

FTC and DOJ Withdraw More Guidance Leaving the State of Collaborative Projects Less Clear

Alert

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On Dec. 11, 2024, the Federal Trade Commission (FTC) and the U.S. Department of Justice's (DOJ) Antitrust Division announced the withdrawal of their decades-old guidelines regarding collaboration among competitors. The guidelines addressed partnerships between competitors – such as joint ventures, joint marketing arrangements and joint research projects – that the agencies viewed as procompetitive and provided an analytical framework for competitors to evaluate the risk that federal authorities would challenge their collaborations as anticompetitive.

The recent withdrawal clarifies that the now-retracted guidelines do not create safe harbors. The [statement](#) announcing the agencies' move stated several reasons the guidelines no longer reflected their policies, including: 1) federal court precedents decided after the guidelines were published; 2) revisions to the FTC and DOJ safe-harbor guidance that the collaboration guidelines had relied on; and 3) advancements in enforcers' analytical methods that account for developments in computer science, business strategy and economic disciplines.

The agencies' statement also noted that the withdrawn guidelines “fail[ed] to address . . . rapidly changing technologies such as artificial intelligence, algorithmic pricing models, vertical integration, and rollups,” each of which the agencies have highlighted in recent [investigations](#) or [enforcement actions](#). The withdrawal of these guidelines follows on the heels of the FTC's and DOJ's withdrawal last year of other guidance related to information sharing, which also was influenced by artificial intelligence and other technology allowing easy analysis of large data sets.

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Now, with no replacement to the former guidelines in effect, predicting how the FTC or DOJ will view potential collaborations within an industry is more challenging. The Dec. 11 announcement encourages businesses to assess the legal risks of such partnerships by reviewing the relevant statutes and case law.

NEXT STEPS FOR COMPANIES

Businesses evaluating existing and prospective collaborations should not simply rely on past practices. Instead, businesses should engage antitrust counsel to analyze the risk of any project in this new environment. As part of that process, there needs to be a consideration of recent case law that may inform the FTC's and DOJ's thinking, including: 1) U.S. Supreme Court and circuit court rulings on collaborations, such as the [decisions](#) forbidding the NCAA from limiting its member institutions' compensation of athletes; 2) a [holding](#) that a joint venture between oil giants to pool their resources and share profits was not a price-fixing scheme; 3) a [finding](#) that the NFL's exclusive licensing agreement with Reebok could violate antitrust laws; and 4) an [opinion](#) forcing American Airlines and JetBlue to abandon their partnership.

Along with case law, the agencies' own statements and policy documents are useful guides to how a competitor collaboration might be evaluated. For example, the FTC's and DOJ's recent statements (both informal and in [court filings](#)) about information sharing should be considered when evaluating a proposed competitor collaboration.

As with any other antitrust assessment, businesses should also consider the likely impact of the incoming Trump administration on the FTC's and DOJ's posture. President-elect Trump has named Commissioner Andrew N. Ferguson to replace FTC Chair Lina Khan and has nominated Mark Meador as a new FTC Commissioner. These changes are expected to usher in a more favorable environment for corporate collaborations. At the same time, Trump has also nominated Gail Slater, a "Big Tech" critic, to lead the DOJ's Antitrust Division, which may indicate continued skepticism of technological collaborations. Stinson attorneys recently authored an [analysis](#) of how Trump's first 100 days are likely to affect federal antitrust policy.

For more information on the FTC's and DOJ's withdrawal of collaboration guidelines, please contact [Jeetander Dulani](#), [Bill Greene](#), [J. Nicci Warr](#), [Vicki Smith](#), [Bill Kearney](#), [Emily Asp](#), [Heather Franco](#), [David Lamb](#) or the Stinson LLP contact with whom you regularly work.

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