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## Winston Sponsors, Kevin Goldstein Speaks at GCR Live: Cartels 2024

MAY 15, 2024

Winston & Strawn Antitrust/Competition partner Kevin Goldstein spoke on the panel “Where did the safe harbours go? Adrift in the sea of information sharing” at this year’s GCR Live: Cartels on May 15, 2024.

This panel focused on recent DOJ actions revoking longstanding healthcare guidelines and how companies seeking market information should mitigate risk in light of the potential equivalence between information sharing and cartel behavior as perceived by European and other enforcers.

### KEY TAKEAWAYS

1. The DOJ Antitrust Division and FTC took action in 2023 to repeal their Statements of Antitrust Enforcement Policy in Health Care, which had been in place for nearly 30 years. The statements had established clear “Safety Zones” for companies engaged in information exchanges of market data with competitors, such as when contributing data to third-party market research firms or trade associations that aggregate data and produce industry statistics. These Safety Zones had long been relied upon by businesses far beyond the health care sector, and were considered broadly informative of the agencies’ thinking about competitor collaborations regardless of industry or sector. Since the statements were repealed in 2023, the agencies have not provided new guidelines, and have brought multiple new enforcement actions where information exchange plays a significant part in the allegedly anticompetitive conduct. The panel discussed the current landscape and what businesses can do to manage risks when participating in market data sharing or other information exchanges. Key points include:
  - a. The law hasn’t changed. The DOJ and FTC statements were just guidelines and statements of enforcement policy. Even after repeal of the agency guidance, the underlying antitrust statutes and court precedent interpreting them is not changed. Moreover, the Statements themselves were rarely cited in case law, and have not been widely adopted into precedent by courts. The senior DOJ official participating in the panel emphasized that businesses should look to the case law on information exchange for guidance in the absence of agency guidelines.
  - b. What has changed is technology and the agencies enforcement priorities. A major driver being repeal of the statements was the rise of big data, algorithms, and AI, which mean that market data exchanges between businesses can look and be used differently from the 1990s when the Statements were initially adopted. The antitrust agencies are concerned that business can use data in new and increasingly sophisticated ways that is

itself anticompetitive, or can be used to facilitate other anticompetitive conduct. Amid this changing landscape, the agencies have said they want to remain agile to police conduct they perceive as harmful, and do not plan to issue new safety zones for data sharing in the foreseeable future.

- c. To manage risk from data exchanges, businesses can continue to look to the withdrawn guidelines as a useful reference point, but should understand that the agencies will not recognize any safe harbors. A handful of current cases—both government actions and private actions—challenge conduct centered around information exchanges, third-party data providers and algorithms. This is an evolving area and we'll be paying attention to those cases to see how the law and enforcer priorities evolve.

Winston is a proud sponsor of GCR Live: Cartels, an event that brings together experts from government enforcers, in-house counsel, and private practice, to provide insights on competition law.

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## Speaker

[Kevin B. Goldstein](#)

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