

# DOJ Withdraws Healthcare Guidance and Safe Harbors

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## Article

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On February 3, 2023, The Department of Justice (“DOJ”) announced the withdrawal of three antitrust policy statements related to the healthcare industry, which collectively created numerous longstanding “safe zones” for collaborations among healthcare providers. The three withdrawn policies, all of which were issued jointly by the DOJ and the Federal Trade Commission (“FTC”), are as follows:

1993 “Antitrust Enforcement Policy Statements Issued for the Health Care Industry” (“1993 Policy”).<sup>[1]</sup>

The 1993 Policy provided “antitrust safety zones” under which the DOJ and FTC would not challenge:

- Hospital mergers;
- Hospital joint ventures involving high-technology or other 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.

1996 “Statements of Antitrust Enforcement Policy in Health Care” (“1996 Policy”).<sup>[2]</sup>

- The 1996 Policy contained nine statements and largely expanded upon the 1993 guidelines.

→ The 1996 Policy included the specific “antitrust safety zone” language, which provided that, if the conditions were met, joint purchasing arrangements among health care providers would not be challenged by either the DOJ or the FTC “absent extraordinary circumstances.” It also set forth additional mitigating factors for joint purchasing arrangements that fall outside the antitrust safety zone.

2011 Statement of Antitrust Enforcement Policy Regarding Accountable Care Organizations Participating in Medicare Shared Cost Savings Program (“2011 Policy”).<sup>[3]</sup>

→ Pursuant to the 2011 statement, the DOJ and the FTC indicated they would apply a “rule of reason analysis” to Accountable Care Organizations” that are “financially or clinically integrated and the agreement is reasonably necessary to accomplish the procompetitive benefits of integration.”

So far, only the DOJ has withdrawn the jointly implemented policies. The FTC has not yet voted to do the same but is expected to soon follow suit. The DOJ characterized all three statements as “outdated.”<sup>[4]</sup> In its press release giving notice of the withdrawals, the DOJ noted that, in the three decades since the first of the policy statements were enacted, “the healthcare landscape has changed significantly. As a result, the statements are overly permissive on certain guidance to the public on relevant healthcare competition issues in today’s environment.” It also reiterated that “[g]uidance documents are non-binding and do not create legal rights or obligations.”

We will continue to monitor developments, including press releases, seminars, speeches, and conferences at which one or both agencies are represented. For now, significant safeguards and antitrust protections have been withdrawn. The long-term ramifications are unclear. The resulting uncertainty has already drawn the ire of the American Hospital Association, which released its own statement that “[w]ithdrawing all the guidance without consultation with the field is both unnecessary and reckless.”

We will keep you apprised of all significant developments. In the meantime, please do not hesitate to reach out to us with any questions or concerns.

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[1] [https://www.justice.gov/archive/atr/public/press\\_releases/1993/211661.htm](https://www.justice.gov/archive/atr/public/press_releases/1993/211661.htm).

[2] [https://www.justice.gov/archive/atr/public/press\\_releases/1993/211661.htm](https://www.justice.gov/archive/atr/public/press_releases/1993/211661.htm).

[3] <https://www.justice.gov/sites/default/files/atr/legacy/2011/10/20/276458.pdf>

[4] <https://www.justice.gov/opa/pr/justice-department-withdraws-outdated-enforcement-policy-statements>.