ALERT MEMORANDUM

DOJ Antitrust Division Warns About "Product-Fixing" Risk

July 2, 2025

Last week, Deputy Assistant Attorney General Dina Kallay warned that the U.S. Department of Justice, Antitrust Division is "watching closely" for "product-fixing"—i.e., coordination among competitors on non-price aspects of the products or product features that they offer.[1]

Kallay distinguished product-fixing from standard-setting activities, which she acknowledged are often procompetitive when appropriately implemented. But she warned that even standard-setting activities must follow specific procedures to prevent product-fixing: Standard-setting activities must occur without an agreement to follow the standard, based on broad input from market participants, and in accordance with well-established and public procedures.

Kallay's comments on product-fixing highlight that discussions among competitors on products or product features carry antitrust risk, even if those discussions do not directly address price. This alert provides further guidance on the law around product-fixing and standard-setting. It is important to consult with experienced antitrust counsel before participating in discussions with competitors about the products or product features you or they offer.

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[1] Khushita Vasant, MLex, US DOJ on lookout for cases of 'product-fixing,' non-price restraints, Kallay says (Jun. 25, 2025), https://www.mlex.com/mlex/articles/2357617/us-doj-on-lookout-for-cases-of-product-fixing-non-price-restraints-kallay-says.

I. Background

On June 24, 2025, DAAG Dina Kallay warned during remarks at the University of Southern California Gould School of Law that the Antitrust Division was "concerned with non-price restrictions for competition," especially where competitors agree to eliminate competition on the types of products or product features that they offer.[2] Kallay said that such "product-fixing" can happen in any setting, including "informal industry groups, collaborative or collusive groups, private consortia and standards development organizations."[3]

Kallay distinguished product-fixing from standard-setting activities, which are analyzed under the rule of reason framework. She acknowledged that standard-setting can "be procompetitive when done right," citing Supreme Court precedent holding as much.[4] However, Kallay warned that standard-setting must follow best practices because competitors looking to unlawfully limit competition "may try to pass [that activity] off as a standard-development exercise."[5] According to Kallay, appropriate standard-setting activities must be:

1. voluntary, such that participants are "free to produce products consistent with the standard or not";
2. "balanced among groups with different interests," avoiding domination from select participants; and
3. governed by "well-established and publicized procedures."[6]

II. Legal Context

In relatively sparse precedent, courts have applied the per se rule to agreements intended to reduce cost competition by producing an inferior product. For instance, in *National Macaroni Manufacturers Association v. F.T.C.*, the Seventh Circuit agreed with the FTC that the per se rule applied to a conspiracy among producers of macaroni to use an inferior blend of wheat in order to reduce cost competition for a superior input in short supply.[7] By contrast, in *In re German Automotive Manufacturers*, the Northern District of California declined to apply the per se rule to an alleged conspiracy among competing car manufacturers to "exchange competitively sensitive technical data" and to use "only certain technical solutions," as standard-setting is in "most instances . . . lawful."[8]

Indeed, courts generally recognize that standard-setting activities should be analyzed under the rule of reason, even when they do not meet the three criteria set out by Kallay. In *F.T.C. v. Indiana Federation of Dentists*, for example, an association of dentists "promulgated a 'work rule' forbidding its members to submit x rays to dental insurers in conjunction with claim forms."[9] The Supreme Court applied the rule of reason to the dentists' work rule, even though it was "enforce[d]" and established "immediately" by dentists without considering broader interests—likely violating all three of Kallay's standard-setting guidelines.[10] The Supreme Court ultimately held that the dentists' work rule could be condemned without "any great difficulty," but nonetheless found the rule of reason appropriate for a trade association rule

[2] *Id.*
[3] *Id*.
[4] *Id.*; *cf. Allied Tube & Conduit Corp. v. Indian Head, Inc*., 486 U.S. 492, 500-01 (1988) ("[S]tandard-setting . . . can have significant procompetitive advantages.").
[5] Vasant, *supra*, note 1.
[6] *Id.*
[7] 345 F.2d 421, 424-27 (7th Cir. 1965).
[8] 392 F. Supp. 3d 1059, 1071 (N.D. Cal. 2019).
[9] 476 U.S. 447, 451 (1986).
[10] *Id.* at 451, 459.

imposed in the context of broader business relationships.[11]

III. Key Takeaways

Effective processes may help reduce risk from standard-setting activities. DAAG Kallay acknowledged that standard-setting activities can be lawful and appropriate so long as they follow the procedures that she set out. In addition to protecting against arguments that the per se rule applies, companies can help protect their activities from scrutiny under the rule of reason by establishing effective processes up front. However, each industry and activity is different and standard-setting may warrant greater or fewer procedural safeguards depending on the specific context.

Legal departments should educate business teams to use care when discussing product design and features. Agreements among competitors on their products or product features carry legal risk, especially when the agreement would produce a product that is inferior. Business teams should consult with their legal department before entering into discussions on these topics and carefully analyze and document the business rationales and consumer benefits for any such discussion.

IV. Conclusion

Companies should consult with experienced antitrust counsel before engaging any competitor in discussions about products or product features.

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[11] *Id.* at 458-59.