

A Review of U.S. Antitrust Agencies' Responses to COVID-19

I. Overview

Due to COVID-19's impact on consumers and businesses in the United States, the Federal Trade Commission ("FTC") and the Antitrust Division of the U.S. Department of Justice ("Antitrust Division") have implemented changes and released guidance to help companies navigate antitrust policy during a time of uncertainty. As these updates are ongoing and reach multiple areas of antitrust compliance, this memorandum summarizes the agencies' COVID-19 antitrust responses to date. We will continue to monitor these developments and invite clients to contact us with further inquiries.

II. Personnel and Operations

Both the FTC and the Antitrust Division have shifted to working remotely during the pendency of the pandemic. For the time being, personnel of both agencies will participate remotely in meetings through telephone or videoconference. The FTC has temporarily restricted its employees' official travel except under "compelling circumstances," requiring permission by top-level management. Absent "extenuating circumstances," the Antitrust Division's depositions will be temporarily postponed and rescheduled using secure videoconferencing.

III. Merger Review

The FTC and Antitrust Division have modified their merger review procedures to adapt to conditions created by the pandemic. Both agencies have temporarily switched to an e-filing system for notifications under the Hart-Scott-Rodino Antitrust Improvements Act ("HSR Act"). The FTC Premerger Notification Office released updated [guidance](#) on its e-filing procedures, under which it will accept electronic signatures and continue to count submissions received after 5PM as submitted on the following business day. A further description of the agencies' merger review modifications is available in our previous [memorandum](#) summarizing these developments.

Although HSR timing has not been officially modified to date (legislative action would be required), merging parties should still account for potential delays caused by the agencies' temporary changes. The Antitrust Division requested that proposed mergers' timing agreements be extended an extra thirty days for the Division to complete its review after the merging parties substantially comply with information requests (often referred to as "Second Requests"). Division staff may reassess timing agreements "in light of further developments."¹ The FTC Bureau of Competition is reviewing its investigations and litigations to determine appropriate timing modifications.²

IV. Conduct Review

In a series of joint and individual statements, the FTC and Antitrust Division have sought to provide clarity on the role of antitrust enforcement during the pandemic and on prohibited and encouraged conduct for companies seeking to mitigate the effects of COVID-19 through coordination.

¹ Justice Department Announces Antitrust Civil Process Changes for Pendency of COVID-19 Event, United States Department of Justice (March 17, 2020), <https://www.justice.gov/opa/pr/justice-department-announces-antitrust-civil-process-changes-pendency-covid-19-event>.

² Ian Conner, Changes in Bureau Procedure during Covid-19 Coronavirus Pandemic, Federal Trade Commission Bureau of Competition (March 16, 2020), <https://www.ftc.gov/news-events/blogs/competition-matters/2020/03/changes-bureau-procedure-during-covid-19-coronavirus>.

On March 24, the agencies released a joint statement announcing their aim to provide timely responses to parties seeking guidance regarding COVID-19 related conduct. Each agency also outlined the specific procedure for obtaining an Antitrust Division review [letter](#) or an FTC Advisory Opinion [letter](#), respectively.

The agencies have also individually provided clarity on their enforcement priorities during COVID-19. FTC Chairman Joe Simons stated that the FTC will not tolerate businesses who exploit COVID-19 to take advantage of consumers. However, he reassured that the “FTC will remain flexible and reasonable in enforcing compliance requirements that may hinder the provision of important goods and services to consumers,” and that “good faith efforts undertaken to provide needed goods and services to consumers will be taken into account in making enforcement decisions.”³

The Antitrust Division has issued two related business review letters addressing collaborations involving a COVID-19 response program led by the Federal Emergency Management Agency (“FEMA”) and the U.S. Department of Health and Human Services (“HHS”). The first stated that the Division will not challenge collaborations between medical supplies distributors McKesson Corp., Cardinal Health, Inc., Henry Schein, Inc., Medline Industries, Inc., and Owens & Minor, Inc. for the purpose of expediting and increasing supply and distribution of personal-protective equipment (PPE) and coronavirus medications.⁴ The second announced that similar conduct by AmerisourceBergen Corp., including efforts to increase the supply of medications and other healthcare supplies, would not be challenged.⁵

V. Conduct in Labor Markets

In a joint statement issued on April 13, the FTC and Antitrust Division warned that they would continue to investigate and challenge conduct in labor markets subverting competition for essential employees and those on the front lines of the pandemic.⁶ The agencies explained that, while certain forms of procompetitive collaboration are permissible under the antitrust laws and that “unprecedented cooperation” may be required to address the pandemic, COVID-19 does not excuse anticompetitive conduct that harms essential employees. Those engaging in such conduct may be held civilly or criminally liable. While the agencies’ interest in anticompetitive labor market conduct is not new, the joint statement solidified their focus on “employers, staffing companies (including medical travel and locum agencies), and recruiters, among others, who engage in collusion or other anticompetitive conduct in labor markets, such as agreements to lower wages or to reduce salaries or hours worked” during COVID-19.

³ Statement from FTC Chairman Joe Simons Regarding Consumer Protection, Federal Trade Commission (March 26, 2020), https://www.ftc.gov/system/files/documents/public_statements/1569773/final_chairman_covid_statement_3262020.pdf.

⁴ Department of Justice Issues Business Review Letter to Medical Supplies Distributors Supporting Project Airbridge Under Expedited Procedure for COVID-19 Pandemic Response, United States Department of Justice (April 4, 2020), <https://www.justice.gov/opa/pr/departments-justice-issues-business-review-letter-medical-supplies-distributors-supporting>.

⁵ Justice Department Issues Business Review Letter to AmerisourceBergen Supporting Distribution of Critical Medicines Under Expedited Procedure for COVID-19 Pandemic Response, United States Department of Justice (April 20, 2020), <https://www.justice.gov/opa/pr/justice-department-issues-business-review-letter-amerisourcebergen-supporting-distribution>.

⁶ Joint Antitrust Statement Regarding COVID-19 and Competition in Labor Markets, Federal Trade Commission and United States Department of Justice (April 13, 2020), <https://www.justice.gov/opa/press-release/file/1268506/download>.

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