



**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

**DAF/COMP/WD(2010)117
For Official Use**

**ROUNDTABLE ON INFORMATION EXCHANGES BETWEEN COMPETITORS UNDER
COMPETITION LAW**

-- Note by the Delegation of the United States --

This note is submitted by the delegation of the United States to the Competition Committee FOR DISCUSSION at its forthcoming meeting to be held on 27-28 October 2010.

JT03290816

Document complet disponible sur OLIS dans son format d'origine
Complete document available on OLIS in its original format

ROUNDTABLE ON INFORMATION EXCHANGES BETWEEN COMPETITORS UNDER COMPETITION LAW

-- Note by the United States --

1. Introduction

1. This submission provides an overview of how U.S. antitrust law looks at exchanges of information among competitors.

2. In modern markets, competitors sometimes need to collaborate in order to achieve legitimate competitive goals such as expanding into foreign markets, funding expensive innovation efforts, and lowering production and other costs. Such collaborations, which may include information-sharing, are often not only benign, but procompetitive.

3. Nevertheless, certain information exchanges among competitors may violate Section 1 of the Sherman Act, which prohibits a “contract, combination...or conspiracy” that unreasonably restrains trade.¹ The antitrust concern is that information exchanges may facilitate anticompetitive harm by advancing competing sellers’ ability either to collude or to tacitly coordinate in a manner that lessens competition. Thus, for example, exchanges on price may lead to illegal price coordination. In addition, information exchanges may raise anticompetitive concern by facilitating group behavior of downstream entities against upstream ones. The following text reviews how U.S. courts, and the U.S. Department of Justice Antitrust Division (“DOJ”) and the Federal Trade Commission (“FTC”) (collectively, “the antitrust agencies”), have applied Section 1 to exchanges of price and other information among competitors.² It also describes the designated “safety zones” in which, absent extraordinary circumstances, the antitrust agencies are likely to view information exchanges as legitimate.

2. Standard of analysis and potential procompetitive aspects

4. In the U.S., information exchanges among competitors are examined either under the “rule of reason” or condemned as *per se* violations.³ Generally, information exchanges are examined under the “rule of reason,” a method of antitrust analysis that distinguishes legitimate information exchanges from illegal ones by balancing the information exchanges’ anticompetitive effects with their potential procompetitive benefits.⁴

¹ 15 U.S.C. § 1.

² Violations of the Sherman Act are also deemed to be violations of section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45.

³ “Although an agreement to exchange price information is not itself illegal *per se*, proof that competitors have shared information sometimes has served as evidence of a *per se* illegal conspiracy to fix prices.” ABA Section of Antitrust Law, 1 Antitrust Law Developments 93 (6th ed. 2007) citing, *inter alia*, *In Re Flat Glass Antitrust Litig.*, 385 F.3d 350, 368—69 (3rd Cir. 2004) *cert. denied*, 544 U.S. 948 (2005); *Petroleum Products Antitrust Litigation*, 906 F.2d 432, 445-50 (9th Cir. 1990).

⁴ See, for example, *Petroleum Products Antitrust Litigation, Id.*

5. U.S. courts and antitrust agencies have long recognized that information sharing schemes can be competitively neutral or even procompetitive. Thus, for example, in *Maple Flooring Mfrs.' Ass'n v. United States* the court noted that the public interest is served by certain information exchanges that may “avoid the waste which inevitably attends the unintelligent conduct of economic enterprise” and that “[c]ompetition does not become less free merely because the conduct of commercial operations becomes more intelligent through the free distribution of knowledge of all the essential factors entering into the commercial transaction.”⁵

6. Similarly, the antitrust agencies’ *Antitrust Guidelines for Collaborations Among Competitors*,⁶ discussed in greater detail in section IV.B.i below, expressly recognize that the sharing of information among competitors may be procompetitive and is often reasonably necessary to achieve the procompetitive benefits of certain collaborations. For example, sharing certain technology, know-how, or other intellectual property may be essential to achieve the procompetitive benefits of R&D collaboration.⁷

7. The antitrust agencies’ advisory opinions and business review letters described later in this paper have similarly recognized certain information exchanges as procompetitive, for example through enhancing efficiency and product quality. See, e.g., the *TriState Health Partners*,⁸ *Rx-360*,⁹ and *Medical Group Management Association*¹⁰ advisory opinions respectively discussed below in ¶¶ 27, 29, and 30.

3. The evidentiary value of information exchanges

8. Information exchanges can be treated as circumstantial evidence of an unlawful price fixing or market allocation agreement among competitors, and in such a case are analyzed under the *per se* rule as a violation of the antitrust laws. For example, in *In re Petroleum Prods. Antitrust Litigation*,¹¹ the 9th Circuit explained that “[i]nformation exchanges help to establish an antitrust violation only when either (1) the exchange indicates the existence of an express or tacit agreement to fix or stabilize prices, or (2) the exchange is made pursuant to an express or tacit agreement that is itself a violation of § 1 under a rule of reason analysis.”¹² The court further held that evidence of pricing information exchanges was supportive of a conspiracy inference under Section 1 of the Sherman Act, but not conclusive of such a conspiracy.

9. In addition to serving as evidence of an unlawful agreement, information exchanges likely to affect prices may, under certain circumstances, be illegal in and of themselves. For example in *United States v. Container Corp. of America*¹³ the Supreme Court found “exchange of price information but no agreement to adhere to a price schedule...”¹⁴ It held, nonetheless, that exchanges of information

⁵ 268 U.S. 563, 582-83 (1925).

⁶ FTC and U.S. Dep’t of Justice, *Antitrust Guidelines for Collaborations Among Competitors* (2000) (hereinafter, “Collaboration Guidelines” or “Guidelines”), available at <http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf>.

⁷ *Id.*, ¶3.31(b), at p. 15.

⁸ See FTC Letter to TriState Health Partners, Inc. of April 13, 2009, at 1-3, available at <http://www.ftc.gov/os/closings/staff/090413tristatealetter.pdf>.

⁹ See FTC Letter to Joanne Lewers, Counsel to Rx-360, of September 15, 2010, at 1-2, available at <http://www.ftc.gov/os/2010/09/100916bloomletter.pdf>.

¹⁰ See FTC Letter to Gerald Niederman, of November 3, 2003, available at <http://www.ftc.gov/bc/adops/mgma031104.pdf>.

¹¹ 906 F 2d 432, (9th Cir. 1990).

¹² *Id.*, at p. 447.

¹³ 393 U.S. 333 (1969).

¹⁴ *Id.*, at p. 334.

concerning the “most recent price charged or quoted” among sellers of corrugated shipping containers,¹⁵ albeit on an irregular basis, unlawfully stabilized prices. Consequently, the Court concluded that the exchange of price information, involving a highly concentrated industry and a fungible product with inelastic demand, “had an anticompetitive effect in the industry, chilling the vigor of price competition.”¹⁶ It therefore found the exchange to amount to concerted action and thus sufficient to establish a combination or conspiracy in violation of Sherman Act §1.

4. Criteria considered in assessing the legitimacy of information exchanges

10. Information exchanges may facilitate anticompetitive harm by advancing competitors’ ability to collude. The exchange may carry out an overt agreement, support tacit meetings of the mind, or be unilateral in nature, but all result in anticompetitive effects. Therefore, actual evidence of anticompetitive harm, such as industry-wide price increases as a result of the exchange, would be the strongest factor in finding the exchange illegal. In the absence of such actual anticompetitive effects, various criteria, as discussed below, are considered in assessing the legitimacy of information exchanges, including:¹⁷

- The nature and quantity of the information (extensive exchange of information regarding pricing, output, major costs, marketing strategies and new product development is more likely to have anticompetitive implications);
- How recent the shared data is (sharing of past data is generally deemed less problematic than sharing current data);
- The parties’ intent in sharing the information (an anticompetitive intent, such as an intent to stabilize prices, is problematic);
- The industry structure (in concentrated industries, an exchange among few firms could be more likely to harm competition);
- Public availability of information (where information is already publicly available, the risk of its exchange between competitors seems low);
- How the exchange is structured and controlled (a direct exchange is more likely to be anticompetitive than an exchange through an intermediary);
- The frequency of exchanges (the more frequent the exchange, the more problematic it may be); and
- Whether the parties adopted safeguards to prevent or limit the participants’ access to each others’ competitively sensitive information.

11. The following paragraphs describe court cases and antitrust agency guidance and cases that demonstrate how consideration of these criteria plays out in specific cases.

4.1 *Supreme Court cases*

12. In *American Column & Lumber Co. v. United States*,¹⁸ the Supreme Court examined whether price information exchange concerning hardwood floors must be deemed an “unreasonable restraint on

¹⁵ *Id.*, at p. 335.

¹⁶ *Id.*, at p. 337.

¹⁷ See also ABA Section of Antitrust Law, 1 Antitrust Law Developments 92-98 (6th ed. 2007).

¹⁸ *American Column and Lumber Co. v. United States*, 257 US 377 (1921).

trade” under Section 1 of the Sherman Act. In considering the purpose and likely effect of the information exchange, the Court found it to be unlawful because of the quantity and quality of information shared. It stated that “[g]enuine competitors do not make daily, weekly and monthly reports of the minutest details of their business to their rivals.” In terms of likely effect, the Court observed that hardwood prices had increased “to an unprecedented extent,” and therefore found the evidence to indicate cartel-like behavior in which the information exchange enabled the American Hardwood Manufacturers’ Association to detect and punish members who deviated from its policy. In light of these findings, the Court found the information exchange to constitute a combination and conspiracy in restraint of interstate commerce that was unlawful under §1 of the Sherman Act.

13. However, the Court has held that information exchanges that are not likely to lead to anticompetitive effects do not violate §1 of the Sherman Act. In the aforementioned *Maple Flooring* case,¹⁹ the Court concluded that even if the specific information exchange presented an opportunity for an agreement on price or production, the exchange was lawful because no such agreement was actually executed. It based its decision on four decisive facts. First, the data shared were aggregated and historic, *i.e.* involved only past transactions; second, the information exchanged was made publicly available and read by 90-95% of the defendants’ buyers; third, the exchange did not result in actual uniformity in prices; and, finally, the court found the shared data to have “a useful and legitimate purpose in enabling members to quote promptly a delivered price on their product.”²⁰

14. In *United States v. American Linseed Oil Co.*,²¹ the Court found the price information exchange program to have the purpose and effect of stabilizing prices, and therefore deemed it unlawful. Conversely, in *Cement Mfrs. Protective Ass’n v. United States*,²² the Court held that the price uniformity did not result from the information exchange. Instead, the information exchange was aimed at preventing purchasers’ manipulation of the bidding system and therefore did not violate the Sherman Act.

15. Over time, in evaluating information exchanges, the Court appeared to shift its emphasis from the purpose of the exchange to its likely effect on competitive conditions, and rather than looking only for overt price fixing agreements, also began to assess exchanges that suggest a tacit agreement. In *U.S. v. Container Corp.*,²³ despite finding no agreement on price, the Court held that a direct exchange of pricing information among competitors posed a competitive risk, noting that “price is too critical, too sensitive a control to allow it to be used even in an informal manner to restrain competition.”²⁴ In this case, at the request of a competing company, each corrugated container manufacturer submitted “the most recent price charged or quoted” and, in return, obtained the same information from the requesting company.²⁵ The Court found that “the inferences are irresistible that the exchange of price information has had an anticompetitive effect in the industry, chilling the vigor of price competition.”²⁶ The fact that the exchanges were of recent price information also played a role in the Court’s analysis.

¹⁹ *Supra* note 5.

²⁰ *Id.*, at p. 571.

²¹ *United States v. American Linseed Oil Co.*, 262 U.S. 371 (1923).

²² *Cement Mfrs. Protective Ass’n v. United States*, 268 U.S. 588 (1925).

²³ *United States v. Container Corp.*, 393 U.S. 333 (1969).

²⁴ *Id.*, at p. 338.

²⁵ *Id.*, at p. 335.

²⁶ *Id.*, at p. 337.

16. The Court clarified its previous decisions and provided further guidance for analyzing information exchanges in *U.S. v. U.S. Gypsum Co.*²⁷ In its decision, the Court observed that exchange of price data and other information among competitors does not invariably lead to anticompetitive effects. The Court distinguished the “gray zone of socially acceptable and economically justifiable business conduct,” from *per se* illegal conduct, noting that the exchange of price information in and of itself, without inquiring into the intent with which it was undertaken, does not necessarily constitute illegal conduct.²⁸ The Court noted that information exchange practices may, in some cases, foster economic efficiency and confer procompetitive effects. Relevant considerations in determining whether a practice confers procompetitive or anticompetitive effects include the industry structure and the nature of the information exchanged.²⁹ The Court also stressed that exchange of current price information has the greatest potential of generating anticompetitive effects and, although not *per se* unlawful, has consistently been held to violate the Sherman Act.

4.2 Guidance by the antitrust agencies

4.2.1 DOJ/FTC Antitrust Guidelines for Collaborations Among Competitors (2000)

17. In 2000 the antitrust agencies issued joint *Antitrust Guidelines for Collaborations among Competitors*,³⁰ which apply to information exchanges and other joint conduct in a variety of business contexts.³¹ The *Collaboration Guidelines* address, among other things, how the FTC and DOJ evaluate the likelihood that a given collaboration might result in disclosure of competitively sensitive information, appropriate safeguards to reduce antitrust risk from such exchanges, and exchanges that would qualify for safety zones from antitrust liability.

18. While recognizing the potential procompetitive aspects of information sharing, the *Guidelines* recognize such exchanges can also potentially lead to collusion, and identify three main points to consider in this regard. First, the more competitively sensitive the information, the greater the risk. Sharing of pricing and cost data, information about output levels and production capacities, or business strategies and marketing plans will draw much more antitrust scrutiny than disclosure of less competitively sensitive information.³² Second, the exchange of current or future sales strategies will cause greater concern than disclosure of historical sales figures.³³ Third, disclosure of firm-specific information is more competitively dangerous than sharing aggregated data, which does not allow competitors to identify individual firms as the source of particular data points.³⁴ Moreover, the exchange of individual company data (particularly current data on prices or costs, or forward-looking projections of sales or output levels) is usually not required to achieve major efficiencies.

19. In addition to the nature of the shared information, the likelihood that such information will be shared and used for anticompetitive purposes is also a main concern of the Agencies.³⁵ Among other

²⁷ United States v. U.S. Gypsum Co., 438 U.S. 422 (1978).

²⁸ *Id.*, at p. 441.

²⁹ *Id.*, at p. 443.

³⁰ FTC and U.S. Dep’t of Justice, Antitrust Guidelines for Collaborations Among Competitors *supra* note 6.

³¹ *Id.*, at pp. 1-2, 15-16, 21.

³² *Id.*

³³ *Id.*

³⁴ *Id.*, at p. 16.

³⁵ *Id.*, at p. 21.

factors, the FTC and DOJ consider the nature and purpose of the collaboration, how it is structured and controlled, and whether it has adopted safeguards to prevent or limit the participants' access to each others' competitively sensitive information.³⁶

- Safety Zones

- *Under the DOJ/FTC Guidelines for Collaborations among Competitors*

Because some competitor collaborations may be procompetitive, the antitrust agencies believe that “safety zones” are useful in order to encourage such activity.³⁷ Information sharing and various trade association activities also may take place through competitor collaborations, and are therefore a specific type of collaboration. In the aforementioned collaboration Guidelines³⁸ the antitrust agencies designated safety zones to provide participants in a competitor collaboration with a degree of certainty in situations in which anticompetitive effects are so unlikely that the antitrust agencies presume the arrangements to be lawful without inquiring into particular circumstances. These safety zones are not intended to discourage competitor collaborations that fall outside the safety zones.³⁹

General Competitor Collaborations. Absent extraordinary circumstances, the antitrust agencies do not challenge a competitor collaboration when the market shares of the collaboration and its participants collectively account for no more than twenty percent of each relevant market in which competition may be affected. This safety zone, however, does not apply to agreements that are per se illegal, or that would be challenged without a detailed market analysis, or to competitor collaborations to which a merger analysis is applied.⁴⁰

Research and Development Competition Analyzed in terms of Innovation Markets. Absent extraordinary circumstances, the antitrust agencies do not challenge a competitor collaboration on the basis of effects on competition in an innovation market where three or more independently controlled research efforts in addition to those of the collaboration possess the required specialized assets or characteristics and the incentive to engage in R&D that is a close substitute for the R&D activity of the collaboration. This antitrust safety zone does not apply to agreements that are per se illegal, or that would be challenged without a detailed market analysis, or to competitor collaborations to which a merger analysis is applied.⁴¹

- *Under the FTC/DOJ Health Care Statements (1996)*

In August 1996, the FTC and the DOJ jointly issued *Statements of Antitrust Enforcement Policy in Health Care*.⁴² Of these, Statement No. 5⁴³ sets out the antitrust agencies'

³⁶ *Id.*

³⁷ *Id.*, p. 25.

³⁸ *Id.*

³⁹ *Id.*, §4.1, p. 25.

⁴⁰ *Id.*, §4.2, p. 26.

⁴¹ *Id.*, §4.3, pp. 26-27.

⁴² FTC and U.S. Department of Justice, *Statements of Antitrust Enforcement Policy in Health Care (1996)* (hereinafter, “Health Care Statements” or “Statements”), available at <http://www.ftc.gov/bc/healthcare/industryguide/policy/hlth3s.pdf>.

⁴³ *Id.*, at pp. 43-48.

enforcement policy with respect to collective dissemination of health care providers' fee information to purchasers, and Statement No. 6 outlines their policy with respect to exchanges of price and cost information among competing health care service providers.⁴⁴

With respect to collective provision of fee-related information, Statement No. 5 sets forth an antitrust safety zone in which such provision will generally not be challenged by the antitrust agencies.⁴⁵ In order to qualify for this safety zone, the collection of information must: (1) be managed by a third party; (2) contain information based on data that is more than three months old; and (3) contain shared data aggregated from at least five providers, of which no individual provider represents more than 25 percent, and be sufficiently aggregated to prevent identification of prices charged by any individual provider. The sharing of prospective fee-related information falls outside the antitrust safety zone, and will be assessed on a case-by-case basis, including scrutiny of the nature and extent of communications, the rationale for providing the information, and the nature of the market in which it is provided.⁴⁶

Health Care Statement No. 6 provides general guidance on the antitrust agencies' enforcement policy in circumstances where competing service providers (hospitals, physician groups, etc.) participate in written surveys of prices for health care services or compensation costs (salaries, wages, or benefits).⁴⁷ Specifically, Statement No. 6 acknowledges that such surveys can have significant benefits for health care consumers, providers, and purchasers when conducted with appropriate safeguards against collusion or other reduction of competition.⁴⁸ The Statement, therefore, sets forth an antitrust safety zone similar to the one set in Statement No. 5, with the same three conditions mentioned above in ¶ 23 that, when met, lead the antitrust agencies not to challenge the proposed exchange, absent extraordinary circumstances.⁴⁹

With respect to exchanges of price and cost information among competing providers that do not satisfy the safety zone conditions, the antitrust agencies will generally apply a rule of reason analysis. The *Statements* explain that this involves balancing the parties' asserted justifications for the exchange against the enforcement agency's assessment of its likely anticompetitive effects, such as facilitating collusion on salary levels or reducing access to certain specialty services.⁵⁰ However, exchanges of future price or employee compensation data are very likely to be considered anticompetitive, and to the extent such exchanges constitute an agreement among competitors on prices for health care services or wages paid to health care employees, will be considered unlawful *per se*.⁵¹

⁴⁴ *Id.*, at pp. 49-52.

⁴⁵ Importantly, the protection of the antitrust safety zone applies "absent extraordinary circumstances," which leaves the agencies some enforcement flexibility when confronted with atypical facts or business arrangements, see *Id.*, at p. 43.

⁴⁶ *Id.*, at pp. 46-47

⁴⁷ *Id.*, at pp. 49-52. As noted above, the Statements also discuss collective activity by providers to furnish pricing data (fees, discounts, reimbursement methods, etc.) to health care purchasers. For most purposes, the same antitrust principles apply to both types of information exchanges. "The principles expressed in the Agencies' statement on provider participation in exchanges of price and cost information are applicable in this context." *Id.* at p. 44.

⁴⁸ *Id.*, at p. 49.

⁴⁹ *Id.*, at p. 50.

⁵⁰ *Id.*, at p. 51.

⁵¹ *Id.*

5. Examples of information exchanges viewed as permissible

5.1 *FTC advisory opinions*

20. Potential participants in an information exchange may request an advisory opinion from the Commission or FTC staff that analyzes antitrust ramifications of the proposed exchange, provided that they are subject to the agency's jurisdiction.⁵² Most FTC advisory opinions issued in this area to date have involved the health care industry; the agency's Health Care Division has a particular interest in examining the collection, exchange, and provision of information, including price information, among health care providers.⁵³ The following review highlights a few of the antitrust agencies' advisory opinions and business review letters (a similar procedure available at the DOJ and discussed below in section V.ii) that found specific information exchanges permissible due to the unlikelihood of competitive harm, or the presence of procompetitive advantages that outweigh potential competitive harms.

5.1.1 *TriState Health Partners opinion*

21. In 2009, the FTC examined a clinical integration program proposed by a physician-hospital organization.⁵⁴ The organization had requested an advisory opinion on the legality of its program, which included, among other joint activities, implementation of a web-based health information technology system to help identify "high-risk and high-cost patients," and facilitate the exchange of patients' treatment and medical management information. These information-sharing efforts, in turn, were designed to create opportunities for "aggressive care management," which could improve physician performance and quality of treatment for patients, and bring "significant financial benefits for payers."⁵⁵ Given the efficiency justification for the program, the agency viewed the collective conduct as reasonably necessary for the success of the overall program and the achievement of significant procompetitive benefits.⁵⁶

5.1.2 *Greater Rochester Independent Practice Association opinion*

22. A multi-specialty physician practice association requested an advisory opinion for its 2007 proposed clinical integration program. In addition to joint negotiation of contracts and prices with health plans, the integration program involved extensive sharing of patient information (health histories, prescriptions, test results, courses of treatment, clinical outcomes, etc.) and data on physician practices (e.g., adherence to program standards and use of cost-saving measures).⁵⁷ In applying a rule of reason

⁵² Advisory opinions do not normally opine on the legality of the proposed conduct. Instead, they set forth the enforcement intentions of the agency if the proposed conduct were undertaken, and are issued without prejudice to the agency's right to reconsider the issues involved. See Sections 1.1–1.4 of the Commission's Rules of Practice, 16 C.F.R. §§ 1.1-1.4; see also Guidance From Staff of the Bureau of Competition's Health Care Division on Requesting and Obtaining an Advisory Opinion (May 2010), available at <http://www.ftc.gov/bc/healthcare/industryguide/adv-opinionguidance.pdf>.

⁵³ For a list of FTC advisory opinions on exchanges of information between healthcare providers see FTC Bureau of Competition HealthCare Division, TOPIC AND YEARLY INDICES OF HEALTH CARE ANTITRUST ADVISORY OPINIONS BY COMMISSION AND STAFF, p. 8, available at <http://www.ftc.gov/bc/adops/indexfin062010.pdf>.

⁵⁴ See FTC Letter to TriState Health Partners, Inc. of April 13, 2009, at 1-3, available at <http://www.ftc.gov/os/closings/staff/090413tristatealetter.pdf>.

⁵⁵ *Id.*, at pp. 8-9.

⁵⁶ *Id.*, at pp. 14-15, 36-37.

⁵⁷ See FTC Letter to Greater Rochester Independent Practice Ass'n, Inc. of September 17, 2007, at pp. 7-9, available at <http://www.ftc.gov/os/closings/staff/070921finalgripamcd.pdf>.

analysis to the proposed program,⁵⁸ the FTC allowed the integration to go forward, based on the likelihood of the program achieving its procompetitive potential, the ancillarity of the joint contracting to furthering such efficiencies, and indications that the physician association would be unlikely to exercise market power or bring about anticompetitive effects in the relevant market.⁵⁹

5.1.3 *Rx-360 opinion*

23. In September 2010, the FTC issued an advisory opinion concerning sharing of information by members of an international consortium of biotechnology and pharmaceutical firms. The consortium, known as Rx-360, had sought the agency's guidance concerning a proposal to implement supplier audit programs.⁶⁰ Under these programs, consortium members will be able to share both prior quality and safety audit information and the costs of sponsoring further quality and safety audits of common ingredient suppliers.⁶¹ FTC staff advised Rx-360 that it currently has no intention to recommend to the Commission that it challenge the programs, because staff did not find them to raise any significant antitrust risk.⁶² This conclusion was based on a rule of reason analysis, which concluded, based on the information provided, that the audit programs: (1) do not require exchanges of competitively significant information, (2) contain protections to reduce Rx-360 members' ability to use the programs for anticompetitive ends; (3) protect audited firms from concerted misuse of the audit programs; and (4) are intended and likely to promote efficiency, quality, and safety.⁶³

5.1.4 *Medical Group Management Association opinion*

24. Medical Group Management Association (MGMA), a professional association representing medical practice administrators, requested an advisory opinion of its 2003 plan to provide its members information comparing the performance and status of their medical group in comparison to its peers.⁶⁴ The collected information included insurer payments to each physician, and thus was akin to an exchange of price information among physicians. However, MGMA's proposal prevented disclosure of the underlying payment data to physicians; focused on past or current rather than future payments; published only statistics that combined data from at least 5 respondents, and published the information in an aggregated form that prevented disclosure of the price paid by individual insurers or received by individual physician practices. MGMA also sought to collect and circulate aggregated information about insurers' referral networks, rates of claim rejections and payments times, and physicians' satisfaction with payers' responsiveness to questions or concerns about claims or payments. Nevertheless, MGMA planned to circulate only aggregated performance on any of these data; and neither establish clear benchmarks for what might be deemed acceptable performance, nor evaluate particular payers based on any benchmark. Moreover, MGMA's proposed information exchange appeared likely to encourage payers to compete. Therefore, the Commission staff's advisory opinion did not find substantial anticompetitive concern over MGMA's information exchange proposal.

⁵⁸ See FTC Letter to Greater Rochester IPA, at pp. 10-11.

⁵⁹ *Id.* at p. 29.

⁶⁰ See FTC Letter to Joanne Lewers, Counsel to Rx-360, of September 15, 2010, at pp. 1-2, *available at* <http://www.ftc.gov/os/2010/09/100916bloomletter.pdf>.

⁶¹ See FTC Letter to Joanne Lewers, at p. 3.

⁶² *Id.* at pp. 6-8.

⁶³ *Id.*

⁶⁴ See FTC Letter to Gerald Niederman, of November 3, 2003, *available at* <http://www.ftc.gov/bc/adops/mgma031104.pdf>.

5.2 *DOJ business review letters*

25. Persons concerned about the legality under the antitrust laws of proposed business conduct may ask the DOJ for a statement of its current enforcement intentions with respect to that conduct pursuant to the DOJ's Business Review Procedure.⁶⁵ The following paragraphs describe two DOJ business review letters concerning proposed information exchanges.

5.2.1 *Hospital Value Initiative*

26. On April 26, 2010, DOJ issued a business review letter stating it saw no reason to object to an information exchange program of Hospital Value Initiative (HVI), a coalition of three organizations: the Pacific Business Group on Health, the California Public Employees' Retirement System, and the California Health Care Coalition. Together these three groups represent group purchasers of health care services, which purchase health care for more than 7 million people in California. HVI proposed to provide data on the relative costs and resource efficiency of more than 300 hospitals in that state. HVI would collect, analyze and distribute aggregated comparative data on the level of reimbursement received, and the resources used, by California hospitals in providing inpatient and outpatient services. DOJ determined that HVI's proposal was not likely to produce anticompetitive effects because the exchange would involve data that was at least 10 months old and the program would not disclose disaggregated data or any hospital's actual service fees. HVI's data exchange program could potentially benefit consumers by increasing the transparency of the relative costs and resource efficiency of hundreds of California hospitals. Moreover, DOJ concluded that the proposed information exchange might reduce health care costs by improving competition among hospitals and facilitating more informed purchasing decisions by group purchasers of health care services.

5.2.2 *Trucking Companies*

27. On April 9, 2007, DOJ announced that it would not oppose a proposal by the National Association of Small Trucking Companies (NASTC) and Bell & Company (Bell) to conduct an operational and financial survey of small- and medium-sized trucking companies. NASTC and Bell planned to share the collected information -- data on general company information, equipment, finances, and employees -- in aggregate form with survey participants and others to provide trucking firms with competitive benchmarks. DOJ concluded that certain safeguards would ensure that the survey did not result in exchanges of competitively sensitive business information. The survey report would be administered by third parties, would contain only aggregated data that is at least three months old, and would be published only if responses to the survey were received from five or more trucking companies. DOJ's business review letter noted that "such surveys can benefit consumers when industry members use information derived from such surveys to gain efficiencies and price their products or services more competitively."

6. **Examples of information exchanges viewed as illegal**

28. The following paragraphs demonstrate cases in which information exchanges were viewed as violating antitrust laws.

⁶⁵ See 28 C.F.R. § 50.6.

6.1 Exchanges initiated unilaterally

6.1.1 *In re Valassis Communications*

29. Unilateral attempts by a competitor to exchange sensitive information with rivals, even if unreciprocated, can trigger antitrust enforcement. For example, the *Valassis* matter involved an alleged invitation to collude from one publisher of newspaper advertising inserts to its only rival in that market.⁶⁶ The FTC's Complaint alleged that, during an earnings conference call open to the public, the CEO of Valassis announced a new strategy for raising prices of inserts, and that the company's executives knew that its rival, News America, would be monitoring the call.⁶⁷ The Complaint also alleged that Valassis intended to facilitate collusion through its announcement and had no legitimate business reason for disclosing its new pricing strategy.⁶⁸ According to the FTC, if News America had accepted the invitation from Valassis, higher prices and reduced output of newspaper advertising inserts were likely to result.⁶⁹ To resolve these allegations, Valassis entered into a consent order with the agency that prohibits unilateral communications, both public and private, concerning the company's willingness to refrain from competing with rivals or to coordinate pricing with them.⁷⁰ The order further prohibits participation by Valassis in any concerted action to allocate markets or customers, or coordinate pricing with competitors.⁷¹

6.1.2 *In re Stone Container Corporation*

30. In *In re Stone Container Corporation* the FTC challenged a unilateral initiative to reduce output and increase industry prices through a broad scheme that included information exchanges.⁷² The FTC Complaint⁷³ charged that, as part of a devised strategy to invite its competitors to increase prices, Stone Container, the largest U.S. manufacturer of linerboard, conducted a telephone survey of competing U.S. linerboard manufacturers, asking them how much linerboard was available for purchase and at what price. In addition, Stone Container allegedly contacted competitors to inform them of its planned downtime and linerboard purchases, and in the course of these communications, arranged to purchase significant linerboard volumes from its competitors. These communications were entered into outside its ordinary course of business, and their specific intent was to coordinate an industry wide price increase. The methods of communication included private conversations and public statements, including press releases and published interviews. The FTC viewed these acts and practices as an invitation by Stone Container to its competitors to join a coordinated price increase. In agreeing to settle these charges, Stone Container was ordered to cease and desist from these communications and, for a period of five years, to maintain and make available to FTC staff, upon request, all records of communications with competing linerboard manufacturers.⁷⁴

⁶⁶ *In re Valassis Communications, Inc.*, F.T.C. No. C-4160 (April 19, 2006) (consent order), available at <http://www.ftc.gov/os/caselist/0510008/0510008c4160ValassisDecisionandOrder.pdf>.

⁶⁷ *In re Valassis Communications*, Complaint ¶¶ 12-13, available at <http://www.ftc.gov/os/caselist/0510008/0510008c4160ValassisComplaint.pdf>.

⁶⁸ *Id.*, ¶ 14.

⁶⁹ *Id.*, ¶ 15.

⁷⁰ *In re Valassis Communications*, Decision and Order at II.A.

⁷¹ *Id.* at II.B.

⁷² *In re Stone Container Corporation*, F.T.C. No. C-3806, all relevant information available at <http://www.ftc.gov/os/caselist/c3806.shtm>.

⁷³ *In re Stone Container Corporation*, Complaint 3-7, available at <http://www.ftc.gov/os/1998/06/9510006.cmp.htm>.

⁷⁴ *In re Stone Container Corporation*, Decision and Order, available at <http://www.ftc.gov/os/1998/06/9510006.do.htm>.

6.2 Exchanges in trade association contexts

31. Trade associations provide their members and consumers with valuable benefits, such as education, outreach efforts to expand markets, enhancing product compatibility or quality standards, and otherwise helping businesses become more efficient. While the antitrust agencies recognize that trade association activity can be procompetitive or competitively neutral, they remain vigilant for certain types of conduct – especially information sharing – that could facilitate agreements among competitors on prices, output, or other terms of trade. As the FTC recently stated, “it is imperative that trade association meetings not serve as a forum for rivals to disseminate or exchange competitively-sensitive information, particularly where such information is highly detailed, disaggregated, and forward-looking.”⁷⁵

6.2.1 *In re Nat’l Ass’n of Music Merchants, Inc.*

32. In a recent enforcement action involving a trade association of musical instrument manufacturers, distributors, and dealers,⁷⁶ the FTC challenged the organization’s role in arranging and encouraging the exchange of competitively sensitive information – particularly retail pricing policies and strategies – at regular meetings and programs it sponsored.⁷⁷ In its Complaint against the National Association of Music Merchants (“NAMM”), the FTC alleged that the association conducted numerous such events over a two-year period.⁷⁸ The FTC charged that these exchanges of competitively sensitive information, that in many instances served no legitimate business purpose, were anticompetitive because they had the purpose, tendency, and capacity to facilitate collusion and restrain competition unreasonably.⁷⁹ To settle these charges, NAMM entered into a consent order that prohibited it from taking part in any information sharing activities among musical instrument manufacturers or dealers that relates to retail pricing and similarly sensitive subjects.⁸⁰ The consent order also requires NAMM to refrain from any activity that might facilitate collusive agreements among its members, and to implement an extensive antitrust compliance program.⁸¹

6.2.2 *Wisconsin Chiropractic Association*

33. In 2000, the FTC obtained a consent order against the Wisconsin Chiropractic Association, (WCA).⁸² The anticompetitive practices alleged in the FTC Complaint included training seminars in which detailed data on osteopathic pricing was provided, and chiropractors were encouraged to raise their prices to those levels.⁸³ In addition, the Complaint states that respondents frequently collected, analyzed, and provided fee surveys to their members containing current charge data for specific chiropractic

⁷⁵ In re Nat’l Ass’n of Music Merchants, Inc., F.T.C. No. C-4255 (March 4, 2009) (analysis to aid public comment), available at <http://www.ftc.gov/os/caselist/0010203/090304nammanal.pdf>.

⁷⁶ Id. F.T.C. No. C-4255 (Mar. 4, 2009) (consent order), all materials available at <http://www.ftc.gov/os/caselist/0010203/index.shtm>.

⁷⁷ See analysis to aid public comment, supra note 75.

⁷⁸ In re Nat’l Ass’n of Music Merchants, Complaint ¶ 5 (April 10, 2009), available at <http://www.ftc.gov/os/caselist/0010203/090410namcmpt.pdf>.

⁷⁹ Id., ¶ 6.

⁸⁰ In re Nat’l Ass’n of Music Merchants, Decision and Order at II.A.1. (April 10, 2009), available at <http://www.ftc.gov/os/caselist/0010203/090410nammdo.pdf>.

⁸¹ Id. at II.A.2. and II.B.

⁸² In re Wisconsin Chiropractic Association and Russell A. Leonard, F.T.C. No. C-3943 (May 18, 2000) (consent order), the order and all relevant documents available at <http://www.ftc.gov/os/caselist/c3943.shtm>.

⁸³ See the Complaint, ¶10.A-B, available at <http://www.ftc.gov/os/2000/05/wisconsincomp.htm>

treatments. Some of the shared data was collected less than a month prior to being shared.⁸⁴ The FTC ordered the respondents to cease and desist from initiating, developing, publishing, or circulating any proposed or existing fee survey for any health care goods or services, for a period of two years.⁸⁵ An identical order for a period of five years was imposed, unless the respondents implemented safeguards to include: (1) collection, analysis and management of the data by a third party; (2) the fee for surveying to be retained by that third party; (3) any information shared would be more than three months old; and (4) there will be at least five providers reporting data upon which each disseminated statistic is based, no individual provider's data will represent more than 25 percent of that statistic, and any information disseminated will be sufficiently aggregated such that it would not allow identification of the prices charged or compensation paid by any particular provider.

6.2.3 *Airline Tariff Publishing Company (ATP)*

34. In December 1992, DOJ sued eight of the largest U.S. airlines and the Airline Tariff Publishing Company (ATP) for price fixing and for operating ATP, their jointly-owned fare exchange system, in a way that facilitated collusion, in violation of §1 of the Sherman Act.⁸⁶ ATP was a complex information exchange system among airlines that was widely and openly operated to disseminate fare information through computer reservation systems and travel agents. ATP provided both a means for the airlines to disseminate fare information to the public and a means for them to engage in essentially a private dialogue on fares. The defendants designed and operated ATP's computerized fare exchange system in a way that unnecessarily facilitated coordinated interaction among them so that they could (1) communicate more effectively with one another about future fare increases, restrictions, and elimination of discounted fares, (2) establish links between proposed fare changes in one or more city-pair markets and proposed changes in other city-pair markets, (3) monitor each other's changes, including changes in fares not available for sale, and (4) reduce uncertainty about each other's pricing intentions. The *ATP* case involved "cheap talk"-- communication that does not commit firms to a course of action -- such as announcing a future price increase but leaving open the option to rescind or revise it before it takes effect.⁸⁷ If the terms of agreement are complex (*e.g.*, specifying prices in numerous markets) but there is a common desire to reach agreement, cheap talk can help firms reach a collusive equilibrium. ATP collected fare information from the airlines and distributed it daily to all the airlines and to the major computer reservation systems (CRSS) that serve travel agents. This arrangement was an efficient instrument for cheap talk.⁸⁸ The case was resolved with a consent decree crafted to ensure that the airline defendants did not continue to use any fare dissemination system in a manner that unnecessarily facilitated price coordination or that enable them to reach specific price-fixing agreements.

⁸⁴ *Id.*, ¶10.D.

⁸⁵ In re Wisconsin Chiropractic Association, Decision and Order, at ¶¶II.G-H *available at* <http://www.ftc.gov/os/2000/05/wisconsin.do.htm>.

⁸⁶ United States v. Airline Tariff Publishing Co., 1994-2 Trade Cas. (CCH) ¶70,687 (D.D.C. Aug. 10, 1994); see <http://www.usdoj.gov/atr/cases/dir23.htm>.

⁸⁷ Joseph Farrell and Matthew Rabin, "Cheap Talk," 10 *Journal of Economic Perspectives* 103 (Summer 1996).

⁸⁸ William Gillespie, "Cheap Talk, Price Announcement, and Collusive Coordination," EAG 95-3, Discussion Paper, Economic Analysis Group, Antitrust Division, U.S. Department of Justice (9/25/95). See also Severin Borenstein, "Rapid Price Communication and Coordination: The Airline Tariff Publishing Case (1994)," Chapter 13 in John E. Kwoka, Jr. and Lawrence J. White (eds.), *The Antitrust Revolution: Economics, Competition, and Policy*, 3rd ed. (1999).

7. Information exchanges in premerger negotiations

35. Certain information exchanges between competitors are necessary and legitimate in the context of negotiating a potential merger or acquisition. The antitrust agencies recognize that merging firms have a legitimate interest in engaging in certain forms of coordination such as due diligence and appropriate transition planning, both of which necessarily involve information exchanges at levels of detail that would not normally occur among independent firms. These forms of coordination and information sharing are assessed to see if they are reasonable and necessary to implement the legitimate objectives of the imminent merger agreement. Where the merging firms are competitors or are in a relationship that affects competitive interactions in the marketplace, however, premerger information exchanges can present issues under Section 1 of the Sherman Act. The exchange can be especially harmful to competition where the merger negotiation falls through and planned merger never materializes.

36. The antitrust agencies' general approach to information exchanges in premerger negotiations has been that where premerger coordination is reasonably necessary to protect the core transaction, the conduct is assessed under the rule of reason.⁸⁹

8. Conclusion

37. Information exchanges among competitors are not necessarily anticompetitive, and in fact are often procompetitive. In applying Section 1 of the Sherman Act to exchanges of price and other information among competitors, U.S. courts and antitrust agencies follow a rule of reason approach that balances the information exchanges' anticompetitive effects with their potential procompetitive benefits (e.g. efficiency and product quality improvements).

38. Actual anticompetitive harm resulting from the exchange, such as higher prices or price uniformity, is the strongest reason for challenging an information exchange. In addition, criteria considered in assessing the exchange's potential anticompetitive effects include: the nature and quantity of the information; how recent the shared data is; parties' intent in sharing the information; industry structure; public availability of information; how the exchange is structured and controlled; the frequency of exchanges; and whether the parties involved in the exchange adopted safeguards to prevent or limit the participants' access to each others' competitively sensitive information.

39. In addition to applying a general rule of reason analysis, antitrust agencies have delineated safety zones in which, absent extraordinary circumstances, they would consider information exchanges competitively benign. In the context of integrative collaborations, the agencies generally do not challenge information exchanges when the market shares of the collaboration and its participants collectively account for no more than twenty percent of each relevant market in which competition may be affected. Furthermore, in health care markets, the agencies generally view the collection and exchange of information as competitively benign where the exchange: (1) is managed by a third party; (2) is based on data that is more than three months old; and (3) contains shared data aggregated from at least five providers, of which no individual provider represents more than 25 percent, and be sufficiently aggregated to prevent identification of prices charged by any individual provider.

⁸⁹ See William Blumenthal, Former FTC General Counsel, THE RHETORIC OF GUN-JUMPING, Remarks Before the Association of Corporate Counsel (New York, November 10, 2005), p. 8, *available at* <http://www.ftc.gov/speeches/blumenthal/20051110gunjumping.pdf>; *United States v. Computer Assoc. Int'l, Inc.*, 2002-2 Trade Cas. (CCH) ¶ 73,883, at 95,250 § V.D (D.D.C. 2002), *available at* <http://www.usdoj.gov/atr/cases/f11000/11083.htm>.