As you know, each year the Legal Office widely distributes its antitrust guidelines; the October 2019 iteration is attached.

Last week the National Association of College and University Attorneys (NACUA) presented a webinar with a similar theme and a reminder: that as universities and hospitals seek to navigate the particular complexities of the Coronavirus pandemic, we need to keep in mind that certain types of communications with other universities and hospitals can potentially run afoul of the antitrust laws.

Most topics are appropriate for discussion with other institutions in the context of COVID-19 response and planning, such as cooperative research, collaborative development of patient care parameters, joint purchasing agreements, or best practices for addressing logistical challenges of students who remain on campus. But issues related to tuition and other refunds, financial aid, salaries or terms of employment (such as overtime pay, comp time, and employee benefits) are examples of topics that could raise potential antitrust concerns. NACUA elaborated upon those competitively sensitive issues with the following examples:

- Peer information-sharing regarding salaries, tuition, housing costs, refunds, and the like;
- Jointly establishing financial aid methodologies;
- Prospective budget-building information; and
- Any topics that could lead to or constitute price-fixing, group boycotts / concerted refusals to deal, market allocations, bid-rigging, output limitations (such as admissions restrictions), or similar competitively sensitive topics.

We encourage you to take a few minutes to review the attached Legal Office guidelines, and we welcome calls to the attorneys listed. In many situations, we can advise on how such discussions may be structured so as to be permissible under the antitrust laws. In this way, communications that can be critical in addressing this public health crisis can take place without creating antitrust exposure. Thank you.
PUBLIC INFORMATION

You should not disclose to other schools, hospitals, medical foundations or medical
groups (or organizations of such entities), and should not accept from them, information
concerning tuition, fees, financial aid, research costs, charges, rates and salaries unless, to your
personal knowledge, that specific information is publicly available.

This guideline applies to all forms of communications -- whether oral or written, formal
or informal, survey or isolated inquiry.

Salary surveys remain a particularly sensitive area from an antitrust standpoint, as
recently emphasized by the U.S. Department of Justice. Such surveys may also raise potential
issues regarding the privacy of personnel data.

Communication concerning prospective financial information deserves a special note.
Such information -- planned tuition increases, for instance -- should be limited to information
that has been published in Stanford Report. A similar approach should be followed with respect
to future salary levels, financial aid, charges, rates or research costs. In other words, once salary,
tuition or similar financial information for the next year or years has been publicly announced,
these matters may be communicated to representatives of other institutions. Before such public
announcements are made, however, you should not communicate Stanford's plans, projections or
estimates.

Similarly, do not inquire of other schools, hospitals, medical foundations or medical
groups as to their non-public financial information. And in particular do not inquire as to their
plans, projections or estimates before they have made this prospective information public, and do
not accept such information in written or oral form.

INQUIRIES AND MEETINGS

If you receive an inquiry from an individual at another school, hospital, medical
foundation or medical group concerning non-public information concerning tuition, fees,
financial aid, research costs, charges for medical services, rates, salaries or similar information,
please respond that you have been instructed not to participate in any such communication.

If such a topic is raised at a meeting at which you and representatives of other such
institutions are present, make a similar statement and leave the room -- politely, but in a way that
leaves no doubt in the memory of others that you did not participate in the discussion of future financial matters. Do not return until the discussion of prospective financial information is completed.

Assuming other participants have been properly advised, such an inquiry or discussion is not likely to occur, but if it should, please promptly advise the Stanford Legal Office of the incident so that we can take appropriate protective actions.

**LEGISLATIVE AND REGULATORY EFFORTS**

Of course, it is permissible to engage in certain activities relating to legitimate legislative or regulatory efforts, court cases or certain public panels. The permissibility of these activities is based on court decisions and general developments in antitrust law and involves various technical requirements.

Attorneys in the Legal Office are available to discuss with you whether any of these exceptions to the guidelines might be applicable to your particular circumstances.

**SUMMARY**

As a general proposition, it is worth remembering that what the relevant antitrust laws prohibit is an agreement that restricts competition, such as an agreement among competitors to fix prices (i.e., to set prices at a certain level), or to divide markets, or to limit employee compensation or recruiting (such as a “no poaching” or “no hiring” or “wage-fixing” agreement). The U.S. Department of Justice also has an interest in the information-sharing practices of universities and hospitals -- whether through formal surveys or more informal communications -- concerning matters such as fees, salaries and financial aid. For this reason, Stanford offers protective guidance and advice in these areas.

If you become aware of any current or planned surveys, information exchanges, or meetings with other schools, hospitals, medical foundations or medical groups (or organizations of such entities) relating to any of the areas covered by these guidelines, please call the Legal Office so that we may assist you in structuring that activity in a way that is consistent with the guidelines. For example, you may want to add an explicit statement to a survey that only public information is being provided or, if you are attending a meeting with other institutions, you may want to ensure that counsel for the host institution or organization will be present to provide a record that appropriate antitrust protections were taken. There are also certain “safe harbor” approaches that may be used in some circumstances to gather survey information from competitors in a legally appropriate fashion.
In particular, beware of any agreements with other employers to limit employee compensation or recruiting; the DOJ has recently announced that some such agreements are “per se” illegal and can result in criminal prosecutions. For example, in a recent class action against Duke and UNC, an assistant professor of radiology at Duke University School of Medicine alleged that, when she contacted the UNC Chapel Hill School of Medicine in 2015 to inquire about a position in its Radiology Department, the person in charge wrote an email back to her saying, “lateral moves of faculty between Duke and UNC are not permitted” due to an agreement “between the deans of UNC and Duke a few years back.” The DOJ intervened in the case, and in 2019 Duke agreed to pay a $54 million settlement to the class and to take various other steps to ensure compliance in the future.

Please do not hesitate to call the Legal Office if you have any questions concerning the items discussed in this memorandum.

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