

## EXPEDITED ANTITRUST PROCEDURE NOW AVAILABLE FOR BUSINESS COLLABORATIONS THAT COMBAT THE CORONAVIRUS

On March 24, 2020, the U.S. Department of Justice, Antitrust Division ("DOJ"), and the U.S. Federal Trade Commission ("FTC") (the "Agencies"), issued a joint statement providing antitrust guidance to businesses collaborating to combat the spread of the Coronavirus Disease 2019 pandemic ("COVID-19"). As part of this guidance, the Agencies announced that they would expedite their antitrust review of prospective competitor collaborations by parties seeking to respond to COVID-19, an effort the Agencies recognized will require "unprecedented cooperation" between enforcement agencies and private industry.<sup>1</sup> The Agencies warned, however, that they would vigilantly pursue antitrust violations by companies that use the present market turbulence to collude or exclude competitors in violation of the antitrust laws. The Agencies' guidance affects any business whose activities impact U.S. commerce.

### BACKGROUND

The DOJ and FTC have concurrent enforcement jurisdiction over federal antitrust laws. Those laws prohibit both coordinated and unilateral conduct that unreasonably restrain trade.

Certain narrow classes of competitor coordination—such as price-fixing, bid-rigging, or customer or market allocation—have long been recognized as so presumptively anticompetitive as to be per se illegal. These per se restraints give rise to criminal penalties against participating companies and their executives.

#### Key issues

- Expedited antitrust procedure provides for a 7 calendar-day turnaround on providing antitrust guidance upon receiving all necessary information
- U.S. Antitrust Agencies will account for exigent circumstances when assessing competitor collaborations
- Parties should remain vigilant to maintain compliance with U.S. antitrust laws

<sup>1</sup> Joint Antitrust Statement Regarding COVID-19, Mar. 24, 2020, [https://www.justice.gov/atr/joint-antitrust-statement-regarding-covid-19?utm\\_medium=email&utm\\_source=govdelivery](https://www.justice.gov/atr/joint-antitrust-statement-regarding-covid-19?utm_medium=email&utm_source=govdelivery) (hereinafter "Guidance"); see also <https://www.ftc.gov/public-statements/2020/03/joint-ftc-doj-antitrust-statement-regarding-covid-19>.

All other types of agreements are analyzed under the so-called "rule of reason," which considers whether the "relevant agreement likely harms competition by increasing the ability or incentive profitably to raise price above or reduce output, quality, service, or innovation below what likely would prevail in the absence of the relevant agreement."

The U.S. antitrust laws apply both to domestic conduct and to foreign conduct that affects U.S. commerce.

## **JOINT ANTITRUST STATEMENT ("GUIDANCE") REGARDING COVID-19**

The Guidance recognizes that in the wake of the unprecedented spread of COVID-19 around the world, individuals and businesses will need to work together to provide critical goods and healthcare services to combat COVID-19 and its effects. The Guidance seeks to provide clarity to parties considering the antitrust risks of such collaboration and does so in three primary ways.

### **Expedited Review**

First, the Guidance provides for an "expedited" agency review of prospective business collaborations intended to address COVID-19. The Guidance states that the Agencies will aim to resolve "all COVID-19 related requests" that "address[] public health and safety," within seven days of receiving "all necessary information" from inquiring parties.

This expedited review is a fast-track version of each agency's existing process for evaluating *proposed* conduct by individuals and businesses (the DOJ's Business Review Process and the FTC's Advisory Opinion Process). Traditionally, very few companies have availed themselves of these processes because they are lengthy and costly, often involving significant information requests and resulting in some materials being made public. But the new expedited process makes the economics of seeking agency review more compelling.

In the Guidance, the Agencies recognize that businesses are trying to address a "rapidly evolving crisis as quickly as possible." The purpose of the expedited review procedure is to provide "expeditious clarity" for requests "addressing public health and safety" and activities that "respon[d] to this national emergency." The Agencies will also work to expeditiously process filings under the National Cooperative Research and Production Act (as amended by the Standards Development Organization Advancement Act), which provide antitrust protections for certain joint ventures and standard development organizations.

### **Collaborations Will Be Assessed According to Traditional Antitrust Principles**

Second, recognizing that companies may "need to act immediately in addressing this ongoing pandemic," the Guidance seeks to reinforce the confidence of market participants to pursue collaborative responses to COVID-19 without resort to an agency review process. Specifically, the Guidance refers to the Agencies' own prior public guidance on competitor collaboration, including the Antitrust Guidelines for Collaborations Among Competitors (2000) and Statement of Antitrust Enforcement Policy in Health Care (1996). The COVID-19 Guidance

seeks to remind market participants that traditional antitrust analyses will continue to apply to business collaborations undertaken to address COVID-19.

The Agencies have long assessed whether an anticipated collaboration is "reasonably related to, and reasonably necessary to achieve procompetitive benefits." Generally speaking, if the collaboration is reasonably necessary to increase product output and provide greater access to healthcare during this time, then such efficiencies likely will justify the joint efforts. The Agencies also note that even agreements that might be considered *per se* illegal could be evaluated under a rule of reason analysis "provided they are reasonably related to, and reasonably necessary to achieve procompetitive benefits from an efficiency-enhancing integration of economic activity."

By contrast, agreements that are "collateral" to the efficiency-enhancing aspects of an arrangement, will be subject to antitrust scrutiny insofar as those collateral agreements "unreasonably restrict competition and are unlikely to contribute significantly to the legitimate purposes" of a joint venture. As they have long done, the Agencies will test whether a collateral agreement is "reasonably necessary to achieve the efficiencies sought by the venture." For example, in a joint venture between hospitals to "provide highly sophisticated oncology services," an agreement between those hospitals on prices of all radiology services, "regardless of whether the services are provided to patients undergoing oncology radiation therapy," is collateral as to the non-oncology radiation services, because it would be "unnecessary to achieve the benefits of the sophisticated oncology joint venture." The collateral agreement would be illegal. The Guidance is clear that a similar analysis will apply to collaborations in response to COVID-19.

Among other collateral agreements, parties should be particularly careful with non-compete and non-solicitation agreements that affect employees. Agreements that affect employees' abilities to freely move between employers and seek higher wages and better working conditions have been a recent point of focus for both the DOJ and state attorneys general.

## **Exigent Circumstances Around COVID-19 Will Be Taken Into Account**

Third, the Agencies pledge to "account for" what they characterize as "exigent circumstances" in evaluating joint efforts that are "limited in duration and necessary to assist patients, consumers, and communities affected by COVID-19 and its aftermath." The Guidance does not identify which "exigent" circumstances the Agencies would excuse in an antitrust review of a collaboration, or how the Agencies would otherwise "account for" those circumstances.

However, the Guidance expressly recognizes that in responding to COVID-19, healthcare facilities may "need to work together to provide resources and services to communities without immediate access to personal protective equipment, medical supplies or health care." Likewise, businesses may need to "temporarily combine production, distribution, or service networks to facilitate production and distribution of COVID-19-related supplies they may not have traditionally manufactured or distributed."

## **Examples of Permissible Collaborative Activities Designed To "Improve Health and Safety"**

In addition to reminding parties about existing guidance under which companies may assess their potential joint activity, the Guidance also provides specific examples of joint efforts that would "be consistent with the antitrust laws" and likely to be employed to combat COVID-19.

Examples of such activities include the following:

- Collaboration on research and development is considered to be an "efficiency-enhancing integration of economic activity" that is "typically procompetitive."
- Sharing technical know-how, rather than company-specific data about prices, wages, outputs, or costs may be "necessary to achieve the procompetitive benefits of certain collaborations."
- Developing suggested practice parameters – standards for patient management developed to assist providers in clinical decisionmaking – that also may provide useful information to patients, providers, and purchasers.
- Joint purchasing arrangements among healthcare providers, such as those designed to increase the efficiency of procurement and reduce transaction costs.
- Private lobbying addressed to the use of federal emergency authority, including private industry meetings with the federal government to discuss strategies on responding to COVID-19, "insofar as those activities comprise[] mere solicitation of governmental action with respect to the passage and enforcement of laws."

## **AGENCY ENFORCEMENT REMAINS**

Finally, the Guidance makes clear that the Agencies will remain vigilant in their antitrust enforcement efforts, warning against attempts to use the COVID-19 pandemic as an "opportunity to subvert competition or prey on vulnerable Americans." Recent history shows that periods of economic stress may push parties to collude in order to maintain profits. Indeed, the Agencies secured significant criminal penalties concerning cartel conduct that arose around the time of the last global financial crisis.

## **CONCLUSION**

All companies considering any type of collaboration with other competitors in response to COVID-19 should continue to ensure that their employees maintain compliance with the antitrust laws. Even companies not considering a collaboration related to addressing COVID-19 should remain vigilant in their antitrust compliance efforts during this period of market turmoil.

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