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WEBSTER, CHAMBERLAIN & BEAN, LLP – NONPROFIT ALERT

DEPARTMENT OF JUSTICE WITHDRAWS SUPPORT FROM SAFE HARBOR POLICY ON INFORMATION EXCHANGES

On February 3rd, the Department of Justice (“DOJ”) withdrew its support from three antitrust enforcement policy statements with applicability that includes the issue of information exchanges. The policy statements in question were specifically related to antitrust enforcement in health care, but they have traditionally been relied upon as general antitrust guidance in other fields and industries.

Background

The policy statements in question were originally released over the course of two decades: the first two in 1993 and 1996, while the third was released in 2011. The DOJ and Federal Trade Commission jointly issued these policy statements to provide guidance to the health care industry as to how they may legitimately enter mergers, joint ventures, and related arrangements. The statements themselves built on existing antitrust caselaw.

In a press release, the DOJ stated that the policy statements are now considered to be “outdated,” given the marked changes in the healthcare landscape over the prior two decades. These statements also had served as broad guides in assessing how the DOJ’s Antitrust Division would approach questions regarding the permissibility of information exchanges. The DOJ has indicated that it will take a “whole-of-government approach” to information exchanges amongst competitors, analyzing each exchange on a case-by-case basis.

Key Provisions of Prior DOJ Policy Statements Regarding Information Exchanges

One of the more critical pieces of language that has now been withdrawn has to do with what constituted a “reasonable” exchange of information among competitors. Under the previously supported policy statements, the DOJ’s view was that a “reasonable” exchange of information among competitors would exist in a “safety zone” (i.e., there would be no concern of illegality) if:

- The information exchange is managed by a third party (e.g. a trade association);
- The information provided is more than three months old; and
- There are at least five providers reporting data upon which each disseminated statistic is based, no individual provider’s data represents more than 25 percent on a weighted basis of that statistic, and any information disseminated is sufficiently aggregated such that it would not allow recipients to identify the information provided by any individual participant.

What does this change mean for nonprofits?

It is important to note that the DOJ’s policy statements are not themselves law – the case law on information exchanges will continue to govern what is to be considered an acceptable

information exchange. It is also uncertain whether the Federal Trade Commission will withdraw its support for the policy statements regarding information exchanges. However, the DOJ's policy statements have long been considered informational and useful points of reference by the courts; so, the DOJ's withdrawal of support for these policy statements could influence how courts will assess the propriety of information exchanges in the future.

The DOJ's withdrawal from these policy statements reflects broader antitrust changes in recent months and years; the Federal Trade Commission's proposed rule that would ban most non-compete agreements, which we wrote on recently, is but one example.

The DOJ's change in position regarding these policy statements creates added uncertainty and risk when it comes to assessing the propriety of any given information exchange. Associations should take care in examining their own information exchange policies and be sure to contact antitrust counsel for any questions or guidance.

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