King & Spalding
Client Alert

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DOJ Alters Standards for Information Sharing in Healthcare

For more information, contact:

Norm Armstrong (co-chair)
+1 202 626 8979
narmstrong@kslaw.com

Jeffrey S. Spigel (co-chair)
+1 202 626 2626
jspigel@kslaw.com

Robert Cooper
+1 202 626 8991
rcooper@kslaw.com

Albert Y. Kim
+1 202 626 2940
akim@kslaw.com

Emily Marsteller
+1 202 626 2622
emarsteller@kslaw.com

King & Spalding

Washington, D.C.
1700 Pennsylvania Avenue, NW
Suite 900
Washington, D.C. 20006
Tel: +1 202 737 0500

On Friday, February 3, DOJ announced that it is withdrawing three policy statements of antitrust guidance it has provided and that have been adopted by the healthcare industry for close to 30 years. The statements include *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). DOJ has made this change without any updated replacement guidance other than to say that "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." There have been no recent enforcement actions, however, involving certain provision of these withdrawn statements, namely the formation and operation of clinically and/or financially integrated provider networks, including ACOs, messenger model networks, group purchasing and industry benchmarking following the safe harbors contained in the Statements of Antitrust Enforcement Policy in Health Care (Aug. 1, 1996). The FTC is also certain to follow DOJ's announcement with its own statement. With this backdrop, we offer the following observations:

- Friday's announcement is consistent with other recent DOJ and FTC actions withdrawing prior government statements with no replacement guidance to the legal or business community.

- It will be increasingly important that provider networks' procompetitive impacts (e.g., highly quality care delivered more efficiently) have support from ordinary course documents and third parties such as commercial payors, and that networks understand that increased antitrust risk will exist if the network is exclusive, not risk-based, and formed to obtain leverage over commercial payors. Antitrust compliance audits should be implemented as a matter of course to ensure any collective agreements

on price or price-related terms are ancillary to the operation of provider networks that are sufficiently integrated joint ventures.

- With the benchmarking safe harbor withdrawn, it will be even more critical to ensure that benchmarking (irrespective of the industry) is antitrust compliant. For example, important factors to consider include the following:
    - What is the purpose of the benchmarking survey (e.g., are there procompetitive reasons for the benchmarking)?
    - Who are the recipients of the survey information (more antitrust risk if the recipients are competitors)?
    - What is the type of information to be exchanged (competitive information has more antitrust risk; current and future pricing and salary information is inherently suspect)?
    - What is the age of the data (data that can be used to draw conclusions about current or future actions has substantial antitrust risk; DOJ has affirmatively said in Friday's announcement that 3 months is not old enough)?
    - What is the frequency of the information exchanges (regular exchanges have more antitrust risk)?
    - Whether the information is collected and presented on an aggregated or disaggregated basis (aggregation is far safer-the more specific the data the more antitrust exposure)
    - What are the industry characteristics (concentrated industries present the most antitrust risk in addition to other industries that have been subject to increased scrutiny by the DOJ and FTC, such as energy, healthcare/life sciences, and technology)?

King & Spalding has a leading antirust team comprised of lawyers with a deep bench of experience. We work closely with other experts in the firm, including the firm's leading healthcare practice, which is one of the legal industry's largest, public company and private equity lawyers, data security and privacy, and trial lawyers to provide comprehensive legal advice to our clients. Please contact one of our antitrust team members with further details regarding how you can ensure your organic and inorganic business strategy can be implemented successfully while avoiding and minimizing antitrust risks.