

CORONAVIRUS INFORMATION & UPDATES

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Antitrust and COVID-19

Businesses and institutions in many industries, including health care and life sciences, are considering ways to cooperate and collaborate in order to assist in addressing the public health crisis, as well as the economic crisis, caused by COVID-19 in the United States. Although these efforts – particularly among horizontal competitors – warrant assessing antitrust considerations, businesses can often engage in procompetitive collaboration with minimal or no antitrust risk. This Ropes & Gray alert sets forth some general principles, and provides an update on the recent Joint Statement by the Federal Trade Commission (“FTC”) and Antitrust Division of the Department of Justice (“DOJ”) dated March 24, 2020.¹

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Collaborative activities consistent with antitrust laws

Recognizing the need for cooperative efforts to combat the COVID-19 pandemic, the Joint Statement emphasizes the types of collaborative activities that are generally permitted by the antitrust laws:

- **Collaboration on research and development.** Research and development collaboration is typically procompetitive and efficiency-enhancing.
- **Sharing of technical know-how.** 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.
- **Development of suggested practice parameters.** The Joint Statement explains that the FTC and DOJ will not challenge, absent extraordinary circumstances, providers’ development of suggested practice parameters (*i.e.*, standards for patient management developed to assist providers in clinical decision-making) that also may provide useful information to patients, providers, and purchasers.
- **Joint purchasing arrangements.** Most joint purchasing arrangements among health care providers, such as those designed to increase the efficiency of procurement and reduce transaction costs, do not raise antitrust concerns.
- **Lobbying regarding the use of federal emergency authority.** The antitrust laws generally permit private lobbying relating to the use of federal emergency authority, including private industry meetings with the federal government to discuss strategies on responding to COVID-19, as long as those activities are limited to solicitation of governmental action with respect to the passage and enforcement of laws.

The Joint Statement further notes that interested businesses should refer to previous statements on how the FTC and DOJ analyze cooperation and collaboration between competitors.²

¹ See Federal Trade Comm’n & U.S. Dep’t of Justice, [Joint Antitrust Statement Regarding COVID-19](#) (Mar. 24, 2020).

² See generally Federal Trade Comm’n & U.S. Dep’t of Justice, [Antitrust Guidelines for Collaborations Among Competitors](#) (2000); Federal Trade Comm’n & U.S. Dep’t of Justice, [Statements of Antitrust Enforcement Policy in Health Care](#) (1996).

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Additional considerations

The Joint Statement also announces several related considerations regarding collaboration and enforcement in the context of the COVID-19 response:

- ***The FTC and DOJ will take into consideration exigent circumstances.*** In evaluating efforts to address COVID-19, the antitrust agencies will account for exigent circumstances. For example, the Joint Statement acknowledges that health care facilities may need to work together in providing resources and services to communities without immediate access to personal protective equipment, medical supplies, or health care. Moreover, other businesses may need to temporarily combine production, distribution, or service networks to facilitate production and distribution of COVID-19-related supplies that they may not have typically manufactured or distributed. The Joint Statement recognizes that such joint efforts, limited in duration, may be necessary responses that provide Americans with products or services that might not otherwise be available.
- ***The Defense Production Act and the Pandemic and All-Hazards Preparedness Act.*** To the extent the federal government enlists help from private businesses in addressing COVID-19, the FTC and DOJ will work with the Department of Health and Human Services to effectuate these acts, as appropriate.
- ***The FTC and DOJ will provide expedited guidance, when requested.*** The DOJ's Business Review Process and FTC's Advisory Opinion Process—which provide ways for businesses to ask the FTC and DOJ to evaluate proposed conduct—will aim to respond expeditiously to all COVID-19-related requests, and to resolve those addressing public health and safety within seven calendar days of receiving all necessary information. The FTC and DOJ will also work to expeditiously process filings under the National Cooperative Research and Production Act (as amended by the Standards Development Organization Advancement Act).

Conclusion

The FTC/DOJ Joint Statement dated March 24, 2020, and the agencies' prior statements, provide useful guidance for businesses taking actions in collaboration with others to address the COVID-19 pandemic. Of course, the application of antitrust laws necessarily depends upon the details of the planned collaborative efforts. If you have questions, do not hesitate to contact [Chong S. Park](#), [Mark Popofsky](#), [Jane Willis](#), or the Ropes & Gray attorney who usually advises you.