

## **CLIENT ALERT**

### **Collaboration Among Competitors Guidelines Withdrawn**

On December 11, 2024, the Department of Justice Antitrust Division (“DOJ”) and the Federal Trade Commission (“FTC”) jointly announced their withdrawal of the *Antitrust Guidelines for Collaborations Among Competitors* (“Collaboration Guidelines”), originally issued in April 2000.

#### **Background**

The Collaboration Guidelines set forth a series of “safety zones” for procompetitive competitor collaborations. In publishing the Collaboration Guidelines, the DOJ and the FTC stated that they would not prosecute entities that were within these safety zones outside extraordinary circumstances. Both agencies have now withdrawn these guidelines and have offered no replacement.

#### **Weren’t the Collaboration Guidelines withdrawn last year?**

No, only one component was withdrawn. The part of the Collaboration Guidelines addressing information sharing/data exchanges was withdrawn in 2024. This is the part that was most applicable to associations, though other aspects were relevant as well. Now the DOJ and FTC have withdrawn the Collaboration Guidelines *entirely*.

#### **Why were the Collaboration Guidelines withdrawn?**

In their joint statement, the DOJ and FTC cited drifting case law and new technologies such as pricing algorithms and artificial intelligence as making the nearly 25-year-old Collaboration Guidelines obsolete.

#### **What does this mean for associations?**

Associations of course are central to many “competitor collaborations,” i.e., joint activities among their members. These activities include information sharing/data exchange programs; development of best practices; publication of position statements; legislative and regulatory advocacy; joint advertising campaigns; research; technical standards; product and personnel certification; codes of conduct; and group purchasing. *These and other joint activities remain generally legal under the antitrust laws.*

*However*, the withdrawal of the Collaboration Guidelines is consistent with a more aggressive approach by federal antitrust regulators generally in recent years. The withdrawal could also encourage private antitrust litigation. Associations therefore should be especially

vigilant in ensuring that their activities can withstand antitrust scrutiny. Reassessing current activities is advisable in this regard.

**Have the rules changed with respect to what is permissible activity by associations under the antitrust laws?**

Not at all. *Withdrawal of the Collaboration Guidelines does not change the law.* The first American antitrust statute, the Sherman Act, was passed in 1890. Since then, and with the passage of the Clayton Act (1914), the FTC Act (1914), and others, there has been over 130 years of case law. There are also long-standing advisory opinions and other guidance from the FTC and DOJ that remain in place.

**How does the changing administration affect this decision?**

There is no way to know whether the Collaboration Guidelines might be reinstated or whether replacement guidelines may be developed under the Trump Administration. The FTC Commissioners will soon become majority Republican, including two current FTC Commissioners who voted against withdrawal of the Collaboration Guidelines. The background of the nominee to head the DOJ Antitrust Division does not provide any hints of how she may view the withdrawal.

**What can we do in the meantime?**

As always, when it comes to collaborative efforts among competitors, it is important to practice caution and be sure to not create mechanisms that could be viewed as facilitating unlawful collusion of some kind. As stated above, associations should now be especially vigilant in ensuring that their current, and any future, activities can withstand antitrust scrutiny. It is also important to engage qualified legal counsel in this regard.

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Court L. Culver | cculver@wc-b.com | (202) 785-9500

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