

DOJ Antitrust Division Withdraws Three Healthcare Policy Statements as Part of Increasing Antitrust Scrutiny of Information-Sharing Practices

On February 3, 2023, the Department of Justice Antitrust Division (“DOJ”) announced the withdrawal of three policy statements related to certain practices in the healthcare industry (the “Healthcare Policy Statements”) that had been in place since 1993, 1996 and 2011, respectively.¹ The DOJ characterized the Healthcare Policy Statements as “outdated” and “overly permissive on certain subjects, such as information sharing”.² The announcement was initially made by Principal Deputy Assistant Attorney General Doha Mekki in her keynote speech at the GCR Live: Law Leaders Global conference on February 2, 2023, where she analogized the Healthcare Policy Statements to guidance developed for “audio cassette tapes” that is now being applied to “digital streaming”.³

The Healthcare Policy Statements described certain “safety zones” in the healthcare industry, indicating the government would not challenge certain conduct that met specific safeguards. In withdrawing them, the DOJ announced that, going forward, it plans to use a “case-by-case enforcement approach” for conduct and transactions in the healthcare industry, and that the withdrawal of the Healthcare Policy Statements “best serves the interest of transparency with respect to the Antitrust Division’s enforcement policy in healthcare markets”.⁴ The withdrawal of the Healthcare Policy Statements is part of a broader pattern of DOJ antitrust enforcement focusing on an increased scrutiny of information-sharing practices across many industries.

The 1993 Policy Statement defined six antitrust safety zones, including one for hospital mergers in which one of the merging hospitals has fewer than 100 licensed beds and averages fewer than 40 daily patients, another for hospital joint ventures involving expensive equipment like MRI machines and a third

for joint purchasing agreements.⁵ Notably, the 1993 Policy Statement established two safety zones on information-sharing, one addressing information-sharing between physicians and purchasers of healthcare services and the other addressing hospitals sharing prices for hospital services or wages, salaries or benefits of hospital personnel in surveys managed by third parties.⁶ The 1996 Policy Statement generally updated the guidance established in the 1993 Statement,⁷ including additional specificity on the safety zones for the two categories of information-sharing addressed in the 1993 Statement.⁸ Additionally, the 1996 Statement reiterated that a safety zone exists for physician network joint ventures comprised of 20 percent or less of the physicians in each specialty in the relevant geographic market where members share substantial financial risk, and provided additional examples of networks that fell within that safety zone.⁹ The 2011 Policy Statement provided antitrust guidance for Affordable Care Organizations (“ACO”) stemming from reforms established by the Affordable Care

Act.¹⁰ The 2011 Statement set forth a safety zone for independent ACO participants that provide the same service and have a combined share of each common service of 30 percent or less in each participant's primary service area.¹¹

Although the three withdrawn Healthcare Policy Statements specifically addressed the healthcare industry, their guidance as it related to information-sharing had been applied to other industries, in particular the labor/HR space.¹² However, the DOJ and FTC's 2000 Guidelines for Collaborations Among Competitors appear still to be in place and address some conduct found in the Healthcare Policy Statements, including information-sharing practices and joint purchasing agreements among competitors.¹³ In her remarks announcing their withdrawal, DAAG Mekki signaled that it had broader antitrust enforcement implications across all industries and is a part of the agencies' evaluation of existing policy statements and guidance documents.¹⁴ The withdrawal comes during a period of increasing scrutiny by the antitrust agencies of anticompetitive information-sharing.¹⁵ She noted that even the use of the same pricing algorithms by two competitors in the same market is cause for heightened concern.¹⁶

The DOJ has had two consent decrees over the past several years resolving antitrust violations related to information-sharing, both of which DAAG Mekki referenced in her speech.¹⁷ Those settlements redressed conduct involving sharing competitively sensitive data about workers' compensation in the poultry industry¹⁸ and revenue data for advertising slots in the broadcast television industry,¹⁹ respectively. DAAG Mekki stated that these cases are "sobering reminders" that information exchanges can be facilitated in any market, even if it is not characterized by a high level of concentration.²⁰ Companies can expect the DOJ's information-sharing enforcement to be far-reaching and not industry-specific going forward.

In her remarks, DAAG Mekki also stated that the DOJ's evaluation of information-sharing would not be limited to enforcement through Section 1 of the Sherman Act. She explained that companies with a history of unlawful information-sharing "will face an uphill battle" during merger review under the Hart

Scott Rodino Act, and the potential for anticompetitive information-sharing will play a large role in evaluating whether a merger may violate Section 7 of the Clayton Act.²¹ DAAG Mekki noted that other federal agencies, like the Department of Transportation, have the ability to challenge unfair methods of competition, including information-sharing, and called for a "whole-of-government approach" to stopping unlawful information-sharing.²²

The withdrawal of these long-standing policy statements is a sign that companies should exercise caution when participating in information exchanges or other forms of collaboration with competitors and ensure their employees are properly trained in antitrust compliance with respect to information-sharing practices.²³ Given these developments, companies should engage with antitrust counsel to anticipate and adapt to the DOJ's expanding antitrust enforcement agenda with respect to information-sharing methods and practices.

- 1 Press Release, Justice Department Withdraws Outdated Enforcement Policy Statements, Dep't of Justice (Feb. 3, 2023), <https://www.justice.gov/opa/pr/justice-department-withdraws-outdated-enforcement-policy-statements> [hereinafter Feb. 2023 Press Release]. The three policy statements that have been withdrawn are: Department of Justice and FTC Antitrust Enforcement Policy Statements in the Health Care Area (Sept. 15, 1993), https://www.justice.gov/archive/atr/public/press_releases/1993/211661.htm; Statements of Antitrust Enforcement Policy in Health Care (Aug. 1, 1996), <https://www.justice.gov/atr/page/file/1197731/download>; and Statement of Antitrust Enforcement Policy Regarding Accountable Care Organizations Participating in the Medicare Shared Savings Program (Oct. 20, 2011), <https://www.justice.gov/sites/default/files/atr/legacy/2011/10/20/276458.pdf>.
- 2 Feb. 2023 Press Release.
- 3 Principal Deputy Assistant Attorney General Doha Mekki of the Antitrust Division Delivers Remarks at GCR Live: Law Leaders Global, Dep't of Justice (Feb. 2, 2023), <https://www.justice.gov/opa/speech/principal-deputy-assistant-attorney-general-doha-mekki-antitrust-division-delivers-0> [hereinafter Feb. 2023 Mekki Speech].
- 4 Feb. 2023 Press Release. It is not clear whether the Healthcare Policy Statements, which were jointly issued by the DOJ and the Federal Trade Commission ("FTC"), remain in effect at the FTC. The DOJ's announcement made no mention of the FTC's position, but any affirmative withdrawal of these policy statements by the FTC would require a commissioner vote.
- 5 See Department of Justice and FTC Antitrust Enforcement Policy Statements in the Health Care Area (Sept. 15, 1993), https://www.justice.gov/archive/atr/public/press_releases/1993/211661.htm. The guidance on joint purchasing agreements has been cited by the DOJ in explaining why it did not intend to challenge proposed joint purchasing agreements in other non-healthcare related industries. See e.g., Department of Justice Business Review Letter to National Cable Television Cooperative, Inc. (Oct. 17, 2003), <https://www.justice.gov/atr/response-national-cable-television-cooperative-incs-request-business-review-letter>.
- 6 Department of Justice and FTC Antitrust Enforcement Policy Statements in the Health Care Area (Sept. 15, 1993), https://www.justice.gov/archive/atr/public/press_releases/1993/211661.htm. The 1993 Policy Statement explained that these types of information-sharing practices generally have procompetitive benefits that improve the quality of patient care. *Id.*
- 7 Statements of Antitrust Enforcement Policy in Health Care at 1-7 (Aug. 1, 1996), <https://www.justice.gov/atr/page/file/1197731/download>.
- 8 *Id.* at 40-52. For example, the statement on provider participation in exchanges of price and cost information states that "[t]he Agencies will not challenge, absent extraordinary circumstances, provider participation in written surveys of (a) prices for health care services, or (b) wages, salaries or benefits of health care personnel, if the following conditions are satisfied: (1) the survey is managed by a third-party ... ; (2) the information provided by survey participants is based on data more than 3 months old; and (3) there are at least five providers reporting data upon which each disseminated statistic is based, no individual provider's data represents more than 25 percent on a weighted basis of that statistic, and any information disseminated is sufficiently aggregated such that it would not allow recipients to identify the prices charged or compensation paid by any particular provider." *Id.* at 50.
- 9 See *id.* at 64-70.
- 10 Statement of Antitrust Enforcement Policy Regarding Accountable Care Organizations Participating in the Medicare Shared Savings Program at 2 (Oct. 20, 2011), <https://www.justice.gov/sites/default/files/atr/legacy/2011/10/20/276458.pdf>.
- 11 *Id.* at 7. The 2011 Policy Statement focuses its safety zone analysis on three categories of patient services: physician specialist, major diagnostics categories for inpatient facilities and outpatient categories for outpatient facilities. *Id.*
- 12 See Antitrust Guidance for Human Resource Professionals at 4-5 (Oct. 2016), <https://www.justice.gov/atr/file/903511/download> (citing the Healthcare Policy Statements as a resource on when written surveys of wages may raise antitrust issues).
- 13 Department of Justice and FTC Antitrust Guidelines for Collaborations Among Competitors at 13-15, 21 (Apr. 2000), https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf; *id.* at 2 n.4 (noting that "[t]he analytical framework set forth in these Guidelines is consistent with the analytical frameworks in the *Health Care Statements*").
- 14 Feb. 2023 Mekki Speech.
- 15 See Policy Statement Regarding Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act at 13 (Nov. 10, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf (listing "practices that facilitate tacit coordination" as "[c]onduct that violates the spirit of the antitrust laws" and thus an "unfair method of competition" under Section 5 of the FTC Act).
- 16 Feb. 2023 Mekki Speech.
- 17 *Id.*
- 18 Competitive Impact Statement at 1-2, *United States v. Cargill Meat Solutions Corp.*, No. 22-cv-01821 (Sept. 12, 2022), ECF No. 37.
- 19 Competitive Impact Statement at 1-2, *United States v. Sinclair Broadcast Grp.*, No. 18-cv-02609 (Aug. 13, 2019), ECF No. 50.
- 20 Feb. 2023 Mekki Speech.
- 21 *Id.*
- 22 *Id.*
- 23 See DOJ Withdraws Health Care Antitrust Guidance, Highlights Information Sharing Concerns, Practical Law Antitrust (Feb. 3, 2023), [https://today.westlaw.com/Document/15a4f6dc5a3dc11ed8636e1a02dc72ff6/View/FullText.html?transitionType=CategoryPageItem&contextData=\(sc.Default\)&firstPage=true](https://today.westlaw.com/Document/15a4f6dc5a3dc11ed8636e1a02dc72ff6/View/FullText.html?transitionType=CategoryPageItem&contextData=(sc.Default)&firstPage=true) ("Generally, counsel should be cautious in relying on FTC or DOJ antitrust guidance that pre-dates the Biden administration . . .").

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