LEGAL UPDATES

A New Vacuum in Antitrust? DOJ Withdraws Longstanding Health Care Enforcement Statements

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With little warning the Antitrust Division of the U.S. Department of Justice announced on February 3 the withdrawal of three critical pieces of guidance for the health care industry:

1. *Department of Justice and FTC Antitrust Enforcement Policy Statements in the Health Care Area* (Sep. 15, 1993)

2. *Statements of Antitrust Enforcement Policy in Health Care* (Aug. 1, 1996)

3. *Statement of Antitrust Enforcement Policy Regarding Accountable Care Organizations Participating in the Medicare Shared Savings Program* (Oct. 20, 2011)

(collectively, the "Joint Healthcare Guidance"). The Joint Healthcare Guidance was issued by the Department of Justice (DOJ) and Federal Trade Commission (FTC), the two federal agencies (the "Agencies") with primary enforcement authority for antitrust law, as a tool for understanding how business arrangements that present competitive issues would be analyzed.

Why did the Joint Healthcare Guidance Matter?

For decades, health care providers have relied on the Joint Healthcare Guidance as a roadmap for navigating antitrust issues. DOJ indicated that withdrawal of the guidance is "the best course of action for promoting competition and transparency" and reflected the fact that the health care industry has changed significantly since they were originally published. According to DOJ, this meant that "the statements are overly permissive on certain subjects, such as information sharing, and no longer serve their intended purposes of providing encompassing guidance" on healthcare competition matters that reflect the way the industry operates today. The reference to the guidance on "information sharing" as being "overly permissive" is noteworthy. Many organizations have long looked to Statements 5 and 6 from the 1996 Guidance for direction on the parameters for competitors' sharing of sensitive categories of information, such as health care providers' reimbursement, fee and cost information or the salaries they pay employees.

Related People

Jesse A. Berg
Partner
Minneapolis
612.632.3374
jesse.berg@lathropgpm.com

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The Joint Healthcare Guidance was important for several reasons, including because it established a series of "safety zones". The safety zones described arrangements that would not be challenged under the antitrust laws "absent extraordinary circumstances". Important safety zones included:

- Statement 5 (Providers' Collective Provision of Fee-Related Information to Purchasers of Healthcare Services). This statement was helpful because it offered a route for providers' participation in benchmarking and data aggregation arrangements where analysts would combine historical data and report back out blinded information to participants.

- Statement 6 (Provider Participation in Exchanges of Price and Cost Information). This Statement offered a roadmap for providers to participate in arrangements where they would share information about salaries, wages and benefits paid to employees. This topic received attention in the form of 2016's joint DOJ / FTC, *Antitrust Guidance for Human Resource Professionals*, which, among other things, warned against competitors sharing sensitive information about their employees such as current wage information. It is not clear if DOJ / FTC will be withdrawing the 2016 guidance.

- Statement 7 (Joint Purchasing Arrangements). This safety zone permitted providers to engage in collective purchasing without having to worry that they would be viewed as fixing prices for the products, supplies and other inputs needed to operate their businesses.

- Statements 8 and 9 (Physician Network Joint Ventures and Multiprovider Networks). Similar in their intent of offering a framework for unintegrated providers to collaborate in the delivery of health care, Statement 8 created a safety zone for physician networks with market shares below specific levels and Statement 9 explained how physician — hospital networks would be evaluated. These statements became particularly important as healthcare reimbursement shifted towards value-based models because they outlined how the Agencies would evaluate whether sufficient levels of financial or clinical integration existed as a basis for supporting conduct that would otherwise be considered anticompetitive.

The Joint Healthcare Guidance also explained how arrangements that could not meet a safety zone would be analyzed. Numerous examples were provided of arrangements that would not present competitive concerns, arrangements that would likely be treated as per se illegal and arrangements that would be evaluated under the rule of reason.

What Happens Now?

There is no indication that withdrawal of the Joint Healthcare Guidance reflects any relaxation of the Agencies' enforcement posture in healthcare. Rather, the Biden Administration has been very active in antitrust matters over the past few years as shown by the July 2021 Executive Order Promoting Competition in America, the FTC's repeal of the Vertical Merger Guidelines in September 2021 and the joint DOJ/FTC effort to modernize the Horizontal Merger Guidelines. And in a groundbreaking new development, in December 2022 DOJ and the Office of Inspector General at the U. S. Department of Health & Human Services (OIG) signed a memorandum of understanding indicating their plans to work together to promote competition in healthcare. In the press release announcing the withdrawal, the Antitrust Division offered little detail about what is likely to come next, noting that recent "enforcement actions and competition advocacy" offer guidance to the public and that a "case-by-case enforcement approach will allow the Division to better evaluate mergers and conduct in healthcare markets" that could hurt competition.

So, what signposts can providers look to for purposes of understanding the competitive analysis that is likely to apply to their business arrangements?

- DOJ Business Review Letters and FTC Advisory Opinions have been issued over the years that address health care competition matters. These documents offer insight, for example, on how the agencies would evaluate clinically integrated networks under antitrust principles. These materials are valuable in that they illustrate application of key antitrust principles to specific factual situations. They can help organizations understand how the regulators would evaluate business arrangements that share similar characteristics. Parties that relied on the Joint Healthcare Guidance as a basis for their relationships in the past may want to revisit the antitrust analysis of those arrangements under

relevant Business Review Letters and Advisory Opinions, as well as recent DOJ/FTC enforcement actions, to see whether they would still pass muster.

- The ability to articulate legitimate pro-competitive rationales is critical in defending conduct under a rule of reason analysis. With providers no longer able to fall back on the protections of the safety zones, being able to point to specific benefits to the market in the form of things like lower costs, improved quality, enhanced access and similar characteristics will take on added importance. The Agencies have always been skeptical of efficiency claims that are not backed up with specific support and that is a trend that shows no signs of abating.

- Having robust internal antitrust compliance polices and protocols, along with good training for business leaders and others involved in accessing competitively sensitive information, will be critical. Organizations may also want to vet the antitrust compliance of third parties that are engaged to aid in activities that could present competitive issues. For example, providers that engage third parties to assist in data aggregation related to salaries, costs or reimbursement rates will want to ensure that the parties conducting the analysis are taking appropriate steps to sufficiently blind the aggregated information that is generated for participants.

- Providers should carefully evaluate their arrangements to minimize chances of any spillover collusion from occurring. Spillover collusion refers to activities such as using competitively sensitive information outside of a joint venture's legitimate purposes; for example, using price information not only to establish rates for services offered by the venture but also to set prices for services the joint venture parties provide outside of the venture.

- While not part of the Joint Healthcare Guidance, along similar lines DOJ has expressed concern that some organizations may not be properly complying with their obligations under the Hart-Scott-Rodino (HSR) reporting thresholds. Organizations contemplating transactions should remember to evaluate whether HSR filings are required.

If you have questions about addressing antitrust matters in light of DOJ's withdrawal of the Joint Healthcare Guidance, please contact Jesse Berg (at jesse.berg@lathropgpm.com or 612-632-3374) or your regular Lathrop GPM attorney.