



## DOJ Withdraws Antitrust Guidance on Information Exchanges

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The DOJ Antitrust Division recently announced that it was withdrawing decades-old guidance regarding how the Division would view information exchanges under the antitrust laws. Specifically, the withdrawal of the 1996 DOJ/FTC Policy Statements in Health Care, announced on February 3, 2023, by Principal Deputy Assistant Attorney General Doha Mekki, signals that the Division intends to look more closely at the potential anticompetitive implications of information exchanges, particularly those involving competitors.<sup>[1]</sup> For any entity — including but not limited to trade associations — that has relied on the guidance (and safe harbors) contained in the Policy Statements in the past, reconsideration of their current information exchange protocols is not only warranted, but likely imperative to ensure continued compliance with the antitrust laws.

In announcing the change in policy, DAAG Mekki stated that the DOJ had come to view the “overly formalistic approach to information exchanges” in the Policy Statements as a recipe for “permitting” or even endorsing “frameworks that may lead to higher prices, suppressed wages or stifled innovation.” That approach included, most significantly, the creation of “safety zones” for certain information exchanges through third parties, and the view that the exchange of historical data was highly unlikely to have anticompetitive effects.

With respect to industry surveys, the Policy Statements indicated that the DOJ was unlikely to challenge such exchanges where they were (1) managed by a third party (for example, a trade association); (2) the information was more than three months old; and (3) the information was aggregated and de-identified such that no recipient could identify the data of any particular participant (other than their own). However, DAAG Mekki stated that “the Division is concerned that these factors do not consider the realities” of the modern business environment, and that “exchanges facilitated by intermediaries can have the same anticompetitive effects as direct exchanges among competitors.” In fact, she added that “in some instances, data intermediaries can enhance — rather than reduce— anticompetitive effects.”

Similarly, DAAG Mekki announced that the long-held presumption that the exchange of competitor data that is at least three months old is unlikely to lead to price-fixing or other anticompetitive effects was

equally antiquated. As she explained: "The suggestion that data that is at least three months old is unlikely to be competitively-sensitive or valuable is undermined by the rise of data aggregation, machine learning, and pricing algorithms that can increase the competitive value of historical data." She continued: "Where competitors adopt the same pricing algorithms, our concern is only heightened," and "several studies have shown that these algorithms can lead to tacit or express collusion."

While the withdrawal of the Policy Statements on information exchanges does not render the exchange of competitively sensitive information among competitors unlawful in all cases, it does signal that information exchanges are an area of concern for the DOJ, and one that they will likely be examining more closely going forward. In addition, given that the DOJ also announced that it does *not* intend to issue new guidance on this subject any time soon, any entity considering an information exchange with a competitor – whether directly or through a third party intermediary (including but not limited to trade associations) – would be well-advised to ask the following questions before engaging in such an exchange: (1) is the exchange reasonably necessary to achieve a legitimate business purpose; and (2) is the exchange unlikely to have anticompetitive effects. Absent a clear "yes" to both questions, for the foreseeable future, information exchanges among competitors are likely to create a heightened level of antitrust risk for all of those involved in such conduct.

[1] Notably, over the last 25 plus years, Statement 6 of the Health Care Policy Statements, which addresses information exchanges, was applied by the DOJ to other industries as well. As such, the withdrawal of the Health Care Policy Statements undoubtedly signals a change in enforcement approach for all industries, not just health care.

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