Stanford | Office of the General Counsel

TO: Distribution

FROM: Office of the General Counsel

SUBJECT: Antitrust Guidelines

DATE: December 9, 2024

As you know, the Office of the General Counsel (OGC) periodically distributes its antitrust guidelines; the latest iteration is attached. It is important to keep in mind that certain types of communications with other universities and hospitals can potentially run afoul of the antitrust laws.

Issues related to tuition, financial aid, salaries, or terms of employment (such as overtime pay, comp time, and employee benefits) are examples of topics that may raise antitrust concerns.

Here are some examples of competitively sensitive issues:

- Information-sharing among peers about salaries, tuition, housing costs, refunds, and similar financial topics
- Jointly established financial aid methodologies
- Information related to prospective budget-building
- Admissions or other practices related to competition for students (including student-athletes)
- Actions that could lead to or constitute price-fixing, including group boycotts or concerted refusals to deal, market allocations, bid-rigging, output limitations (such as admissions restrictions), or similar topics

We encourage you to take a few minutes to review the attached guidelines and we welcome questions. In many situations, we can advise on how such discussions may be structured to be permissible under the antitrust laws.

Thank you.

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ANTITRUST GUIDELINES FOR STANFORD FACULTY AND STAFF

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 and you have a valid reason to share it. In most cases, this would not include an interest in coordination or influencing the recipient in an area in which you compete.

This guideline applies to all forms of communication - 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 already published information. 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 public announcements are made, however, you should not communicate Stanford's plans, projections, or estimates.

Similarly, you should not inquire of other schools, hospitals, medical foundations or medical groups as to their non-public financial information. 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, you can respond that you have been instructed to not 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, you may 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.

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 OGC of the incident so that we can advise on any actions that may be appropriate.

RECENT CASES AND INVESTIGATIONS IN HIGHER EDUCATION

Higher education has seen significant antitrust litigation and investigations in recent years, particularly with respect to admission and financial aid issues. The following examples highlight the

importance of careful consideration before entering into agreements with other universities regarding competitively sensitive areas.

- **568 Financial Aid Litigation**. Filed in 2022, former students brought a class action alleging that a group of top universities conspired to set a uniform methodology for evaluating a student's ability to pay. A federal exemption to the antitrust laws had authorized such collaboration, but only if the participants practiced entirely need-blind admissions. The exemption expired in September 2022, and the plaintiffs alleged that even while it was in effect the defendant universities failed to qualify for its protection by considering financial need in some admissions decisions. The plaintiffs alleged that by jointly agreeing on a methodology to determine a student's expected financial contribution, the universities were in effect fixing the net price paid by those students and reducing competition between themselves (such as through more generous financial aid awards). Most of the universities sued have settled, with settlement payments ranging from $13 million to $55 million per settling university. The Department of Justice also appeared in the case to support the plaintiffs' allegations of antitrust violations by the universities.

- ***Hansen* Noncustodial Parent Financial Aid Litigation**. On October 7, 2024, another lawsuit was filed alleging an antitrust conspiracy in financial aid determinations, naming dozens of universities (including Stanford). The plaintiffs allege that the universities agreed to a standard formula for considering the financial assets of a student's noncustodial parent in making financial aid determinations. The litigation is ongoing.

- **AP Course Investigation**. In 2021, the DOJ announced an investigation into a group of private high schools that agreed to cease offering AP courses. While the government declined to prosecute after the schools disavowed the agreement, the investigation illustrates the antitrust risk in agreements with competing schools about courses to offer or not offer, as well as agreements to collectively refuse to deal with a specific vendor providing services to the schools.

- **Common Application Litigation**. In 2019, The Common Application, Inc. reached a confidential settlement to resolve allegations that certain features and agreements relating to the Common Application for undergraduate admissions amounted to unlawful antitrust agreements. Among other things, the lawsuit alleged that certain provisions requiring member colleges to exclusively use the Common Application, or to set application fees for alternative application options equal to the Common Application fees, had the effect of stifling competition in college application markets. Agreements among universities that constrain the ability to innovate, make different admissions options available, or to compete on the cost of applications could all face similar scrutiny.

INFORMATION SHARING, SURVEYS, AND DATA-DRIVEN DECISIONS

This year, we call special attention to the issue of information sharing and the use of algorithms in data-driven decision-making. Throughout 2024, the U.S. Department of Justice (DOJ) and Federal Trade Commission (FTC) have demonstrated that in their view, the use of a common algorithm or vendor to make key business decisions can be considered a form of price-fixing that violates antitrust laws. After withdrawing longstanding guidelines on sharing information among competitors in 2023, in 2024 the agencies have filed statements of interest in private class action cases against real estate managers and hotels that relied on a common vendor to recommend prices. The FTC also undertook an investigation into the use of data vendors to target retail discounts and pricing at specific consumer groups in July 2024.

These actions indicate that there may be antitrust risk even without direct communications with a competitor, and the risk is heightened if key financial or competitive actions are guided by an algorithm or

vendor that collects data from other competitors. Historical precedents provide guidance that is broadly applicable when considering whether to participate in an information exchange (whether it is a survey or an analysis by a third-party requiring input from Stanford), and how to use the resulting output:

- Avoid sharing non-public data with third parties and avoid relying on sources that have collected non-public data from competing institutions.
- Do not delegate sensitive decisions to third parties that make similar decisions for competitors.
- Do not share internally developed, forward-looking forecasts or projections with third parties or competitors; it is always safer to share historical or publicly available data instead.
- Understand and document the value of participating in information exchanges or receiving suggestions from a third-party compiler of data; sharing and analyzing data is most valuable when it enhances the decision-making process rather than replacing it.

Going forward, whether information sharing is illegal in any particular case will typically be determined under the rule of reason - meaning that regulators and courts will weigh any harm to competition against countervailing procompetitive benefits from the exchange. The touchstone is that the information at issue should not be used in a way that facilitates agreements among competitors. Stanford should always determine salaries, benefits, and other terms that it offers its faculty, staff and students independently and not based on any sort of agreement or understanding with any other university.

HEALTHCARE COLLUSION AND GROUP NEGOTIATIONS

On September 20, 2024, the FTC sued three major pharmacy benefit managers, alleging the use of group purchasing organizations violated antitrust law by raising healthcare prices. Combined with the 2023 withdrawal by DOJ and FTC of guidance for group purchasing in healthcare, there is increased risk in the healthcare industry of actions that involve pricing, insurance coverage, or reimbursements. On May 9, 2024, the DOJ announced a task force on Health Care Monopolies and Collusion that will investigate potential antitrust violations that include abuses of patient and pricing data, restrictive agreements with insurers and suppliers, and certain practices relating to referral networks. Negotiations relating to group purchasing of medical supplies, provider networks, and reimbursement rates should be carefully scrutinized by counsel to ensure compliance with antitrust laws.

LEGISLATIVE AND REGULATORY EFFORTS

Of course, it is permissible to engage with competitors 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 involve various technical requirements.

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

SUMMARY

As a general proposition, it is worth remembering that what the relevant antitrust laws prohibit is an agreement (expressed or implied) restricting competition, such as an agreement among competitors to fix prices (i.e., to set prices at a certain level), to divide markets (e.g., we will not recruit in X area if you do not recruit in Y area), or to limit or stabilize employee compensation or recruiting (such as a “no poaching”

or “no solicitation” 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.

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 contact OGC so that we may assist you in structuring that activity in a way that is consistent with the guidelines. For example, 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.

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 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 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 Duke agreed to pay a $54 million settlement to the class and to take various other steps to ensure compliance in the future.

When in doubt, please consult with the OGC or simply avoid anything that could interfere with free and fair competition between Stanford and competing institutions - whether they be other universities, hospitals, medical practices, or any other entities with which Stanford competes in any way.

Again, please do not hesitate to contact the OGC if you have any questions.

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