

LEGAL OFFICE MEMORANDUM

TO: Distribution
FROM: Office of the General Counsel
SUBJECT: Antitrust Guidelines
DATE: June 22, 2023

As you know, the Legal Office periodically distributes its antitrust guidelines; the 2023 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 are more likely to raise antitrust concerns. Here are some examples of competitively sensitive issues:

- Peer information-sharing regarding salaries, tuition, housing costs, refunds, and the like;
- Jointly establishing financial aid methodologies;
- Prospective budget-building information;
- Admissions practices that relate to competition for students or student-athletes; 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 questions to the attorneys listed. In many situations, we can advise on how such discussions may be structured to be permissible under the antitrust laws. Thank you.

ANTITRUST GUIDELINES

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 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.

SALARY SURVEYS AND SIMILAR INFORMATION SHARING

This year, we call special attention to new guidance by the U.S. Department of Justice (DOJ). On February 3, 2023, DOJ withdrew three antitrust policy statements that had provided guidance for information sharing by competitors and that DOJ had issued starting 30 years ago. DOJ said that the guidance in those statements was “overly permissive on certain subjects, such as information sharing.” The DOJ announcement creates uncertainty for information sharing among competitors because the antitrust safety zone set forth in the policy statements had been relied upon by many parties—including many associations, professional societies and other nonprofits—when establishing their information-sharing programs. 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 DOJ/FTC policy statements included an “antitrust safety zone” that made the exchange of price and cost information by health care providers presumptively legal if three criteria were met:

1. The information was collected, aggregated and disseminated by a third party;
2. The exchanged information was more than three months old; and
3. At least five providers supplied the exchanged information, no single provider accounted for more than 25 percent of the exchanged information, and the disseminated information was sufficiently aggregated to protect the identity of the underlying sources of the information.

Although the guidance has been withdrawn, and is thus no longer a formal safe harbor, these points are still useful in demonstrating when a particular price or salary survey is not a means to facilitate price fixing or other illegal collusion. These should be considered minimum standards and no longer a “safe harbor.”

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 and employees independently and not based on any sort of agreement or understanding with any other university.

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 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 circumstances.

SUMMARY

As a general proposition, it is worth remembering that what the relevant antitrust laws prohibit is an **agreement** (expressed or implied) 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** (e.g., we will not recruit in X area if you do not recruit in Y area), 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, 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 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.

When in doubt, you should consult with the Legal Office 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.

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

Debra L. Zumwalt
(650-723-6397)

Jennifer A. Zimbroff
(650-498-5108)

Thomas W. Fenner
(650-723-8122)