

U.S. Antitrust Agencies Adjust Review Processes in Response to COVID-19 Crisis

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In response to the COVID-19 pandemic, the Federal Trade Commission and the Antitrust Division of the U.S. Department of Justice have changed two of their review processes. Earlier this week, the FTC and DOJ issued a joint statement reducing the burdens associated with antitrust reviews of collaborations between businesses and providing some guidance regarding collaborative activities that are permitted under the antitrust laws. Last week, the agencies also made significant changes to the timing and process for reviewing transactions that are subject to mandatory reporting under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the HSR Act), which are likely to result in longer HSR reviews.

Expedited Conduct Review Process

The agencies have established expedited antitrust reviews for conduct and collaborations aimed at protecting the health and safety of Americans during the COVID-19 pandemic. Under the new process the agencies will respond to all requests addressing the COVID-19 crisis within seven calendar days of receiving all of the information they need in order to adequately vet these proposals. This expedited process provides the same assurances to businesses concerned about the legality of proposed conduct or collaborations without the typical lengthy review timeline. The FTC's "Staff Advisory Opinion" procedure and the DOJ's "Business Review Letter" procedure allow anyone, to submit a proposal to the agencies and to receive a statement advising whether the agencies would challenge the proposed activity. However, the standard processes typically take months and sometimes can drag on for more than a year. The new process will take only days. The expedited process only requires that applicants to provide the agencies with a written description of the proposed conduct or collaboration, including the parties that would be involved in the effort or activity, and the name and contact information of a person from whom the agencies could obtain additional information. The agencies have also committed to expediting requests under the National Cooperative Research and Production Act for the flexible treatment of certain standard development organizations and joint ventures.

Permitted Collaborative Activities

To help companies move forward as quickly as possible, the agencies also provided a list of collaborative activities with the potential to improve the health and safety response to the pandemic that the antitrust agencies have already recognized as consistent with the antitrust laws and unlikely to cause any harm to competition. For example:

- Collaborating on research and development has generally been considered an "efficiency-enhancing integration of economic activity" that is typically procompetitive. See Federal Trade Commission & U.S. Department of Justice, [Antitrust Guidelines for Collaborations Among Competitors](#) at 31 (2000).
- Sharing technical know-how or other information, rather than company-specific data about prices, wages, outputs, or costs, may in some circumstances be "necessary to achieve the procompetitive benefits of certain collaborations." *Id.* at 15; see also Federal Trade Commission, [Information Exchange: Be Reasonable](#) (discussing the "safety zones" around information sharing).
- Developing suggested practice parameters – standards for patient management developed to assist providers in clinical decision-making – may provide useful information to patients, providers, and purchasers. See Federal Trade Commission & U.S. Department of Justice, [Statement of Antitrust Enforcement Policy in Health Care](#) at 41 (1996).
- Most joint purchasing arrangements among healthcare providers, such as those designed to increase the efficiency of procurement and reduce transaction costs, typically do not raise antitrust concerns. See *id.* at 53 (also explaining circumstances in which joint

purchasing arrangements may raise concerns).

- In general, coordinating lobbying and advocacy in an attempt to persuade legislators or government officials to take (or not take) legislative, administrative or regulatory action, especially related to the use of emergency authority and the distribution of bailout funds, including private industry meetings with the federal or state governments 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.” *Eastern R. Conf. v Noerr Motors*, 365 U.S. 127, 138 (1961); see also [FTC, Enforcement Perspectives on the Noerr-Pennington Doctrine: An FTC Staff Report](#) (2006) (discussing applicability and limitations).

Modified HSR Review Process

The agencies are experiencing significant disruptions of their own due to the COVID-19 pandemic, and last week they made significant changes to the timing and processes in place for reviewing transaction that are subject to mandatory reporting under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the HSR Act) to address some of those challenges. New procedures that will be in place until further notice include:

- The agencies are no longer accepting paper or DVD filings and have instead instituted a new electronic submission process.
- The FTC and DOJ have announced that effective March 30, 2020, grants of early termination will resume as time and resources allow. However, the agencies also indicated that early terminations will only be available on a limited basis, will be granted in fewer cases, and will be granted more slowly, than under normal circumstances. Keep in mind that the agencies may modify or rescind this policy at any time, in light of changes in circumstances, new information, availability of resources, and/or further experience with the temporary e-filing system.
- All FTC and DOJ employees will be allowed to telework and are encouraged to refrain from in-person meetings. As a result, the agencies will conduct all meetings by phone or video conference to the extent possible and absent extenuating circumstances.
- All scheduled depositions have been temporarily postponed and will be rescheduled using secure video conferencing capabilities.
- The agencies have requested that parties add 30 days to all existing timing agreements for pending merger reviews and may revisit the timing agreements to provide additional time to review transactions after the parties have complied with document requests. (This will not affect the initial 30-day HSR waiting period, but there likely will be an increase in the number of transactions that need to be pulled-and-refiled to extend the initial waiting period.)

In addition, it is possible that the HSR timing and process could change again because of Congressional action or changes in how the agencies respond to the COVID-19 crisis.

Foley Hoag has formed a firm-wide, multi-disciplinary [task force](#) dedicated to client matters related to the novel coronavirus (COVID-19). For more guidance on your COVID-19 issues, visit our [Resource Page](#) or contact your Foley Hoag attorney.

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