# Takeaways From DOJ, FTC End To Collaboration Guidelines

By **Amy Vegari and Kate Ross** (January 9, 2025)

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On Dec. 11, Federal Trade Commission and the U.S. Department of Justice's Antitrust Division jointly withdrew the antitrust guidelines for collaborations among competitors.[1]

In place since April 2000, the guidelines purported to set forth an analytical framework for the agencies' antitrust enforcement policy under Section 1 of the Sherman Act, with respect to collaborative agreements between actual or potential competitors.[2]

Through the collaboration guidelines, the agencies had acknowledged that, although horizontal agreements can threaten to unreasonably restrain competition, nevertheless "[i]n order to compete in modern markets, competitors sometimes need to collaborate."[3]

In their joint announcement last month, the agencies stated that the guidelines are no longer reliable because they do not reflect recent case law regarding competitor collaborations; they rely on outdated and withdrawn DOJ and FTC policy statements; and they risk creating safe harbors, which, according to the agencies, have no basis in federal antitrust statutes.[4]

Identifying by name a handful of Section 1 cases, including two in circuit courts, the agencies appear to be reserving the authority to continue the trend of antitrust enforcement seen throughout the Biden administration's term.

This includes highlighting a more restrictive approach to the ancillary restraints doctrine, a more expansive view of the markets in which anticompetitive collaborations may arise — including labor markets, where the agencies have focused enforcement efforts in the last few years — and significantly, the elimination of safe harbors established by the guidelines.

## Applicable Legal Standards Following the Withdrawal

In their announcement withdrawing the guidelines, the agencies clarified the legal standards governing competitor collaborations. They also formally signaled their view that these standards apply to markets beyond those expressly flagged by the guidelines.

### *Framework for Analyzing Collaborations*

The agencies identified five cases that, in their view, "advance[d] the jurisprudence interpreting Section 1" in the years since the guidelines were issued and diminish the utility of the guidelines:

- The U.S. Supreme Court's 2021 decision in NCAA v. Alston;
- The Supreme Court's 2010 decision in American Needle Inc. v. NFL;
- The Supreme Court's 2006 decision in Texaco Inc. v. Dagher;

- The U.S. Court of Appeals for the Seventh Circuit's 2023 decision in Deslandes v. McDonald's USA; and

- The U.S. Court of Appeals for the First Circuit's Nov. 8, 2024, decision in U.S. v. American Airlines Group.[5]

First, the cases highlighted in the agencies' withdrawal announcement underscore the now-familiar sliding scale[6] of scrutiny applied to evaluate whether an agreement or practice constitutes an unreasonable restraint of trade in violation Section 1: (1) the per se rule; (2) the so-called quick look; and (3) the rule of reason.[7]

While quick look review is rarely employed, and was only obliquely mentioned in the guidelines, these cases continue to identify it as a distinct component of the sliding scale. Indeed, even while refusing to apply it, the Supreme Court affirmed in Alston that "sometimes we can determine the competitive effects of a challenged restraint in the 'twinkling of an eye.'"[8]

Second, the cases identified by the agencies define the contours of two defenses used frequently by collaborators faced with Section 1 claims — namely, the single entity rule and ancillary restraints doctrine.

The Supreme Court in the Texaco case, and also in American Needle, clarified that the single entity rule precludes liability where would-be competitors act as a single firm competing with other sellers in the market by, as per the Texaco ruling, "pool[ing] their capital and shar[ing] the risks of loss as well as the opportunities for profit," for example, through a joint venture.[9] As per the American Needle ruling, this is because such entities acting together "do not deprive the marketplace of independent centers of decision making," and as a result, these entities are incapable of conspiring for purposes of Section 1.[10]

The ancillary restraints doctrine exempts horizontal agreements from per se illegality if they are ancillary to the legitimate and competitive purposes of a business collaboration.[11]

Courts faced with this defense must determine whether the practice at issue qualifies for this exception, or if it is simply a "naked" horizontal restraint of trade — or agreement lacking pro-competitive justification — subject to the per se standard.[12]

While the single entity rule governs restraints serving the core activity of a joint venture or business, the ancillary restraints doctrine governs restraints on nonventure activities.[13] The Texaco and Deslandes cases cited in the agencies' withdrawal announcement demonstrate this difference.

In its Texaco ruling, the Supreme Court found the per se rule inapplicable to two oil companies' agreement to sell gasoline at the same price under the single entity rule.[14]

This was because the companies were not competing with one another, but rather, were participating in the gasoline market "jointly through their investments" in a third entity, Equilon — in which they had pooled their resources and consolidated their operations.[15]

In its Deslandes ruling, the Seventh Circuit revived a challenge to a no-poach clause in McDonald's franchise agreements as per se unlawful under Section 1.[16]

The Seventh Circuit rejected McDonald's ancillary restraint defense as a matter of law because the no-poach clause bore no relationship to the legitimate business purpose of the franchises — namely, increasing output by selling hamburgers.[17]

Whereas the price-fixing agreement in the Texaco case was subject to the single entity rule because it served the core activity of the joint venture — selling gasoline — in the Deslandes case, the no-poach clause was framed as an ancillary restraint because the clause governed worker employment, a nonventure activity.

The agencies' citation of the Deslandes ruling may signal their desire to take a narrower view of the ancillary restraints doctrine moving forward. Indeed, the Seventh Circuit previously held that ancillary restraints must be evaluated under the rule of reason.[18]

However, the Deslandes decision suggests that no-poach clauses will be evaluated under the more stringent per se standard, unless the specific clause at issue appears to play a role in increasing output. That stricter approach would be consistent with the agencies' many challenges to employment restrictions in recent years.[19]

***Applicability to New Markets***

The cases the agencies highlight also suggest that the framework for analyzing competitor collaborations may be applied in markets beyond those explicitly named in the guidelines.

The guidelines identified only three types of markets that could be affected by collaborations: goods, technology and innovation, defined as "the research and development directed to particular new or improved goods or processes and the close substitutes for that research and development."[20]

But the restraints challenged in the case law cited by the agencies span additional markets, including air travel services[21] and labor markets.[22]

This suggests that the agencies view collaborative agreements and other joint ventures as having the ability to affect competition in almost any conceivable market in which competitors contemplate collaboration.

**Impact on Future Collaboration: Elimination of Safe Harbors**

The guidelines set forth a flexible approach to evaluating competitor collaborations, explaining applicable legal principles in the abstract without consistently providing concrete examples.

By uprooting the guidelines, the agencies may have attempted to create clearer parameters by emphasizing case law that evaluates the antitrust implications of specific ventures.

That said, the guidelines' withdrawal has the potential to chill some future collaboration, as the agencies disavow previously established safe harbors, as well as endorsements of the potential procompetitive benefits of research and development collaborations that figured prominently in the guidelines.

Indeed, the agencies explicitly cited the safe harbors as one reason why the prior guidance was no longer reliable. Ventures previously qualifying for safe harbors included (1) collaborations affecting no more than 20% of the relevant market; and (2) research and development collaborations where at least three independent innovators would be able to

engage in a close substitute for the research and development activity of the collaboration.[23]

The guidelines also endorsed research and development collaborations as usually procompetitive, given that such collaborations facilitate efficient development or research on new or improved goods, services or production processes.[24]

Going forward, collaborators are likely to be more cautious about engaging in activities previously covered by the safe harbors.

However, the absence of the safe harbors does not necessarily mean that these activities automatically will be deemed illegal; rather, courts likely will analyze them holistically, consistent with the standards above, probably under the rule of reason.

**Remaining Guidance in Effect**

The agencies' withdrawal of the collaboration guidelines coincides with a general trend during the Biden administration of withdrawals of numerous other antitrust policy statements and guidelines characterized as overly permissive and obsolete.

As but one example, in 2023, the agencies withdrew three healthcare-related policy statements dating back to 1993, thereby ending the agencies' endorsement of safe harbors related to information-sharing.[25] though these remain established in case law.[26]

The agencies' remaining antitrust guidance is limited to five subject areas: merger enforcement (2023); guidance for human resource professionals (2016); cybersecurity (2014); international enforcement and cooperation (2017); and intellectual property licensing, and innovation and competition (2007).

**Conclusion**

The agencies' withdrawal of the guidelines ensures that their stated policy with regard to competitor collaborations is clear and consistent with current law.

That said, without the guidelines' finite list of affected markets and safe harbors, businesses likely will analyze potential collaborations more carefully to understand the risks of antitrust scrutiny. Appearing as the agencies prepare for new leadership, this shift dovetails with the agencies' withdrawal of other more permissive guidelines and more stringent approach to enforcement in a variety of new contexts over the last four years.

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[1] U.S. Dep't of Just. and Fed. Trade Comm'n, Antitrust Guidelines for Collaborations Among Competitors [hereinafter "Guidelines" or "Collaboration Guidelines"] (2000).

[2] 15 U.S.C. § 1.

[3] Guidelines, at 1.

[4] Joint Withdrawal Statement, U.S. Dep't of Just. and Fed. Trade Comm'n, Justice Department and Federal Trade Commission Withdraw Guidelines for Collaboration Among Competitors (Dec. 11, 2024), https://www.justice.gov/atr/media/1380001/dl?inline.

[5] Id. The cases are NCAA v. Alston, 594 U.S. 69, 88-92 (2021); Am. Needle Inc. v. NFL, 560 U.S. 183, 191, 202 (2010); Texaco Inc. v. Dagher, 547 U.S. 1, 6 (2006); Deslandes v. McDonald's USA, LLC, 81 F.4th 699, 702 (7th Cir. 2023), cert. denied, 144 S. Ct. 1057 (2024); United States v. Am. Airlines Grp., 121 F.4th 209 (1st Cir. 2024).

[6] Am. Airlines, 121 F.4th at 222 (quoting 11 Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law: An Analysis of Antitrust Principles and Their Application ¶ 1508 (4th ed. 2022)).

[7] Section 1 prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States." 15 U.S.C. § 1.

[8] Alston, 594 U.S. at 88 (quoting NCAA v. Bd. of Regents of Univ. of Oklahoma, 468 U.S. 85, 110, n.39 (1984)); see also Texaco, 547 U.S. at 7 n.3.

[9] Texaco, 547 U.S. at 6 (quoting Arizona v. Maricopa County Medical Soc., 457 U.S. 332, 356 (1982)).

[10] Am. Needle, 560 U.S. at 194 (quoting Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984)).

[11] Texaco, 547 U.S. at 7; see also Polk Bros., Inc. v. Forest City Enterprises, Inc., 776 F.2d 185, 189 (7th Cir. 1985).

[12] Polk Bros., 776 F.2d at 188–89.

[13] Texaco, 547 U.S. at 7-8.

[14] Id. at 6.

[15] Id.

[16] 81 F.4th at 705.

[17] Id. at 704.

[18] Polk Bros., 776 F.2d at 189.

[19] E.g., United States v. Patel, 3:21-cr-220 (D. Conn.); United States v. Jindal, No. 4:20-cr-358 (E.D. Tex.); United States v. Surgical Care Affiliates LLC, 3:21-cr-11 (N.D. Tex.); United States v. Hee, No. 2:21-cr-98 (D. Nev.); United States v. DaVita, Inc., 1:21-cr-229 (D. Col.); United States v. Manahe, 2:22-cr-13 (D. Me.); see also FTC Non-Compete Clause Rule, 16 CFR § 910 (2024). The effective date of the FTC Non-Compete Clause Rule is currently stayed pursuant to an enjoinment order issued by the U.S. District Court for the Northern District of Texas in August 2024. See Ryan, LLC v. Fed. Trade Comm'n, No. 3:24-

CV-00986-E, 2024 WL 3879954 (N.D. Tex. Aug. 20, 2024).

[20] Guidelines, § 3.32(c) at 17.

[21] Am. Airlines, 121 F.4th at 209.

[22] Alston, 594 U.S. at 88-92; Deslandes, 81 F.4th at 702.

[23] Guidelines, § 4 at 25-27.

[24] Id. § 3.31(a) at 14.

[25] Press Release, U.S. Dep't of Just. and Fed. Trade Comm'n, Justice Department Withdraws Outdated Enforcement Policy Statements (Feb. 3, 2023), https://www.justice.gov/opa/pr/justice-department-withdraws-outdated-enforcement-policy-statements.

[26] Todd v. Exxon, 275 F.3d 191, 199 (2d Cir. 2001).