Withdrawal of Antitrust "Safety Zones"

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The US Department of Justice recently announced its withdrawal of three decades-old policy statements recognizing antitrust “safety zones” relating to information sharing and collaboration among competitors. The statements identified circumstances under which the DOJ would not challenge mergers, information sharing, joint ventures, or other conduct as anticompetitive. While initially directed to the healthcare industry, this guidance has been interpreted to apply much more broadly across many industries. Its withdrawal signals a shift towards increased scrutiny of information sharing and other conduct formerly insulated from enforcement in the healthcare industry and beyond.

The three now-withdrawn policy statements were issued jointly by the DOJ and the Federal Trade Commission in 1993, 1996, and 2011. The DOJ has said that its previous guidance has become outdated and overly permissive in the wake of major developments in the healthcare industry over the past 30 years, including changes in the way that data is used and shared, as well as industry consolidation. The FTC has not yet withdrawn its support for the statements, but it is expected to do so in the near future.

We recommend that you revisit your business practices and plans to ensure you are not relying on now-outdated guidance to protect your company from potential antitrust liability, focusing on the following four areas:

1. Information Exchanges

In withdrawing its previous policy statements, the DOJ eliminated a safety zone for the exchange of information between competitors. The previous policy allowed competitors to exchange information without fear of antitrust enforcement so long as (1) exchanges were managed by a third party (e.g., a trade association), (2) the information being exchanged was more than three months old, and (3) the information was compiled from data provided by at least five entities, no single entity's data represented more than 25 percent of a statistic, and no single entity's data could be identified. To date, many companies in many industries—not just healthcare—have relied upon this safety zone when establishing information sharing programs.

In light of the policy change, following these practices is no longer sufficient to prevent scrutiny from antitrust enforcers. We recommend that you review any policies or practices you have in place concerning the exchange of information with competitors to ensure that they appropriately protect competitively sensitive information.

2. Joint Purchases

The DOJ also disavowed the safety zone for joint purchasing agreements entered into by entities that are otherwise competitors, for example, for the purchase of expensive medical equipment or volume-discounted supplies necessary for both competitors' operations. Previously, such agreements would not trigger antitrust scrutiny if (1) the purchases accounted for no more than 35 percent of the total purchases in the relevant market, and (2) the cost of the purchases totaled less than 20 percent of the participants' revenue. This is no longer the case.

We suggest revisiting any joint purchasing agreements your company has entered into or is contemplating entering into in the future, with an eye towards minimizing potential anticompetitive effect.

3. Small Hospital Mergers

In addition, the DOJ removed the safety zone that previously protected mergers of hospitals with fewer than 100 licensed beds and fewer than 40 daily patients from antitrust enforcement. This indicates that mergers of small, rural hospitals could face new scrutiny from enforcers. We suggest you review any planned mergers of small hospitals for potential anticompetitive effect.

4. Accountable Care Organizations

Finally, the DOJ's policy change ended the safety zone that had existed for ACOs that are eligible for and intend to participate in the Medicare Shared Savings Program. Under previous agency guidance, ACO participants providing the same service within the ACO could generally share competitively sensitive information if the participants together had no more than 30 percent of the market for that service in each participant's primary service area. DOJ's elimination of this safety zone, together with the growing size of many ACOs, suggests these organizations could be subject to increased scrutiny going forward. If you are involved with an ACO, we recommend analyzing information-sharing policies and practices for potential antitrust concerns.

Takeaway

The withdrawal of these guidelines does not mean that information sharing, joint purchasing agreements, small mergers, or the activities of ACOs are now illegal. To the contrary, existing law still recognizes that these arrangements generally are not unlawful unless they are anticompetitive. In the absence of the safety zones, however, future enforcements efforts by DOJ (and likely FTC) will proceed on a “case-by-case” basis without bright-line guidance. Accordingly, we suggest taking stock of company policies and business plans to ensure they do not rely on any of the now-defunct safety zones discussed above and reaching out to experienced antitrust counsel to the extent you are involved in information exchanges, joint purchases, a merger involving a small hospital, or an ACO.