

Resources

DOJ and FTC Issue Joint Antitrust Statement Regarding Collaboration During COVID-19 Crisis

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Even though the COVID-19 crisis has shuttered many government and commercial activities, the nation's antitrust regulators are still very much open for business. The Antitrust Division of the Department of Justice ("DOJ") has made clear that they will continue to aggressively prosecute "hard core" antitrust violations such as price fixing, bid rigging and market allocations, particularly those involving companies and individuals who attempt to restrain competition in critical markets such as personal protection equipment.[1] But businesses, even competing businesses, may collaborate in response to this emergency in ways that promote competition as opposed to restraining it.

The DOJ and Federal Trade Commission ("FTC") (collectively "the Agencies") recently issued a joint statement making clear that there are many ways that firms, including competitors, can engage in lawful collaboration in response to this national emergency. They also stated that they "aim to respond expeditiously" to all requests for agency guidance on competitor collaborations related to COVID-19 and to resolve requests that address public health and safety (such as the delivery of health care services and the manufacture and distribution of health and safety equipment) within seven calendar days, a significantly expediated response time.

The procedures for the Justice Department Business Review Letters Related to COVID-19 can be viewed here and the procedures for the FTC Advisory Opinion Process Related to the Novel Coronavirus can likewise be viewed here. To receive expediated treatment, a request for guidance must include:

- an explanation of how it is related to COVID-19
- a description of the nature and rationale of the proposal (including the names of the participants, the product(s) or service(s) the proposal will cover, and the temporal and geographic scope of the arrangement),
- any proposed contractual or other arrangements among the parties (including copies of any documents memorializing the contract or arrangement),
- the names of the major expected customers,
- any available information regarding the competitive significance of other providers of the product(s) or service(s) to be offered, and
- the name and contact information of a person whom the agency can contact for additional information.

In addition, recognizing that businesses may need to act immediately to address health and safety concerns, without the opportunity to wait for an expedited review, the Agencies also provided examples of conduct that is "generally" lawful:

- Collaborating on research and development.
- Sharing technical know-how (as opposed to company-specific data about prices, wages, outputs, or costs) that may be "necessary to achieve the procompetitive benefits of certain collaborations."
- Collaboratively developing patient management standards to assist in clinical decision-making.
- Most 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.

The Agencies will continue to hold accountable those who use the COVID-19 crisis “to subvert competition or prey on vulnerable Americans.” Nevertheless, the Agencies also state that they will take “exigent circumstances” into account. By way of example, the Agencies note that it may be necessary for health care facilities to “work together in providing resources and services to communities without immediate access to personal protective equipment, medical supplies, or health care,” and that “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.” However, such efforts must be “limited in duration” and required to provide assistance to “patients, consumers, and communities affected by COVID-19.” Companies seeking to claim that such “exigent circumstance” justify coordination with competitors should proceed with extreme caution, given the potential liability if not handled appropriately under the antitrust laws.

Companies seeking to collaborate with competitors or obtain expedited business reviews from the Agencies, or that have other concerns about the antitrust implications of a proposed course of conduct, should contact Howard Iwrey (hiwrey@dykema.com), Cale Johnson (cjohnson@dykema.com), or Cody Rockey (crockey@dykema.com), or visit us online at www.dykema.com.

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[1] Avoid Antitrust and Price Gouging Pitfalls In Your Coronavirus Response

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