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DOJ SIGNALS INCREASED SCRUTINY ON INFORMATION SHARING

To Our Clients and Friends:

On February 2, 2023, DOJ announced the withdrawal of three policy statements concerning healthcare markets[1]:

1. the 1993 Department of Justice and FTC Antitrust Enforcement Policy Statements in the Health Care Area ("1993 Statement");

2. the 1996 Statements of Antitrust Enforcement Policy in Health Care ("1996 Statement") (which revised and expanded the 1993 statement); and

3. the 2011 Statement of Antitrust Enforcement Policy Regarding Accountable Care Organizations Participating in the Medicare Shared Savings Program ("2011 Statement").[2]

Taken together, these statements provided guidance and safe harbors for information exchanges and other conduct governed by federal antitrust laws. The withdrawal of the statements is effective immediately. In lieu of the guidance, DOJ is evaluating conduct on a "case-by-case enforcement approach."

The withdrawal creates uncertainty as to the kinds of information exchanges that may attract antitrust scrutiny. While the withdrawal likely does not change the ultimate competitive implication for conduct covered by the statements—in that conformance to the safe harbor requirements would mitigate any potential competitive harm—trade associations and participants in industry surveys or other aggregations of sensitive information should review their existing procedures to confirm they do not raise competitive questions. Looking forward, these same entities should consider the competitive ramifications of proposed information exchanges rather than relying solely on safety zones set out in the withdrawn policy statements.

The Previous Statements Provided Safe Harbor for Information Exchanges Meeting Specified Criteria.

The 1993 Statement set out safety zones in which DOJ and the Federal Trade Commission (FTC) would not challenge, *inter alia*, physicians' provision of information to purchasers of health care services, and hospitals' participation in exchanges of price and cost information.[3]

One of these safety zones permitted physicians to provide "non-price" information, including the collective provision of underlying medical data, and the development of suggested practice parameters to purchasers of healthcare services (such as insurance companies).[4] The statement also specified that

although the safety zone did not cover the collective provision of "fee-related information," it did not consider sharing this information to be "necessarily illegal."[5]

Taken together, the 1993 and 1996 Statements also set out three conditions to qualify for a safety zone when sharing pricing or cost related information[6]:

1. the information must be collected and managed by a third party (such as a survey or similar program);

2. the information collected must be at least three months old; and

3. there must be at least five participants reporting data upon which each disseminated statistic is based, no individual provider's data may represent more than 25 percent on a weighted basis of that statistic, and any information disseminated must be sufficiently aggregated such so that prices charged or compensation paid by particular participants cannot be identified.[7]

Finally, the 2011 Statement established a safety zone for sharing competitively sensitive information between participants in Accountable Care Organizations (ACOs).[8] The Affordable Care Act enables groups of medical service providers and suppliers to work together to manage and coordinate care for Medicare fee-for-service beneficiaries through an ACO.[9] The 2011 Statement permits ACO participants to share information if the independent ACO participants that provide the same service (a "common service") have a combined share of 30 percent or less of each common service in each participant's Primary Service Area (PSA).[10] The PSA for each participant is defined as "the lowest number of postal zip codes from which the ACO participant draws at least 75 percent of its patients, separately for all physician, inpatient, or outpatient services."[11] DOJ's remarks did not specifically address this safety zone.

The Withdrawal of the Healthcare Industry Statements Creates Uncertainty about the Agencies' Human Resources Guidance.

The withdrawal of the Healthcare Industry Statements also casts doubt on safe harbors in related human resources guidance. DOJ and FTC's 2016 "Guidance For Human Resource Professionals" advises H.R. professionals that information exchanges of compensation and other information may be lawful if they satisfy the conditions articulated by the now-withdrawn 1996 Statement.[12] The withdrawal of the 1996 Statement creates uncertainty about the conditions under which compensation and other human resources-related information can be safely shared between potential competitors for labor.

The Competitor Collaboration Guidelines Remain in Effect and will Serve as Guideposts for Proposed Information Exchanges.

The Competitor Collaboration Guidelines issued by DOJ and FTC in 2000 demonstrate that information exchanges are less likely to raise concerns if they adhere to the conditions that would have qualified them for safety zones under the Healthcare Industry Statements.[13] First, the Guidelines advise that parties may reduce antitrust concerns by sharing sensitive information through independent third parties as opposed to sharing this information directly with competitors.[14] Further, sharing historical

information is less likely to raise competitive concerns than sharing information on current or future operations.[15] Finally, the sharing of aggregated data which does not permit recipients to identify individual firm data will be subject to less antitrust scrutiny than the sharing of individual company data.[16] These principles underlaid the safety zones from the Health Industry Statements. As the Guidelines remain in effect even after the Statements' withdrawal, conformance to these conditions should mitigate antitrust exposure.

Moreover, the Competitor Collaboration Guidelines make clear that conduct falling outside of safety zones can be competitively neutral or even procompetitive.[17] The withdrawal of the safety zones does not necessarily raise heightened concerns about this conduct.

The Withdrawal of the Healthcare Industry Statements May Signal Criminal Enforcement by DOJ of Anticompetitive Information Sharing.

DOJ's remarks that "information exchanges can facilitate full-blown criminal conspiracies" when they lead to conduct that is *per se* illegal, and, in other instances, may be evaluated under the rule of reason, suggest that DOJ may seek to pursue anticompetitive information sharing criminally.

DOJ Will Closely Scrutinize Mergers when There is a Prior History of Collusion.

DOJ also remarked that its investigations into anticompetitive information exchanges are not limited to Section 1 of the Sherman Act, and a history of collusion within an industry will serve as important context for the evaluations of mergers under Section 7 of the Clayton Act.[18] In particular, when one or more merging parties has previously engaged in anticompetitive information exchange, DOJ may treat any *past harm* resulting from such exchanges as evidence of the potential harmful effects of the merger *in the future.[19]*

Takeaways.

The withdrawal of DOJ's prior statements establishing information sharing safety zones creates uncertainty around whether DOJ will now treat exchanges of information that were encompassed by these safety zones as problematic. Moreover, there is considerable doubt about what conditions must be satisfied for information sharing to be considered lawful by DOJ and the FTC, in the healthcare industry and other industries. This includes heightened uncertainty around a range of previously presumptively lawful benchmarking related practices in the H.R. space and beyond. Finally, it remains to be seen whether DOJ will seek to prosecute anticompetitive information sharing criminally.

Gibson Dunn attorneys are closely monitoring these developments and available to discuss these issues as applied to your particular business.

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[1] Doha Mekki, Principal Deputy Assistant Attorney General, Dept. of Justice, *Keynote Address at GCR Live: Law Leaders Global* (Feb. 2, 2023), https://www.justice.gov/opa/speech/principal-deputy-assistant-attorney-general-doha-mekki-antitrust-division-delivers-0#_ftnref19.

[2] *Id.*

[3] U.S. Dep't of Justice, *Department of Justice and FTC Antitrust Enforcement Policy Statements in the Health Care Area* (Sept. 15, 1993), at 3, https://www.justice.gov/archive/atr/public/press_releases/1993/211661.htm.

[4] *Id*.

[5] *Id.* at 3-4.

[6] U.S. Dep't of Justice & Fed. Trade Comm'n, *Statements of Antitrust Enforcement Policy in Health Care* (Aug. 1996), at 44, https://www.justice.gov/atr/page/file/1197731/download.

[7] *Id*. at 44-45.

[8] U.S. Dep't of Justice & Fed. Trade Comm'n, *Statement of Antitrust Enforcement Policy Regarding Accountable Care Organizations Participating in the Medicare Shared Savings Program* (Oct. 28, 2011), at 2, https://www.justice.gov/sites/default/files/atr/legacy/2011/10/20/276458.pdf.

[9] *Id*.

[10] *Id.* at 7.

[11] *Id.*

[12] U.S. Dep't of Justice & Fed. Trade Comm'n, *Antitrust Guidance For Human Resource Professionals* (Oct. 2016), at 5, https://www.justice.gov/atr/file/903511/download.

[13] U.S. Dep't of Justice, Department of Justice and Fed. Trade Comm'n, *Antitrust Guidelines for Collaborations Among Competitors* (Apr. 2000), at 15-16, https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf.

[14] *Id*. at 21.

[15] *Id*. at 14.

[16] *Id.* at 15.

[17] *Id*. at 25.

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Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding the issues discussed in this update. Please contact the Gibson Dunn lawyer with whom you usually work, any member of the firm's Antitrust and Competition practice group, or the following:

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