated" policy statements on antitrust enforcement in healthcare, and it is expected that the Federal Trade Commission (FTC) will take similar action

This announcement is significant for firms in the healthcare and other sectors that rely on benchmarking and other types of information exchanges that could soon be under heightened antitrust scrutiny

The announcement is also expected to affect how the division and FTC view transactions in the healthcare industry

On Feb. 3, 2023, the Antitrust Division of the Department of Justice withdrew three long-standing policy statements relating to antitrust enforcement in the healthcare market. Although policy statements do not have the force of law, this action signals a profound change in the division's approach to antitrust enforcement.

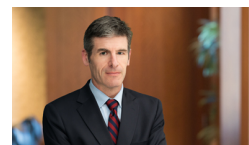
The division described these long-standing policies as "outdated" and

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“overly permissive on certain subjects, such as information sharing, and no longer serve their intended purpose of providing encompassing guidance to the public on relevant healthcare competition issues in today’s environment.”

The Federal Trade Commission (FTC) is expected to make a similar announcement in coming weeks.

The three withdrawn policy statements are:

- [Department of Justice and FTC Antitrust Enforcement Policy Statements in the Health Care Area \(Sept. 15, 1993\)](#)
- [Statements of Antitrust Enforcement Policy in Health Care \(Aug. 1, 1996\)](#)
- [Statement of Antitrust Enforcement Policy Regarding Accountable Care Organizations Participating in the Medicare Shared Savings Program \(Oct. 20, 2011\)](#)

The 1993 and 1996 policy statements established various antitrust “safety zones” for which the division and the commission would not challenge including: 1) hospital mergers, 2) hospital joint ventures involving high-technology or other expensive medical equipment, 3) physicians’ provision of information to purchasers of healthcare services, 4) hospital participation in price and cost information exchanges, 5) joint purchasing arrangements among healthcare providers and 6) physician network joint ventures. The 2011 policy, established in the wake of the Affordable Care Act, addressed safety zones for Accountable Care Organizations eligible for and participating in the Medicare Shared Savings Program.

The stated purpose of these policy statements was to resolve antitrust uncertainty related to the innovative attempts healthcare industry actors were using at the time to compete more effectively in the market place. The division’s recent action suggests greater skepticism and heightened scrutiny in connection with health care transactions and competitors sharing data with one another. It is notable that the division’s other policy statement about sharing of information, Antitrust Policy Statement on Sharing of Cybersecurity Information (2014), so far, remains in place.

Moving forward, the division (and likely the commission) will follow a case-by-case enforcement approach as doing so “will allow the division to better evaluate mergers and conduct in healthcare markets that may harm competition” and encourages industry members to take guidance from its recent enforcement actions. Healthcare industry members should expect a more aggressive approach generally to antitrust enforcement by the current administration. Entities in the healthcare industry, and in other industries, that have relied on the antitrust safety zones for assurance that their joint arrangements would not be challenged by government enforcers should consider re-evaluating their practices to ensure they do not bear undue antitrust risk.

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