

## Insights

# COVID-19: U.S. ANTITRUST AGENCIES SEEK TO PROVIDE EXPEDITED RESPONSES TO COMPETITOR COLLABORATION BUSINESS EVALUATION REQUESTS

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## SUMMARY

Competitors, especially healthcare providers, are actively seeking ways to engage in collaborative efforts to help address the COVID-19 outbreak. Appreciating the challenge, necessity, and time pressures of such competitor collaborations in light of the crisis, the Antitrust Division of the U.S. Department of Justice (“DOJ”) and Federal Trade Commission (“FTC,” collectively the “Agencies”)) issued a joint statement announcing an expedited timeline to respond to requests and certain filings by competitors seeking advice on proposed collaborative COVID-19 response efforts. The Agencies also provided guidance on certain types of collaborations that, based on the Agencies’ prior analyses and scholarship, are generally likely to pass muster under the U.S. antitrust laws.

Typically companies have to wait several months before receiving a response to their Business Review Letter (DOJ) or Advisory Opinion requests (FTC) relating to complex questions that involve the antitrust laws. The current national crisis, however, has led to the Agencies to state that they “will aim to respond expeditiously to all COVID-19-related requests, and to resolve those addressing public health and safety within seven (7) calendar days of receiving all necessary information,” which they set forth in their March 24, 2020 joint statement.<sup>1</sup> The Agencies also stated that they would expeditiously process National Cooperative Research and Production Act (“NCRPA”) filings. An NCRPA filing, if approved, reduces potential antitrust liability for certain competitor collaborations, such as production and/or research and development joint ventures.

In addition to these expedited processes, the Agencies reminded competitors that certain joint conduct, based on prior advice, analyses, and scholarship from the Agencies, are typically considered to be procompetitive, such as:

- Research and development collaborations that have “efficiency-enhancing integration of economic activity.” This could include, by way of example, work on anti-virals or a vaccine.
- Sharing technical know-how that is necessary for collaborations.

- Providers' development of suggested practice parameters, such as standards for patient management developed to assist providers in clinical decisions relating to the hospitalization and treatment of COVID-19 patients.
- Joint purchasing arrangements among healthcare providers to increase the efficiency of procurement and reduce transaction costs (for example, purchasing for items like Personal Protection Equipment and ventilators).
- Private petitioning of local, state, and federal government agencies on COVID-19 response issues, and joint meetings with government agencies to discuss the COVID-19 response.

Finally the Agencies indicated that they would take into account “exigent circumstances” in evaluating joint competitor conduct to address issues related to the COVID-19 crisis. The Agencies signaled that this might include situations in which competitors discuss ways to “combine production, distribution, or service networks to facilitate production and distribution of COVID-19-related supplies they may not have traditionally manufactured or distributed.”

While it is clear that the Agencies do not want the antitrust laws to deter legitimate, pro-consumer efforts to help with combatting the COVID-19 outbreak, the Agencies also stressed that they will continue to monitor and investigate those who seek to take advantage of this national crisis to “subvert competition and prey on vulnerable Americans.”

Healthcare providers and companies seeking to collaborate with competitors to help combat the COVID-19 outbreak can contact the Antitrust and Competition team to make sure that such collaborations comply with antitrust laws or seek to take advantage of the new expedited processes.

1. Agencies March 24, 2020 Joint Statement, found at <https://www.justice.gov/atr/joint-antitrust-statement-regarding-covid-19> and [https://www.ftc.gov/system/files/documents/public\\_statements/1569593/statement\\_on\\_coronavirus\\_ftc-doj-3-24-20.pdf](https://www.ftc.gov/system/files/documents/public_statements/1569593/statement_on_coronavirus_ftc-doj-3-24-20.pdf).

## **RELATED CAPABILITIES**

- Antitrust & Competition

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