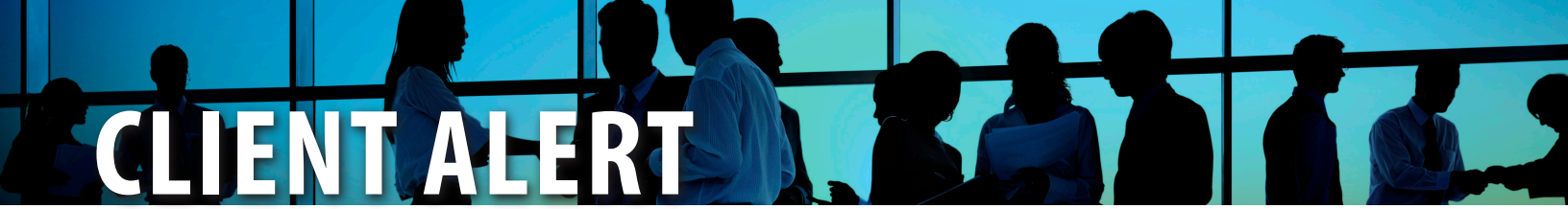

DOJ ANNOUNCES WITHDRAWAL OF LONGSTANDING GUIDANCE FOR THE HEALTH CARE INDUSTRY AND ELIMINATES BENCHMARKING SAFETY ZONE FOR COMPETITIVELY SENSITIVE INFORMATION

by L. Pahl Zinn

Last Friday, the DOJ announced "the withdrawal of three outdated antitrust policies related to enforcement in healthcare markets:

- *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); and
- *Statement of Antitrust Enforcement Policy Regarding Accountable Care Organizations Participating in the Medicare Shared Savings Program* (Oct. 20, 2011)." [1]

The broad scope of this withdrawal includes a most notable casualty: the elimination of the safety zone that allowed entities to compile and participate in benchmarking (aka market surveys). The result is the elimination of a clearly defined "safety zone" that previously protected market surveys containing competitively sensitive information.

While it remains to be seen what this all means, there are two immediate takeaways

- **Continued heightened regulatory atmosphere, including increased scrutiny of information-sharing agreements; and**
- **Businesses that participate in certain benchmarking activities, including more sophisticated practices using AI and pricing algorithms, should re-evaluate and consult with counsel regarding their information-sharing practices and use of third parties, including third-party data aggregators.**

Previously, to qualify for the safety zone, benchmarking or market surveys needed to be (generally speaking): administered through a third party, historical in nature (*aka* competitively obsolete), and anonymous: The enforcement guidance from the 1993 Statements in Antitrust Enforcement in Health Care specifically provided that:

1. *the collection is managed by a third party (e.g., a purchaser, government agency, health care consultant, academic institution, or trade association);*
2. *although current fee-related information may be provided to purchasers, any information that is shared among or is available to the competing providers furnishing the data must be more than three months old; and*
3. *for any information that is available to the providers furnishing data, there are at least five providers reporting data upon which each disseminated statistic is based; no individual provider's data may represent over 25% on a weighted basis of that statistic, and any information disseminated must be sufficiently aggregated such that it would not allow recipients to identify the prices charged by any individual provider.*[2]

Although this safety zone, when announced, pertained to healthcare markets, it has been interpreted and often considered to apply to and inoculate exchanges of information through other third parties who conducted and coordinated market surveys in other industries.

In taking this step, Assistant Attorney General Jonathan Kanter explained that "withdrawal of the three statements is the best course of action for promoting competition and transparency. . . . [T]he statements are overly permissive on certain subjects, such as information sharing, and no longer serve their intended purposes of providing encompassing guidance to the public." [3]

The DOJ has not announced any plan to replace the Guidance; rather, it stated that "[r]ecent enforcement actions and competition advocacy in healthcare provide guidance to the public, and a case-by-case enforcement approach will allow the [Antitrust] Division to better evaluate mergers and conduct in healthcare markets that may harm competition."

While this notable change provides less certainty for businesses, it does not fundamentally change the law on information exchanges. Under Section 1 of the Sherman Act, the exchange of competitively sensitive information is only *per se* illegal if the exchange is predicated on an agreement to fix prices, rig bids, or allocate customers (or any other *per se* unlawful activity). All other information exchanges among market participants are still evaluated under the rule of reason.

Dickinson Wright attorneys are closely monitoring DOJ and FTC moves as the regulatory landscape evolves and are available to discuss how such moves could impact your business. Additionally, Dickinson Wright attorneys stand ready to assist in evaluating your business's antitrust-related risks and necessary compliance measures and can provide antitrust compliance training tailored to your specific industry or business.

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[1] *See* Press Release, U.S. Dep't of Justice, Antitrust Division, https://www.justice.gov/opa/pr/justice-department-withdraws-outdated-enforcement-policy-statements.
[2] *See* U.S. Dep't of Justice and Fed. Trade Comm'n Antitrust Enforcement Policy Statements in the Health Care Area (9/15/1993), p. 5.
[3] *See* Press Release, U.S. Dep't of Justice, Antitrust Division, https://www.justice.gov/opa/pr/justice-department-withdraws-outdated-enforcement-policy-statements.