Insights: Alerts

Senior DOJ Antitrust Official Announces Withdrawal of Information Exchange Guidelines

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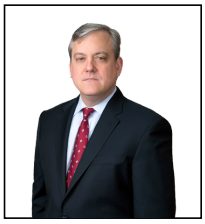
In a speech delivered on February 2, 2023, Principal Deputy Assistant Attorney General Doha Mekki of the Antitrust Division of the Department of Justice announced that the Antitrust Division would soon be withdrawing several policy statements issued between 1993 and 2011 that outlined or reiterated antitrust "safe harbors" for permissible information sharing among competitors in the healthcare industry. Mekki said there were no plans to replace the withdrawn guidance.

The policy guidance had provided an antitrust "safety zone" or "safe harbor" for exchanges of information among healthcare providers which the DOJ subsequently applied in other industries outside of healthcare. The "safe harbor" requires that (1) a third party (for example, a trade association) manages the collection, aggregation, and dissemination of the information; (2) the information is at least three months old; and (3) at least five participants contribute data for any statistic and no individual participant's data makes up more than 25 percent of a statistic on a weighted basis. *See* Statements of Antitrust Enforcement Policy in Health Care (justice.gov).

In recent years, the DOJ's Antitrust Division and the Federal Trade Commission (FTC) have generally recognized that many types of information sharing among competitors can be procompetitive and that the reasonableness of an information exchange depends mainly on the nature of the information to be shared. Through the DOJ's issuance of Business Review Letters, and the FTC's issuance of Advisory Opinions, the agencies had reiterated that they would not take enforcement action against proposed information exchanges that either exclude the sharing of competitively sensitive information or that comply with the "safe harbor" requirements.

The imminent withdrawal of the policy statements will leave ongoing and future information exchange activities among competitors in uncertain and potentially risky waters. The antitrust agencies have been particularly concerned over the years with the sharing of information relating to price, cost, output, wages, customers, or strategic planning. Participation in information exchanges touching those areas and undertaken in reliance on the agencies' "safe harbor" guidance, will now present new or heightened risks of agency scrutiny and even potential enforcement action. As a result, the withdrawal of the policy guidance will elevate the importance of obtaining sound antitrust advice before engaging in information exchanges, and will also likely increase the prevalence of recommendations that clients seek an Advisory Opinion or Business Review Letter from the agencies for such activity.

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