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The DOJ Withdraws from the Health Care Antitrust Statements: a Cause for Concern for Physician Organizations?

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Clinical Integration, Risk, and Accountable Care: New developments from the DOJ

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FOR IMMEDIATE RELEASE — Friday, February 3, 2023

Justice Department Withdraws Outdated Enforcement Policy Statements

The Withdrawal Best Serves the Interests of Healthcare Competition

The Justice Department's Antitrust Division announced today the withdrawal of three outdated antitrust policy statements related to enforcement in healthcare markets: *Department of Justice and FTC Antitrust Enforcement Policy Statements in the Health Care Area* (Sept. 15, 1993); *Statements of Antitrust Enforcement Policy in Health Care* (Aug. 1, 1996); and *Statement of Antitrust Enforcement Policy Regarding Accountable Care Organizations Participating in the Medicare Shared Savings Program* (Oct. 20, 2011).

After careful review and consideration, the division has determined that the withdrawal of the three statements is the best course of action for promoting competition and transparency. Over the past three decades since this guidance was first released, the healthcare landscape has changed significantly. As a result, the statements are overly permissive on certain subjects, such as information sharing, and no longer serve their intended purposes of providing encompassing guidance to the public on relevant healthcare competition issues in today's environment. Withdrawal therefore best serves the interest of transparency with respect to the Antitrust Division's enforcement policy in healthcare markets. Recent enforcement actions and competition advocacy in healthcare provide guidance to the public, and a case-by-case enforcement approach will allow the Division to better evaluate mergers and conduct in healthcare markets that may harm competition.

"The healthcare industry has changed a lot since 1993, and the withdrawal of that era's out of date guidance is long overdue," said Assistant Attorney General Jonathan Kanter of the Justice Department's Antitrust Division. "The Antitrust Division will continue to work to ensure that its enforcement efforts reflect modern market realities."

Guidance documents are non-binding and do not create legal rights or obligations. Antitrust enforcement and competition advocacy in healthcare remain important parts of the division's mission, and the division will continue to vigorously enforce the antitrust laws in the healthcare industry.

Topic(s):
Antitrust

Component(s):
Antitrust Division

Press Release Number:
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Updated February 3, 2023

On February 3, 2023, ***the Department of Justice ("DOJ") withdrew from three antitrust policy statements*** (collectively, the "Statements") that it had previously jointly promulgated with the Federal Trade Commission ("FTC"). The DOJ's withdrawal from the Statements – which it now characterizes as "overly permissive" and "out of date" – ***puts an end to a suite of "safety zones" vis-à-vis DOJ antitrust enforcement in health care.***

Until the DOJ's February announcement, these safety zones assured health care organizations that if they met set criteria when engaging in certain types of joint conduct, DOJ would (absent exceptional circumstances) view the conduct as legitimate and pro-competitive.

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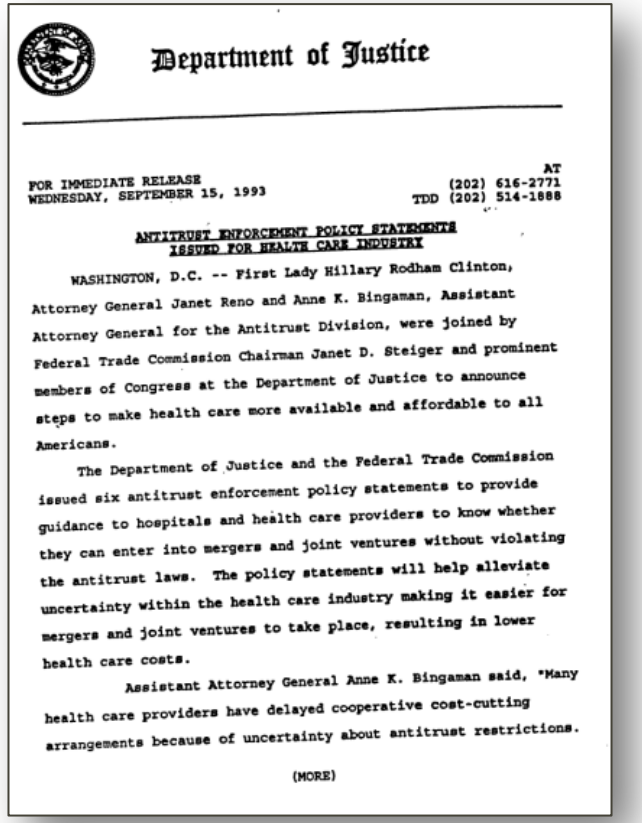
The 1993 Statements

The 1993 Antitrust Enforcement Policy Statements in the Health Care Area. The 1993 Statements were the first policy statement by the agencies to provide antitrust safety zones for circumstances under which the Department of Justice and the Federal Trade Commission would not challenge, absent extraordinary circumstances: hospital mergers, hospital joint ventures involving high-technology or other expensive medical equipment, physicians' provision of information to purchasers of health care services; hospital participation in exchanges of price and cost information; joint purchasing arrangements among health care providers; and physician network joint ventures. In 1994, the agencies expanded the scope of the 1993 Statements to include joint ventures involving expensive services.

Notably, the 1993 Statements and their expansion in 1994 only discussed the bearing of substantial financial risk in the context of conduct that physician networks could undertake without violating antitrust law – and established a safety zone for such physician networks that comprised only 20% of any particular medical or surgical specialty in a geographic market.



Department of Justice

FOR IMMEDIATE RELEASE
WEDNESDAY, SEPTEMBER 15, 1993

AT
(202) 616-2771
TDD (202) 514-1888

ANTITRUST ENFORCEMENT POLICY STATEMENTS
ISSUED FOR HEALTH CARE INDUSTRY

WASHINGTON, D.C. -- First Lady Hillary Rodham Clinton, Attorney General Janet Reno and Anne K. Bingaman, Assistant Attorney General for the Antitrust Division, were joined by Federal Trade Commission Chairman Janet D. Steiger and prominent members of Congress at the Department of Justice to announce steps to make health care more available and affordable to all Americans.

The Department of Justice and the Federal Trade Commission issued six antitrust enforcement policy statements to provide guidance to hospitals and health care providers to know whether they can enter into mergers and joint ventures without violating the antitrust laws. The policy statements will help alleviate uncertainty within the health care industry making it easier for mergers and joint ventures to take place, resulting in lower health care costs.

Assistant Attorney General Anne K. Bingaman said, "Many health care providers have delayed cooperative cost-cutting arrangements because of uncertainty about antitrust restrictions.

(MORE)

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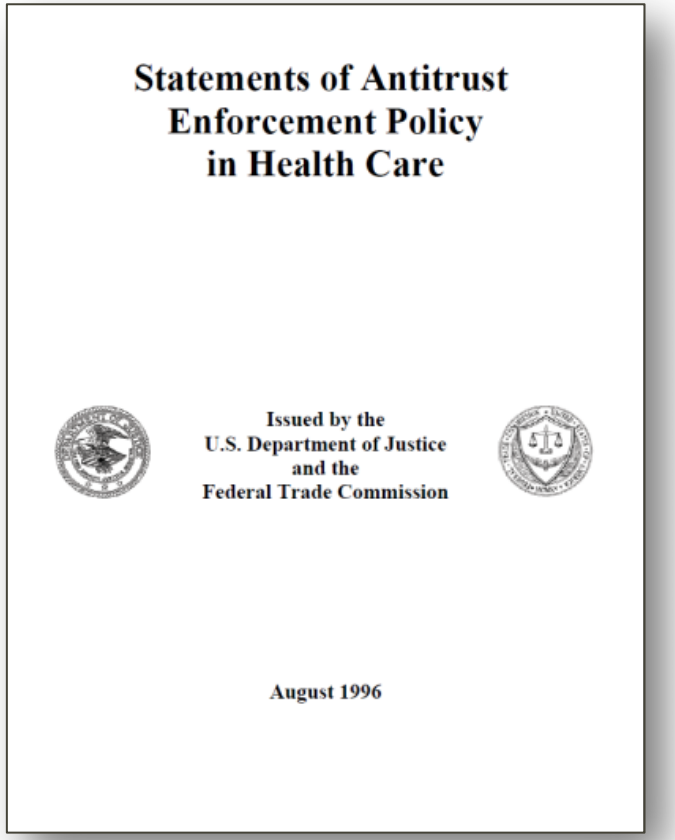
The 1996 Statements

Statement 8 of the 1996 guidance provided much more expansive advice for physician joint ventures seeking to avoid per se illegal treatment.

The 1996 Statements:

- **reiterated the 1993 safety zones for independent practice associations (IPAs) and physician hospital organizations (PHOs) that share substantial financial risk;**
- **described appropriate "messenger model" contracting by IPAs and PHOs; and**
- **articulated, using traditional antitrust "rule-of-reason" analysis, how an IPA or PHO could create significant efficiencies through *clinical integration* that could outweigh the restraint on trade that joint payor contracting would otherwise entail.**



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The 2011 Statements

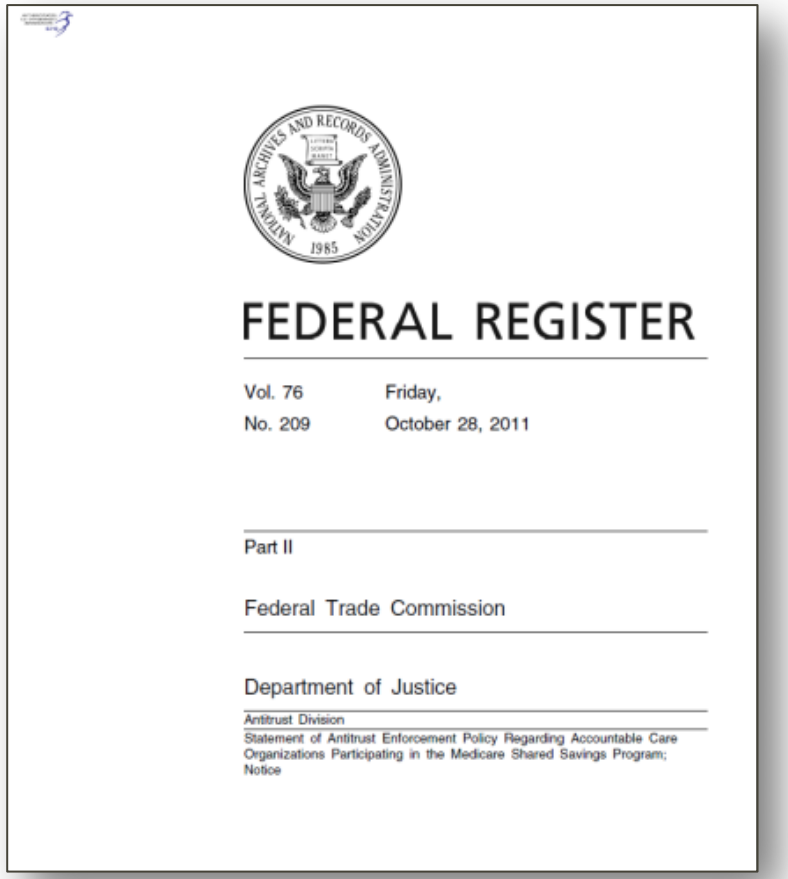
The 2011 Statement established that the agencies would not challenge as per se illegal a qualified ACO participating the MSSP that jointly negotiates with commercial payors. Instead, the DOJ and FTC would apply a "rule of reason" analysis.

Additionally, the 2011 Statement established a safety zone for ACOs with participants that hold combined share of less than 30 percent of a "common service" (i.e., services in the same medical or surgical specialty or particular inpatient or ambulatory services) in each participant's primary service area (PSA) as defined by Medicare.

The issuance of the 2011 Statement led to the widespread, and *erroneous*, view that ACOs in the MSSP were "deemed" clinically integrated or received a new antitrust "exemption."

In point of fact, the "rule of reason" treatment of ACOs advocated in the 2011 Statement would actually require the same analysis described in the 1996 Statements of whether the quality, cost, and access efficiencies created by the ACO would outweigh the restraint on trade caused by joint contracting and whether joint contracting is reasonably necessary to achieve those efficiencies.

And, in any event, the analysis of efficiencies would only apply to those providers (almost exclusively primary care physicians) who are actively involved in the quired by the MSSP, and only when those are applied specifically to the populations contracted under commercial payor contracts.



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Part II

Federal Trade Commission

Department of Justice

Antitrust Division

Statement of Antitrust Enforcement Policy Regarding Accountable Care Organizations Participating in the Medicare Shared Savings Program; Notice

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Remaining legal guidance for physician organizations

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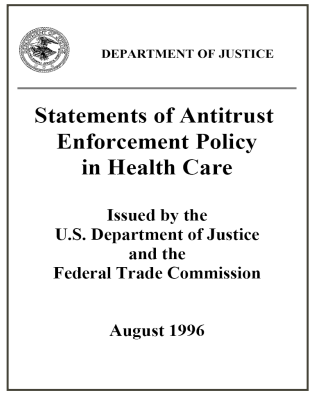
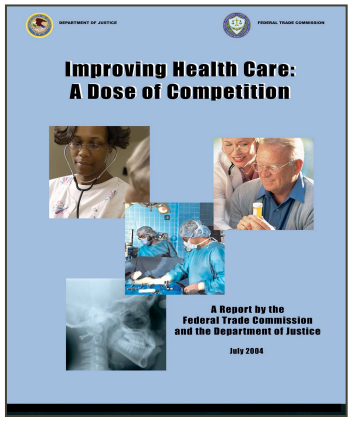

DEPARTMENT OF JUSTICE

Statements of Antitrust Enforcement Policy in Health Care

Issued by the U.S. Department of Justice and the Federal Trade Commission

August 1996



FTC Enforcement Actions

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DOJ's withdrawal from the Health Care Statements: key takeaways

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The DOJ is indicating a ***much more robust posture in enforcement*** of antitrust in the health care industry.

Well-established Supreme Court precedent regarding ***the "rule-of-reason" remains the law of the land***. This means that financially and clinically integrated physician organizations need to ***demonstrate efficiencies in quality, cost, and access*** – and show how ***collective contracting with payors is reasonably necessary*** to achieve these efficiencies.

Health systems and physician organizations ***should examine the extent of their reliance of the safety zones*** contained in the Statements (particularly in the area of information sharing and joint purchasing) and should ***take the opportunity to reassess their antitrust risk regardless*** of their application of the safety zones.

Moreover, ***health care organizations must understand that establishing an ACO for participation in the MSSP decidedly does not result in automatic consideration as a "clinically integrated" network*** – and ACOs engaged in contracting with commercial payors ***cannot*** rely on the 2011 Statement to ward off DOJ scrutiny.

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