



DOJ & FTC Provide Guidance on Antitrust Enforcement in the Face of COVID-19

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It is often during times of natural disaster and economic crisis that competitors engage in discussions and conduct that can be risky from an antitrust perspective. This risk is especially amplified now, given the effects of COVID-19 on market conditions far and wide. But certain collaborative efforts by would-be competitors could facilitate much-needed solutions in light of these circumstances.

A [Joint Antitrust Statement Regarding COVID-19](#) (the “Joint Statement”) issued by the Department of Justice and the Federal Trade Commission (the “Agencies”) provides guidance on how the Agencies intend to confront the trade-off between preserving economic competition and protecting public health, safety, and welfare.

While the Joint Statement expressly recognizes the necessity of appropriate collaborative efforts to facilitate responses to the pandemic, it also conveys a clear warning: the antitrust laws remain in full force, and the Agencies will continue to enforce antitrust laws vigilantly.

This warning comes as no surprise. The Agencies have taken similar stances during past crises to guard against what some opportunists may perceive as an advantageous occasion to engage in anticompetitive conduct.

Consistent with [past approaches](#), the Joint Statement stresses that the Agencies “will not hesitate to seek to hold accountable” companies and individuals who use the COVID-19 pandemic “as an opportunity to subvert competition or prey on vulnerable Americans.” The Agencies “stand ready” to prosecute civil and criminal violations of antitrust laws, including agreements that restrain competition through fixed prices, lower wages, decreased output, or reduced quality. Efforts by companies to use monopoly power to engage in exclusionary behavior are also being monitored.

Accordingly, as under normal circumstances, companies and individuals considering collaborative projects or other changes to their business operations should proceed with caution.

Yet, however vigilant the Agencies may be, they recognize that the need for immediate collaborative efforts demands at least some modification to their enforcement approach. This is reflected in the Joint Statement's resolution that the Agencies will enforce the antitrust laws "responsibly" in light of the pandemic.

To that end, the Joint Statement announces an expedited process for Business Review Letters and Advisory Opinions, which are typically provided to companies seeking an antitrust evaluation of pending business ventures. The Agencies commit that they will respond to such requests "within seven (7) calendar days of receiving all necessary information," or otherwise as "expeditiously" as possible. In addition, reviews of joint ventures will be expedited and evaluated pursuant to statutes that allow "flexible treatment."

While the Joint Statement recognizes the unique circumstances at hand, the notions that (1) the Agencies will "account for exigent circumstances" when evaluating conduct and that (2) there may be some room for "flexible treatment" should not be read as a license for companies to engage in anticompetitive conduct. The extent to which the Agencies will afford more lenient treatment than it would under normal circumstances—if at all—is less than clear.

For example, the Joint Statement does not definitively spell out particular types of collaborations the Agencies view as "necessary to assist patients, consumers, and communities affected by COVID-19 and its aftermath." And, while some businesses "may need to temporarily combine production, distribution, or service networks" as they retool or take other measures to manufacture and distribute COVID-19-related supplies, the Joint Statement does not clarify how heavily "exigent circumstances" will weigh on enforcement decisions.

One collaboration among medical supply companies to expedite and scale up the distribution of medications and personal protective equipment was recently approved in an [Expedited Business Review Letter](#), but it is not clear that this case is indicative

of a blanket, one-size-fits-all enforcement approach.

On the other hand, what the Agencies do “wish to make clear” is that “there are many ways firms, including competitors, can engage in procompetitive collaboration that does not violate the antitrust laws.” The Joint Statement specifically highlights a handful of timely efforts that would be consistent with antitrust laws. These include efforts whereby companies, healthcare providers, or other firms:

- collaborate on research and development;
- share technical know-how, rather than company-specific data about prices, wages, outputs, or costs;
- develop standards for patient management to assist in clinical decision-making;
- execute joint purchasing arrangements to economize healthcare-related procurement and transaction costs; and
- solicit governmental action on strategies for responding to the COVID-19 pandemic.

Although the highlighted range of potentially permissible conduct is relatively sparse, the Agencies appear eager to permit collaborative efforts designed to improve the health and safety of the public—at least to the extent these efforts are “limited in duration” and “necessary to assist” in the fight against COVID-19. But given the Agencies insistence that they will remain vigilant in their enforcement approach, businesses and individuals should seek counsel before engaging in collaborative projects and other significant changes to their operations.

For more information, please contact [Matt Blickensderfer](#) or [Derrian Smith](#) from Frost Brown Todd’s [Antitrust](#) team.

*To provide guidance and support to clients as this global public-health crisis unfolds, Frost Brown Todd has created a **Coronavirus Response Team**. Our attorneys are on hand to answer your questions and provide guidance on how to proactively prepare for and manage any coronavirus-related threats to your business operations and workforce.*

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