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MEMORANDUM

TO: **Lauri Cole, Executive Director, and Members of the NYS Council for Community Behavioral Healthcare**

FROM: **Adam J. Falcone, Esq.**

DATE: **March 17, 2023**

RE: **Antitrust Guidance – Important Update**

Last October 28, 2022, I had the privilege of conducting a webinar for the members of the NYS Council for Community Behavioral Healthcare entitled "Commercial Contracts and Antitrust: Why it is Never a Good Idea to Share Reimbursement Rates with Other Providers". That webinar provided an overview of federal antitrust laws, the applicable legal standards, and certain "safety zones" for the sharing and exchanging of information by competing providers that had been established under Policy Statements issued jointly by the U.S. Department of Justice (DOJ) and Federal Trade Commission (FTC).

On February 3, 2023, the DOJ announced the withdrawal of those Policy Statements. The three policy statements specifically withdrawn by the DOJ are:

- 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 (August 1, 1996).
- Statement of Antitrust Enforcement Policy Regarding Accountable Care Organizations Participating in the Medicare Shared Savings Program (Oct. 20, 2011).

Please note that the FTC has not withdrawn these Policy Statements, though many anticipate that the FTC will take similar action to do so.

For the last 30 years, these Policy Statements have guided providers in sharing and exchanging information with each other and establishing clinically and financially integrated networks that contract with managed care organizations and health insurers. Notably, the guidance established certain "safety zones," similar to safe harbors, for structuring arrangements that would be unlikely to result in enforcement action by the DOJ or FTC, including the safety zones that I had discussed in my October 28, 2022 webinar.

This memorandum offers my views on the impact of the withdrawn Policy Statements and offers legal considerations for providers that wish to share information (such as reimbursement rates) with competing providers or participate in provider networks that negotiate contracts with managed care organizations or health insurers.

Impact on Health Care Providers

- In explaining its decision, the DOJ said 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 of the policy statements leaves providers at risk for activities that had been previously approved under the Policy Statements.
- Because the DOJ said it will take a "case-by-case enforcement approach," providers will have no other choice than to exercise caution in engaging in activities that involve competitors until there is sufficient enforcement activity to act as guidance.
- The withdrawal of the Policy Statements will be particularly challenging for providers that had relied on the 1996 Policy Statements' safety zones, such as those that apply to the sharing of fee and non-fee information, including the sharing facilitated by third parties such as networks or state associations.
- The DOJ's withdrawal of the Policy Statements does NOT mean that competitor collaborations and joint ventures are now illegal. Notably, the DOJ did NOT withdraw the Antitrust Guidelines for Collaborations Among Competitors (2000).
- The "Rule of Reason" legal standard will continue to apply to conduct that does not constitute "naked" per se violations of the antitrust laws. In applying that legal standard, it will be important to consider the following:
  (1) Does the collaboration have a legitimate and pro-competitive justification?
  (2) Would the collaboration have an adverse effect on competition?

Recommendations to NYS Council Members

- Disclosing Reimbursement Rates is (Even) Riskier
  - Because the DOJ has expressed concern with information-sharing among competitors, and the DOJ withdrew the information-sharing safety zones, any sharing of cost or fee-related data (including information-sharing facilitated by third parties such as networks or state associations) should be re-assessed and follow strict compliance policies for the use and disclosure of any shared information. Please note that, as discussed in the October 28, 2022 webinar, sharing of reimbursement rates with other entities could breach the confidentiality obligations contained in contracts with managed care organizations and health insurers.

- Provider Network Participation
    - In collaborations that involve competing providers (such as provider networks), the legal agreements underlying those collaborations should document the "efficiencies" and procompetitive benefits to patients and third-party payors resulting from price agreements necessary to achieve financial or clinical integration.
    - Provider networks that are not sufficiently integrated, and which rely on the "messenger model" to facilitate contracting with payors, should review their compliance program policies, provide additional training to staff on those policies, and ensure that they are operating in compliance with those policies.
- Guidance and Legal Standards
    - Providers should monitor whether the DOJ or FTC articulates new standards – through enforcement actions or otherwise -- that challenge conduct that would have previously been protected in a safety zone or covered under the policy statements.
    - If providers are unsure whether a particular arrangement would be lawful under the antitrust laws, providers and networks can work with legal counsel to submit a request for an advisory opinion or business review letter to either of the federal enforcement agencies (i.e., DOJ or FTC).