



Weekly Checkup

Trust Withdrawn

JACKSON HAMMOND | MARCH 10, 2023

Recently, the Department of Justice (DOJ) **withdrew** three decades-old policy statements that created antitrust safety zones for various health care entities, including hospitals. My colleague Fred Ashton has all of the details [here](#). Below is a brief overview of what this withdrawal means for the health care industry.

The withdrawn DOJ guidance was drafted in 1993, 1996, and 2011 in conjunction with the Federal Trade Commission (FTC). **FTC has not withdrawn its version of these policy statements, however, leading to some confusion over which behaviors the antitrust agencies are likely to scrutinize.** These policy statements are not legally binding, but they inform industry participants as to how a given agency will enforce a law or regulation. As Ashton explains, the withdrawn statements “established antitrust safety zones, circumstances under which the antitrust enforcement agencies will not challenge certain activity, for information exchanges, hospital mergers, joint ventures, and Accountable Care Organizations (ACO) participating in the Medicare Shared Savings Program covering millions of patients.” **The key phrase here is “withdrawn” – DOJ has issued no replacement guidance and has offered that stakeholders should consult “recent enforcement actions and competition advocacy” to determine what its future actions may be.**

The problem with DOJ’s advice, of course, is that every past enforcement action was made under the withdrawn guidance—and as DOJ did not issue replacement guidance, industry participants will have to look to *future* actions to understand how DOJ will enforce antitrust law. **Industry cannot predict how DOJ will act in the future, so there is no certainty about what behavior DOJ will scrutinize and how likely it is to investigate existing industry participants.**

How many entities could be at risk for enforcement? That is difficult to say, but 3,421 hospitals (56 percent of all hospitals) in the United States fell within antitrust safety zones in 2022, and over 1,600 mergers took place between 1998–2021. Similarly, there were 456 ACOs as of January 2023 overseeing the care of about 10.9 million patients. A large number of these entities could now be vulnerable to the DOJ’s antitrust scrutiny. **Additionally, we are likely to see a freeze by stakeholders on new hospital mergers, expanded joint ventures and ACOs, and information exchanges.**

Now, the premise behind this withdrawal – that the original guidance is associated with a period of increased monopolization – isn’t a bad one. **The old guidance, issued under the belief that economies of scale provided cost efficiencies and better care coordination, supported a free-for-all environment in which hospital mergers skyrocketed.** As the American Action Forum [has previously noted](#), these hospital mergers have been linked to rising prices and spending for hospital care.

In theory, revoking this guidance could be beneficial: DOJ is more likely to crack down on hospital mergers that would raise prices. **Without replacing the guidance with anything concrete, however, DOJ has instead left large portions of the health care system in limbo, with good-faith actors unclear on which behaviors the antitrust agencies will deem permissible, confusion compounded by the fact that the FTC has opted to keep its guidance on these safety zones on the books.** Adding confusion in an industry that depends on stability and certainty is likely to cause significant problems not just for hospitals, but for their patients, too.