

# AntitrustConnect Blog

## Information Sharing: Still Risky After All These Years

Jacqueline K. Shipchandler and Timothy Newman · Thursday, May 31st, 2012

Two recent antitrust matters serve as reminders that exchanging sensitive information with business competitors can pose significant antitrust risks – particularly when companies stray from the “safety zones” established by the federal antitrust enforcement authorities.

From an antitrust perspective, agreements to exchange information present significant risks. An information exchange has the potential to facilitate unlawful coordination among competitors, and even if coordination does not occur, companies that share information might face difficult questions about how frequent access to sensitive competitor information does not undermine competition. In 1996, the Antitrust Division of the United States Department of Justice and the Federal Trade Commission issued joint guidance in their [Statements of Antitrust Enforcement Policy in Health Care](#). The Health Care Statements established an antitrust “safety zone” for exchanges that meet certain requirements. Absent extraordinary circumstances, the agencies will not challenge an information exchange if:

- (1) the exchange is managed by a third party;
- (2) the information provided by participants is based on data that is more than three months old;
- (3) there are at least five contributors of data for each disseminated statistic;
- (4) no individual participant’s data represents more than 25 percent of any particular statistic; and
- (5) disseminated information is sufficiently aggregated such that participants are unable to identify the data of any other participants.

Over the past two decades, companies and counsel in and out of the health care industry have relied on the Health Care Statements to provide a framework for establishing permissible information exchanges. Two recent antitrust cases illustrate the risks of engaging in information exchange outside these guidelines.

### **Ductile Iron Pipe Fitting Sellers Settle FTC Allegations of Unlawful Information Sharing**

In January 2012, the FTC challenged the conduct of McWane, Inc., Star Pipe Products, Ltd., and Sigma Corporation, all sellers of ductile iron pipe fittings (DIPF), essential components of municipal water systems. The FTC alleged, among other things, that McWane, Star Pipe and Sigma colluded to raise prices in the DIPF industry and exchanged sensitive sales data as a means of monitoring each competitor’s participation in the price-fixing scheme.

According to the FTC, McWane, Star Pipe, and Sigma provided their previous month’s sales data to a third-party accounting firm who then aggregated the data and re-distributed it to the three

competitors. Contrary to agency guidelines, the data provided by the competitors was typically no more than 45 days old, and the aggregated data re-distributed to the competitors was typically no more than two months old. Furthermore, the three companies together enjoyed more than 90 percent of DIPF sales in the relevant market at the time of their alleged collusion. Thus, the alleged information exchange ran afoul of the Health Care Statements' information exchange safety zone in numerous ways:

- (1) the data provided by the competitors was typically not more than three months old;
- (2) it appears from the FTC complaints that fewer than five competitors participated in the exchange; and
- (3) given the alleged concentration of the DIPF market and the limited participation in the exchange, it is likely that an individual participant's data represented more than 25 percent of a particular statistic.

McWane continues to oppose the FTC's administrative complaints, but Star Pipe and Sigma have both consented to FTC orders that they abstain from price fixing and market allocation. In addition, Star Pipe and Sigma have agreed to severe limitations on their ability to share information with competitors in the future, aside from certain information sharing related to joint ventures or DIPF sales. They may participate in an exchange only when:

- (1) data provided by participants and the statistics created in return relate to transactions that are at least six months old;
- (2) industry statistics are distributed no more than once every six months;
- (3) industry statistics distributed to participants represent an aggregation of input data for transactions covering a period of at least six months;
- (4) industry statistics distributed to participants represent an aggregation of input data received from no fewer than five competitors;
- (5) relating to price, output, or total unit cost, no individual contributor's input data represents more than 25 percent of the total reported sales, and the sum of any three contributor's input data represents no more than 60 percent of the total reported sales;
- (6) data is sufficiently aggregated so that no participant can identify the input data submitted by any other participant;
- (7) Star Pipe and Sigma communicate with other exchange participants regarding the exchange only when (a) at official meetings of the information exchange, (b) in accordance with a written agenda prepared in advance of the meeting, and (c) in the presence of antitrust counsel;
- (8) Star Pipe and Sigma retain, for submission to the FTC upon reasonable notice, a copy of all input data communicated to the exchange manager and all industry statistics received by Star Pipe and Sigma from the third-party manager; and
- (9) industry statistics resulting from the exchange are, at the same time they are distributed to participants, made publicly available.

### **Detroit-Area Hospitals Face Jury Trial Surrounding Information Exchange**

In another recent case involving allegations of information sharing, registered nurses ("RNs") have survived summary judgment on their claims that Detroit-area hospitals exchanged sensitive wage information in violation of Section 1 of the Sherman Act, resulting in depressed wages for RNs in the relevant market. According to the plaintiffs, eight hospitals regularly exchanged RN wage information over a four-year period through direct contacts, health care industry organizations, and third-party surveys. Contrary to agency guidelines, the hospitals allegedly exchanged wage

information—including current wages and ranges—through direct contacts, disclosed plans for future wage increases, and participated in “third-party” wage surveys in which unaggregated and unmasked data was shared with participants.

The court recently denied defendant hospitals’ motions for summary judgment, holding that the plaintiff RNs had presented sufficient evidence to present their case to a jury. Although the court granted the defendants summary judgment on the plaintiffs’ per se antitrust claim, the court held that the plaintiffs had presented sufficient evidence to survive summary judgment on their rule of reason claim. According to the court, the regular exchange of sensitive information created an environment in which competitive wage information was available “on demand.” Furthermore, there was evidence that the “on demand” wage information played a role in the hospitals’ decisions regarding wages and compensation, often resulting in lower-than-planned pay increases. Some hospitals allegedly set “market targets” for their compensation levels—for example, one hospital aimed to pay 66 percent of the highest wage on the market—and used the “on demand” wage information to ensure that they met those targets. The court found that this evidence was sufficient to survive summary judgment under the more flexible rule of reason analysis.

### Key Takeaways

The repercussions of the FTC’s complaints in the DIPF industry and the allegations of Detroit-area RNs are evident. Star Pipe and Sigma, who entered into consent orders with the FTC, face restrictions on future information sharing that are much more stringent than those found in DOJ/FTC Guidance. The Detroit-area hospitals accused of sharing sensitive wage information face a costly civil trial and the specter of substantial civil liability if the plaintiffs succeed in their claims, for which they seek treble damages. Both matters highlight the importance of carefully crafting information exchanges in accordance with federal law and enforcement agency guidance. Those who ignore the guidance run the risk of having limitations placed on future legitimate information sharing, exposure to substantial private liability, and the specter of government investigations.

#### NOTE:

Additional information on this Haynes and Boone news alert and others is available at <http://www.haynesboone.com/>.

Additional information is available on the FTC website regarding *In the Matter of McWane, Inc. and Star Pipe Products, Ltd.*, Docket No. 9351 and *In the Matter of Sigma Corp.*, Docket No. C-4347.

The text of the March 22, 2012, decision in *Cason-Merenda v. Detroit Medical Center*, E.D. Mich., No. 06-15601, is published at ((CCH) 2012-1 Trade Cases ¶77,893).

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