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BLOG

Another Day, Another Withdrawal: FTC and DOJ Withdraw Decades-Old *Antitrust Guidelines for Collaborations Among Competitors*

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In a manner that can fairly be described by now as "business as usual," the Federal Trade Commission and the Department of Justice Antitrust Division issued a press release on Wednesday, December 11, announcing their decision to withdraw another key regulatory guidance document: the Antitrust Guidelines for Collaborations Among Competitors ("Collaboration Guidelines"). With just five weeks left for the Biden Administration, the move leaves no time for this administration to implement, let alone propose, any alternate guidance in replacement.

The withdrawal of the 24-year old Collaboration Guidelines was approved by the FTC by a narrow 3-2 party-line vote with the three Democratic commissioners in favor of their withdrawal and the two Republican commissioners dissenting. Predictably echoing their reasoning in their prior withdrawals of other long-relied-upon regulatory guidance documents, the FTC and DOJ reasoned in their withdrawal statement that the Collaboration Guidelines "no longer provide reliable guidance … about how enforcers [(under the Biden Administration, at least)] assess the legality of collaborations involving competitors," because they do not reflect or account for today's business and competitive landscape, technical advancements, or legal realities and controlling precedents.

According to the joint withdrawal statement released by the FTC and DOJ, there are four overarching justifications for the withdrawn Collaboration Guidelines that were widely viewed over the last two decades as a key safe harbor by businesses across industries:

1. The Collaboration Guidelines do not reflect the evolution and development of Supreme Court and federal appellate jurisprudence on competitor collaborations during the last 24 years. The statement cites a handful of Supreme Court and appellate-level cases, and suggests that businesses and their counsel should look to these cases to understand the metes and bounds of collaborations involving competitors.
2. The Collaboration Guidelines rely on and reference some outdated policy statements which have since been withdrawn or updated (in all but one instance, by the antitrust regulators under the Biden Administration), and therefore, "risk creating safe harbors that have no basis in federal antitrust statutes." They specifically point to: (a) the 1992 and 1997 merger guidelines, which have been replaced more than once, most recently in December 2023; (b) the 1993 Statements of Antitrust Enforcement Policy in Health Care, which were withdrawn by the DOJ and FTC in 2023; and (c) the 1995 Antitrust Guidelines for the Licensing of Intellectual Property, which were updated in January 2017.

3. The Collaboration Guidelines “rely on outdated analytical methods that fail to capture advances in computer science, business strategy, and economic disciplines that help enforcers assess the competitive implications of corporate collaborations.”
4. The Collaboration Guidelines “fail to address the competitive implications of modern business combinations and rapidly changing technologies such as artificial intelligence, algorithmic pricing models, vertical integration, and roll ups.”

The FTC’s Republican Commissioners, Melissa Holyoak and Andrew Ferguson, issued sharp rebukes in their dissents opposing the Commission’s decision to withdraw the Collaboration Guidelines, arguing that it was wrong of the Commission to make this move during the lame-duck period just 40 days before President-Elect Trump’s administration takes over. Commissioner Ferguson wrote that “the time for the Biden-Harris Commission to conduct such guidance review is over,” and Commissioner Holyoak complained that “[t]he Majority had four years to address its concerns with the *Collaboration Guidelines*—now is not the time.” Commissioner Holyoak went a step further, however, and criticized the Majority’s decision to withdraw the Collaboration Guidelines “without providing any replacement guidance, or even intimating plans for future replacements,” a move which she believes “leaves businesses grasping in the dark.” On the other hand, writing for the Majority, Commissioner Alvaro Bedoya asserts that the FTC is “not on vacation,” and that “[t]he American people expect their government to keep working for them even in periods of transition.”

KEY TAKEAWAYS

With this dismantling of yet another long-accepted safe harbor, businesses that are considering engaging in collaborations with competitors are simply “encouraged to review the relevant statutes and case law to assess whether a collaboration would violate the law.” It continues to be prudent for businesses—particularly those in industries that often involve collaborative efforts between competitors and sectors that are prime targets of antitrust enforcement and scrutiny (e.g., health care, technology)—to engage early and often with counsel who are antitrust specialists and can help navigate the murky waters of statutory and case law precedent and can advise businesses on how to steer clear of compliance violations and regulatory risk.

Companies should also consider working with experienced counsel to engage with the DOJ and/or FTC preemptively through the agencies’ business review processes, whereby companies can receive specific guidance on whether a particular collaboration among competitors would violate antitrust laws according to that agency. The Winston & Strawn antitrust team is capable of assisting clients with such outreach to the regulators.

Winston & Strawn has a deep bench of thought partners and advisors who are adept at antitrust law and policy, and regularly draw on their expertise and strong relationships to guide clients through complex antitrust issues. Our team stands ready to help companies successfully navigate these issues with an eye toward the most up-to-date trends, decisions, and regulatory actions.

Law clerk Laura Toland also contributed to this blog post.

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