

Insights

NEVER BAD-MOUTH SYNERGY: FTC AND DOJ WITHDRAW ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS

Dec 20, 2024

On December 11, 2024, the Federal Trade Commission and the Antitrust Division of the Department of Justice unexpectedly withdrew the 2000 Antitrust Guidelines for Collaborations Among Competitors (Collaboration Guidelines). Potential collaboration with competitors has always been a tricky area of antitrust law, with many pitfalls for the unwary. The withdrawal of the Collaboration Guidelines is an unusual, sparsely justified action that removes important guidance clarifying the types of actions that are likely to raise antitrust concerns.

The FTC voted 3-2 along partisan lines, with Commissioners Holyoak and Ferguson dissenting. Commissioner Bedoya issued a separate statement. The Withdrawal of the Collaboration Guidelines follows the similar unexplained withdrawal of other antitrust policy statements, including the 2023 withdrawal of policy statements related to antitrust enforcement in healthcare markets.

The Collaboration Guidelines contained guidance for competitors who wished to collaborate but still “preserve some form of competition among the [market] participants.” For example, the Collaboration Guidelines contained important information for competitors who wish to engage in joint ventures or short-term collaboration such as research and development projects. As the Collaboration Guidelines further explained, they supplemented the Merger Guidelines, the latter of which contain guidance on mergers that usually “completely end competition between the merging parties in the relevant market(s).”

The joint DOJ-FTC explanatory statement withdrawing the Collaboration Guidelines asserts that the Guidelines contained out-of-date guidance that no longer accurately reflected significant case law decided since April 2000. The withdrawal statement also notes that the Collaboration Guidelines cite to other outdated guidelines and policies, including older versions of the Merger Guidelines. Instead of providing guidance to competitors as to which conduct is likely to violate the antitrust laws, the withdrawal statement encourages competitors to “review the relevant statutes and caselaw to assess whether a collaboration would violate the law.”

Ironically, much of the “relevant ... caselaw” that the FTC and DOJ point to incorporates the Collaboration Guidelines. Before their withdrawal, federal courts routinely cited to the Collaboration Guidelines for guidance on identifying the types of behavior that may run afoul of the antitrust laws when competitors collaborate. *See, e.g., Flextronics Int’l USA, Inc. v. Panasonic Holdings Corp.*, No. 22-15231, 2023 WL 4677017, at *3 (9th Cir. July 21, 2023) (citing to the Collaboration Guidelines to identify the types of information exchange that are more likely to raise competitive concern); *Burnett v. Nat’l Ass’n of Realtors*, No. 19-CV-00332-SRB, 2022 WL 17827581, at *2 (W.D. Mo. Dec. 20, 2022) (finding that an expert’s opinions were reliable and based on an adequate methodology where the expert followed a “standard antitrust analysis of horizontal conduct” as set forth in the Collaboration Guidelines); *Jien v. Perdue Farms, Inc.*, No. 1:19-CV-2521-SAG, 2020 WL 5544183, at *12 (D. Md. Sept. 16, 2020) (citing to sections of the Collaboration Guidelines that identify pricing information and “current operating...plans” as the type of information exchanges that are especially likely to raise antitrust concerns). One of the cases cited by the joint explanatory statement—a recent significant win for the DOJ—likewise cites to the Collaboration Guidelines for support. *See United States v. Am. Airlines Grp. Inc.*, 121 F.4th 209, 225 (1st Cir. 2024) (citing to the Collaboration Guidelines for the proposition that a defense of a restraint of trade challenging competition itself is insufficient as a matter of law).

The withdrawal of the Collaboration Guidelines is particularly curious for the FTC. Another appellate-level decision relying on those Guidelines is the Fifth Circuit’s opinion in *Impax Laboratories, Inc. v. FTC*, 994 F.3d 484, 496 (5th Cir. 2021). That decision was a significant win for the FTC’s efforts to proscribe pay-for-delay agreements, as the Fifth Circuit affirmed the Commission’s opinion, via the FTC’s in-house court system, that the agreement at issue violated the antitrust laws. Given the overall hostility of the Fifth Circuit towards administrative law in general and the FTC in particular, it is surprising to see the FTC chip away at the foundations of one of the few decisions in its favor from that circuit. Indeed, this decision hands future litigants an argument that *Impax* is no longer good law, as the FTC and DOJ now disavow one of the authorities cited in the opinion.

Equally odd is the explanatory statement’s assertion that potential collaborators did not need the Collaboration Guidelines because they could just “review the relevant statutes and caselaw to assess whether a collaboration would violate the law.” Commissioner Holyoak’s dissent argues that this encouragement would render all of the guidance documents issued by the FTC unnecessary, such as the Merger Guidelines or the 2022 Section 5 Policy Statement. As with those unwithdrawn documents, competitors could always review the relevant statutes and caselaw in a given area without the FTC’s guidance. The withdrawal of the Collaboration Guidelines will thus result in additional confusion for competitors who are considering collaborating since, as Commissioner Holyoak notes, not “all businesses have antitrust lawyers on speed dial.”

Finally, the FTC and DOJ’s withdrawal is quite strange in light of another option available to the agency that the withdrawal statement never addresses: updating the Collaboration Guidelines. If the

agencies felt that the Collaboration Guidelines were out of date, they could have revised the Collaboration Guidelines to explain the agencies' current views and how they have changed, as the agencies recently did with the 2023 Merger Guidelines. Or the agencies could have withdrawn the Collaboration Guidelines while indicating they would provide a new version, as the FTC did in 2021 in [withdrawing the 2015 Section 5 Policy Statement](#). Unfortunately, the agencies do not explain why they did not choose this option, nor why they did not provide notice to the public that they were considering withdrawing the Collaboration Guidelines in the first place.

Given the complexity of the issues raised in potential collaboration of competitors, we advise clients to follow Commissioner Holyoak's advice: competitors who wish to collaborate with one another should seek qualified antitrust counsel before engaging in collaboration with competitors.

RELATED PRACTICE AREAS

- Antitrust

MEET THE TEAM



David B. Schwartz

Washington

david.schwartz@bclplaw.com

+1 202 508 6086



Rebecca A. D. Nelson

St. Louis / Washington

rebecca.nelson@bclplaw.com

+1 314 259 2412



Charles E. Tompkins

Washington

charles.tompkins@bclplaw.com

+1 202 508 6055



Evan Boyle

Chicago

evan.boyle@bclplaw.com

+1 312 602 5118

This material is not comprehensive, is for informational purposes only, and is not legal advice. Your use or receipt of this material does not create an attorney-client relationship between us. If you require legal advice, you should consult an attorney regarding your particular circumstances. The choice of a lawyer is an important decision and should not be based solely upon advertisements. This material may be “Attorney Advertising” under the ethics and professional rules of certain jurisdictions. For advertising purposes, St. Louis, Missouri, is designated BCLP’s principal office and Kathrine Dixon (kathrine.dixon@bclplaw.com) as the responsible attorney.