FTC and DOJ Withdraw Antitrust Collaboration Guidelines: Increased Uncertainty In Healthcare Competitor Collaborations

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Collaboration Among Competitors: A Shifting Regulatory Landscape

Collaboration among competitors has long been a complex area of antitrust law. These collaborations balance the potential benefits of joint ventures and other cooperative arrangements, including between healthcare providers and payers, against the risk of antitrust scrutiny and enforcement. Agency guidelines historically have played a crucial role in providing clarity and predictability for businesses navigating this landscape, offering a framework for evaluating the legality of collaborations and assessing potential antitrust risks.

Withdrawal of Antitrust Guidelines for Collaborations Among Competitors

On December 11, 2024, the Federal Trade Commission (FTC) and the Department of Justice (DOJ) jointly withdrew the Antitrust Guidelines for Collaborations Among Competitors, originally issued in April 2000. This latest action by the FTC and DOC reflects a continuing trend among enforcement agencies toward skepticism of published guidelines and established safety zones and a preference for case-by-case review and enforcement.

The FTC and DOJ cited several key reasons for withdrawing the guidelines. Primarily, the agencies stated that the 2000 guidelines were outdated and "no longer provide reliable guidance to the public about how enforcers assess the legality of collaborations involving competitors." They pointed to significant Supreme Court and appellate court decisions since 2000 that have reshaped the legal landscape surrounding competitor collaborations. The agencies also noted that the withdrawn guidelines relied on outdated agency guidance and failed to address the complexities of modern business practices and technological advancements such as artificial intelligence, algorithmic pricing, and vertical integration. The agencies did not offer any new guidance to replace the withdrawn guidelines, but instead encouraged businesses considering collaborating with competitors "to review the relevant statutes and caselaw to assess whether a collaboration would violate the law."

Impact on Joint Ventures and other Provider Collaborations

The withdrawal of the guidelines has raised concerns about its potential impact on collaborations between competitors in the healthcare space. The prior

guidelines – along with the previously withdrawn Statements of Antitrust Enforcement Policy in Health Care – provided a framework for hospitals, skilled nursing facilities, and other providers to assess whether affiliations between competitors would attract regulatory scrutiny. Those clear, bright-line rules aided providers in their business decisionmaking, allowing them to assess how collaborations between competitors could be structured to provide healthcare in innovative and effective ways without posing antitrust concerns.

The absence of new guidelines creates uncertainty, potentially deterring some provider-led joint ventures and resulting in a chilling effect on healthcare mergers and acquisitions. The increased regulatory uncertainty may lead to higher costs associated with planning and executing agreements, as organizations will rely more on legal counsel to assess antitrust risk. For example, the prior guidelines included a safety zone that protected affiliations below a combined 20% market share in each relevant market. Removal of this safety zone may discourage collaborations even when the combined market share is relatively low. Furthermore, existing affiliations may now face increased scrutiny, requiring providers to re-evaluate arrangements that were previously considered safe under the withdrawn guidelines.

With the withdrawal of these guidelines, competing healthcare providers may be less willing to engage in provider-provider collaborations across the continuum of care such as joint ventures, or in payer-provider collaborations such as Accountable Care Organizations (ACOs) or similar value-based arrangements. Increased scrutiny of information gathering and sharing poses a particular concern in this context. While prior administrations have prioritized value-based care arrangements, these types of arrangements can only be made effective by robust data sharing between the parties. The agencies' removal of clear guidelines around acceptable data gathering and sharing may thus chill providers' efforts to enter into value-based care arrangements, contrary to the administrations' stated intent and the efforts of healthcare regulators at other federal agencies.

Conclusion and Future Outlook

The withdrawal has sparked debate, with dissenting FTC commissioners criticizing the timing and lack of replacement guidance. As one commissioner stated in dissent, the majority's decision "leaves businesses grasping in the dark". With the incoming administration under President-elect Trump and the likelihood that the dissenting commissioners will be part of a new majority in the near future, the FTC and DOJ's antitrust enforcement priorities may shift. While both the first Trump administration and the current Biden administration took a proactive approach to robust antitrust enforcement, these dissents suggest an uncertain outlook for antitrust enforcement priorities under the incoming Trump administration.

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