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Antitrust and COVID-19: DOJ and FTC Offer Limited Expedited Processing, and Potential Flexibility in Exigent Circumstances



Recently, the U.S. Department of Justice Antitrust Division (DOJ) and Federal Trade Commission (FTC) issued a [joint statement regarding COVID-19](#). The joint statement commits to the following:

- Provide expedited guidance in limited circumstances to individuals and companies faced with antitrust concerns relating to their efforts to respond to the national emergency
- Identify various joint activities that may be permissible under existing guidelines
- Account for "exigent circumstances" in evaluating joint efforts

In doing so, the agencies appear to be implementing the administration's position on cutting red tape to help companies during this time, while reaffirming their prior [statement](#) that vows to "hold accountable anyone who violates the antitrust laws."

### **Joint Statement—Limited Expedited Processing**

The joint statement offers expedited review of proposed business strategies in limited circumstances.

The joint statement first reminds individuals and businesses that they may ask the agencies to evaluate proposed conduct under the Antitrust Division's Business Review and the FTC's Advisory Opinion processes. Instead of these reviews taking "several months" to complete, the agencies commit to completing reviews of COVID-19-related requests in seven calendar days. Companies that seek to use the expedited procedure are to use the agencies' new COVID-19 email addresses for these requests and must include detailed information about the

nature of the proposal, including the names of anticipated significant customers.

Second, the joint statement explains that the agencies commit to "expeditiously process filings" made under antitrust laws governing certain standards development organizations and joint ventures. No guaranteed review timelines are provided for these filings.

There is no commitment to expedited review for other filings such as Hart-Scott-Rodino Premerger filings.

### **Joint Statement—Substantive Concerns**

There are many ways that companies can cooperate with each other to combat COVID-19 without running afoul of the antitrust laws, so long as the actions result in procompetitive outcomes. The joint statement reiterates many of these:

- Collaborate on research and development
- Share technical knowledge
- Develop suggested clinical practice parameters, such as standards for patient management developed to assist providers in clinical decision-making
- Implement or further joint purchasing arrangements to increase the efficiency of procurement and reduce transportation costs
- Privately lobby concerning the use of federal emergency authorities

Companies considering cooperating with competitors should be mindful of potential antitrust concerns—the agencies used the joint statement to simultaneously emphasize that they will continue to prosecute antitrust violations where the conduct results in increased prices, lower wages, decreased output, or reduced quality or involves exclusionary conduct by monopolists. And, the DOJ will use its criminal authority to prosecute unlawful agreements to fix prices or wages, rig bids, or allocate markets. These authorities apply to "individuals and business" and appear to generally mirror the agencies' general enforcement authorities.

The only new guidance or relief offered by the joint statement is a commitment to account for exigent circumstances in evaluating efforts to address the "spread of COVID-19 and its aftermath." The joint statement provides the following example of what exigent circumstances—"limited in direction and necessary to assist patients, consumers, and communities"—may qualify:

For example, healthcare facilities may need to work together in providing resources and services to communities without immediate access to personal protective equipment, medical supplies or healthcare. Other businesses may need to temporarily combine production, distribution or service networks to facilitate the distribution of COVID-19 related supplies that they have not traditionally manufactured.

While heavily focused on healthcare, the statement itself is broadly worded to cover other industries. Unfortunately, the joint statement does not provide examples or guidance for other industries and does not otherwise provide clear guidance as to the definition of "exigent circumstances" or describe how this will factor into the agencies' traditional per se, quick look, or rule of reason analysis. Per se violations are those that are illegal without further inquiry into the circumstances of the conduct and may be subject to criminal penalties. Quick look and rule of reason analyses provide for a more in-depth review of the markets and market impact.

Finally, while some companies may qualify for immunity under the Defense Production Act or the Pandemic and All-Hazards Preparedness Act, other individuals and companies may still face private action. There is a strong argument that legitimate efforts to address COVID-19-related supply problems, including traditional categories of per se treatment such as geographic, customer, or product allocations, should be subject to the rule of reason instead of the per se rule. But companies are not assured of such treatment and even traditional rule of reason treatment may condemn certain activities that are necessary to allow production and distribution of necessary goods or ensure the long-term survival of many companies.

## **Implications**

Many American businesses are in a fight for survival while others are struggling to meet the needs of the nation under what may soon become unimaginable circumstances. While the joint statement implements expedited processes in limited circumstances, it does not expand substantive protections available to companies combatting COVID-19 absent "exigent circumstances." With the scope and effect of the "exigent circumstances" statement unclear, companies are left at significant risk of antitrust concerns during this period of "unprecedented cooperation." Additional action and guidance from the agencies would appear to be both appropriate and necessary. We will continue to monitor DOJ and FTC announcements for further developments.

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