Don't Ask, Don't Tell? The Antitrust Risk of Conducting and Participating in Market Surveys Increase

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Near the top of the list of "**Antitrust Don'ts**" given by any antitrust practitioner is "Don't share competitively valuable information with your competitors!" Yet a form of information exchange – market surveys – is commonplace. Many trade associations, trade publications and third-party information services conduct them and many businesses participate in and use them. Antitrust law recognizes that surveys can improve business-decision making and increase competition, but can also be a means of communicating competitively valuable information to competitors with the purpose or effect of reducing competition. Thus, surveys present difficult to assess antitrust risks.

In 1996, the Antitrust Division of the Department of Justice (DOJ) and the FTC, which share responsibility for federal antitrust enforcement, reduced the uncertainty in one area of the economy, health care, by issuing "Statements of Antitrust Enforcement Policy in Health Care" ("Enforcement Policy"), which created an antitrust "Safety Zone" for surveys based on three more or less objective criteria which, if followed, would largely immunize the survey participants from government antitrust scrutiny.[1]

The survey Safety Zone was specifically applicable only to health care, and then only to government enforcement not private litigation, and then not even binding on the government. Nevertheless, its practical influence was significant within and outside the health care sector. In practice, for 25+ years survey sponsors and participants (and antitrust lawyers) relied on the Safety Zone and have acted on the assumption that compliant surveys presented minimal or no antitrust risk.

That changed on February 3, when the DOJ revoked the Enforcement Policy,[2] and thus the survey Safety Zone. The FTC is expected to follow soon. As a result, the risks of conducting or

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participating in market surveys has increased, and so too should your attention to your conduct of, participation in or use of surveys.

What was the Safety Zone and Why Was it Revoked?

The three Safety Zone criteria were:

(1) the survey is managed by a third-party . . . ; (2) the information . . . is based on data more than 3 months old; and (3) 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 prices charged or compensation paid by any particular provider.

In other words, the survey was to be a "black box" which could not disclose or allow competitors to derive competitor-specific information.

The DOJ revocation announcement itself did not explain the reasons for the revocation, other than that they were "outdated." However, the revocation was foreshadowed in a speech given the day before, in which a senior DOJ antitrust enforcer stated that the Safety Zone no longer worked because "high-speed, complex algorithms can ingest massive quantities of 'stale,' 'aggregated' data from buyers and sellers to glean insights about the strategies of a competitor." Stated differently, the DOJ believes that sophisticated data mining can turn the black box into a sieve.

What Replaces the Safety Zone?

The short answer is nothing, other than often abstract and imprecise statements of antitrust doctrine and a relatively limited and fact specific number of cases. The Safety Zone proved so influential precisely because there is no other simple and reliable guidepost for risk-minimizing survey behavior. Now, as stated in the withdrawal notice and speech discussed above, instead of objective criteria, the DOJ will "[c]areful[ly] consider [] the facts and [] enforcement approach that is consistent with the law as Congress wrote it and as the courts have interpreted it" and follow "a case-by-case enforcement approach."

What are the Takeaways?

The obvious takeaway is simple, but not necessarily satisfactory: Participating in surveys is riskier than it was before February 3, but how much riskier and how might those risks be mitigated is unclear.

That does not mean that, recycling a metaphor used above, the new government enforcement approach is a black box. The case law is limited and antitrust doctrine often opaque, but guidance is possible. Indeed, the author of this Alert has litigated the leading case in the area. An experienced antitrust advisor can provide concrete, actionable advice to align your business needs and survey practices to mitigate antitrust risk.

Towards that end, Butzel recommends that businesses that participate in market surveys should consider the following:

First, consider whether there is an actual business purpose for participating in a survey. In addition to antitrust risk, surveys involve costs of time and, perhaps, money. If there is not a business reason for doing so, why gratuitously incur risks and costs?

Second, consider the competitive significance of the surveyed information. In general, and strictly by way of example, price, cost, and capacity information is more likely to be put to anti-competitive uses than quality or methodology information.

Third, the criteria that defined the Safety Zone are still relevant to anti-competitive risk, just not determinative. The older the data, the better. The more broadly aggregated data, the better.

Fourth, assess the competence and reliability of the entity gathering, aggregating and disseminating the survey data, whether that is the survey sponsor or a third-party service provider. Assessing, for example, whether there are methodological changes that would reduce the "data-mining" risks that concern the DOJ is not a job for amateurs.

Fifth, upgrade your antitrust policies, training and enforcement programs.

Sixth, seek guidance from your antitrust advisor. It took little expertise or judgment to comply with the Safety Zone. Both are required to prudently manage antitrust risks in the post-Safety Zone world.

Please contact the author of this Alert or your Butzel attorney for more information.

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[1] For clarity, the Enforcement Policy did not make surveys outside the Safety Zone unlawful; instead, such surveys were merely subject to scrutiny as potentially unlawful.

[2] This Alert focuses only on the survey Safety Zone, but the entire Enforcement Policy, which addressed a large number of other health care specific antitrust concerns, was also revoked. While outside the scope of this Alert, that broader revocation will be important to many in in the health care sector. Your Butzel health care attorney is available to advise on those non-survey, health care-specific issues.