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DOJ Withdraws Three Decades of Health Care Antitrust Policy

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The DOJ continued its transformation of long-standing antitrust policy on February 3rd, withdrawing a slate of long-standing antitrust policy statements addressing healthcare markets and providers. The three guidance documents, though non-binding, provided certainty in healthcare deal making for the past three decades.

The first statement, issued September 1993, impacts antitrust safety zones for hospital mergers, hospital joint ventures involving high technology, and hospital survey information sharing, among others. The second statement, issued August 1996, included revised antitrust safety zones on physician network joint ventures and multi-provider networks and identified additional types of arrangements that qualify as a physician-network joint venture. The third statement, issued October 2011, focused on guidance provided after passage of the Affordable Care Act, and included guidance on Accountable Care Organizations, such as an antitrust safety zone for ACOs in the Shared Savings Program, and specific conduct to avoid for ACOs outside the safety zone.

The agency provided several bases for the withdrawals and included that the statements are “overly permissive” in certain areas and have not kept up with changes in the healthcare industry over the last thirty years. The DOJ, also particularly skeptical of information sharing, cited overly permissive information-sharing as a basis as well. Ultimately, the Antitrust Division said, it prefers to withdraw the three statements in full, rather than reevaluate each on a piecemeal basis – an ambitious approach that is in line with the Biden Administration’s mandate initiated by the Executive Order on Promoting Competition in the American Economy, signed July 9, 2021. That Executive Order included 72 initiatives across federal agencies and focused on antitrust concerns.

This withdrawal announcement will return the DOJ's analysis of the health care markets to a largely case-by-case enforcement approach, which comes with reduced certainty for deal making and collaborations. The Antitrust Division maintained that the new case-by-case approach will improve the Agency's ability to evaluate mergers and anticompetitive conduct in health care markets. Assistant Attorney General Jonathan Kanter: "Antitrust Division will continue to work to ensure that its enforcement efforts reflect modern market realities." Modern realities of antitrust enforcement mean that collaborators in the health care space should move forward with greater care.

The announcement claims that recent enforcement actions and advocacy provide sufficient guidance of how the agency is likely to proceed – if not the reception such moves will get in court. The FTC likewise has been a partner in the Division's move to highly scrutinize the health care markets. In 2022, the Antitrust Division's unsuccessful challenge of the UnitedHealth-Change Healthcare transactions made headlines, to that agency's dismay; while the FTC's apparent comfort with advancing potentially unsuccessful claims led to its unsuccessful challenge of the Illumina-Grail transaction. The UnitedHealth-Change Healthcare challenge centered on access to competitively sensitive data in Change's business, which the federal district court rejected based on UnitedHealth's past practice and a proposed divestiture plan. Meanwhile, the Illumina-Grail challenge focused on Illumina's post-acquisition ability to advantage Grail over alleged rivals, in the relevant market of MCED tests, which the FTC's Chief Administrative Law Judge rejected, based on Illumina's already existing ability to raise prices before the acquisition, and Illumina's long-term supply agreement offer to rivals. Given that the three longstanding statements were jointly issued by the DOJ and the FTC, we expect the FTC to follow suit and similarly withdraw the statements.

Federal antitrust regulators' removal of antitrust safety zones in the health care markets is significant not only as yet another example of reversing long-standing jurisprudence, but also because of the significant ambiguity under which health systems must now operate. The guidance, while non-binding, ultimately served as strong protection against overbroad enforcement. With landscape changes coming in fast succession, deal makers in the healthcare space would do well to stay current on recent enforcement actions and adjust accordingly.

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