

# Health Care and Life Sciences Deals in a Post-COVID-19 World

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# Agenda

Current Snapshot of HSR Approval Process

Fast Track for COVID-19 Business Collaborations

Will COVID-19 Change Merger Reviews?

Impact of Past Enforcement of Hospital Consolidation

Practical Advice on Health Care Deals

# Current Snapshot of HSR Approval Process

Practical Facts Regarding FTC/DOJ Merger Review Process

# Business As (Almost) Usual

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The protection of competition, and the welfare of American consumers, is as important now as ever. Our working model may be changing in some ways for the foreseeable future, but we remain on duty and open for business.



- Ian Conner, Director of FTC's Bureau of Competition



Despite changes in where agency employees do their work, the FTC is conducting the business of the Commission without interruption. Our work is as important now as ever, and we remain committed to protecting consumers and competition.

- Commissioner Christine Wilson, FTC



# Staffing Challenges – FTC departures



## We're hiring a new AD!

By: Ian Conner, Bureau of Competition | Apr 6, 2020 5:13PM

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I want to thank Kevin Hahm for his work in the Bureau of Competition and, most importantly, for his contribution to our competition enforcement. Kevin, most recently, the Assistant Director for the Mergers IV Division, has been an integral part of the reinvigoration of the hospital merger enforcement efforts within the Bureau. Before becoming Assistant Director, Kevin had served as Deputy Assistant Director of the Mergers IV Division. He worked on multiple litigated cases, including the Commission's challenges to [Advocate/North Shore](#) and [Sanford/Mid Dakota Clinic](#).

## Yes, we're hiring another AD!

By: Ian Conner, Bureau of Competition | Apr 8, 2020 12:46PM

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I want to thank Mike Moiseyev for his dedication and commitment to the Bureau of Competition. Mike has led the Mergers I Division for the past 16-and-a-half years, becoming Assistant Director in 2003. Mike joined the Bureau of Competition in 1989, following law school. He has managed some of the most significant cases in the Bureau during his career. Among the most recent of these are the Bureau's [challenge to the consummated merger of Otto Bock and Freedom](#) and the Commission's innovative [challenge to Illumina's acquisition of Pacific Biosciences](#). While these are recent successes, they don't capture the scope of the cases that Mike has handled, which include

# Extended Timeline: Reviews Are Taking Longer



- Early terminations: fewer approved and more slowly than before pandemic
- DOJ will request in timing agreements an extra 30 days to make a decision after parties have substantially complied with a Second Request
- Remote working causing additional delay
- But, HSR filings are down 60%, so even though review may be slower because of remote working, agencies are still committed and have more time for the deals that ARE reported

**Backlogs could impact timing for future transactions where parties haven't yet filed for clearance.**

# Enforcement Actions Announced Recently

- Numerous merger enforcement actions (settlements or abandoned transactions) have been announced since the COVID-19 pandemic began

## FTC Imposes Conditions on AbbVie Inc.'s Acquisition of Allergan plc

Agency requires companies to divest three drugs

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FOR RELEASE

May 5, 2020

## Federal Trade Commission Closes Investigation of Johnson & Johnson's Proposed Acquisition of TachoSil from Takeda Pharmaceutical Company

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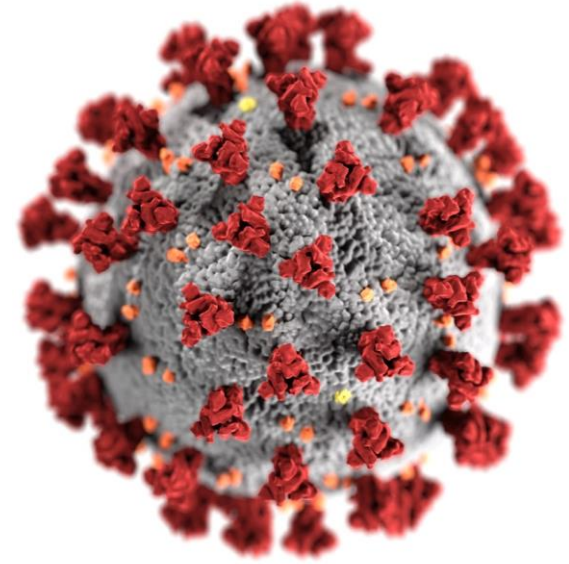


FOR YOUR INFORMATION

April 10, 2020

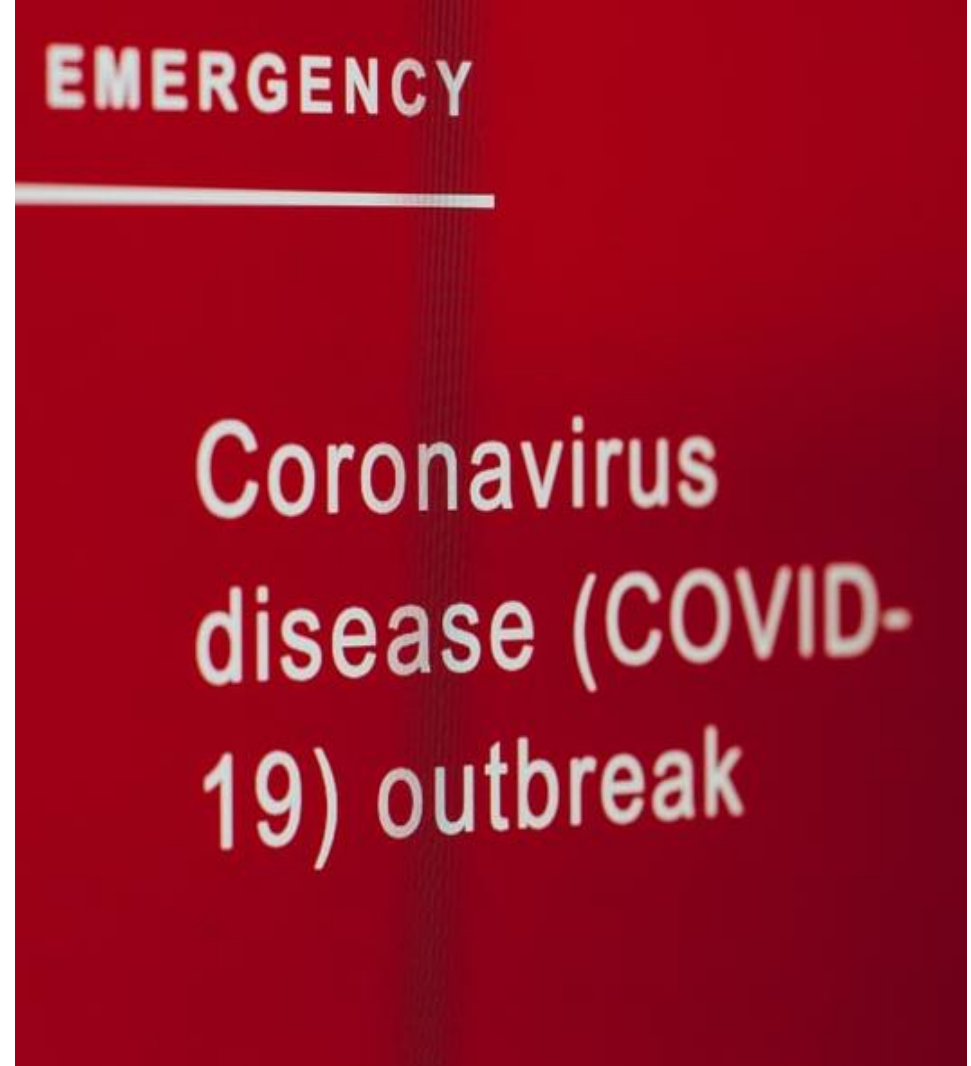


# Fast Track for COVID-19 Business Collaborations



- Fight against COVID-19 “will require unprecedented cooperation between federal, state, and local governments and among private businesses”
- Expedited process for agencies to evaluate proposed COVID-19 related collaborations within seven days
  - FTC Advisory Opinions
  - DOJ Antitrust Division Business Review Letters
  - Provides clarity that agency has no intention to take enforcement action

# Real Connection to COVID-19 Required





**U.S. DEPARTMENT OF JUSTICE**  
Antitrust Division

**MAKAN DELRAHIM**  
Assistant Attorney General

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April 04, 2020

Lori A. Schechter  
Executive Vice President, Chief Legal  
Officer, and General Counsel  
McKesson Corporation  
6535 N. State Highway 161  
Irving, TX 75039

Michael S. Ettinger  
Senior Vice President, Corporate &  
Legal Affairs and Chief of Staff  
Henry Schein, Inc.

Alex Liberman  
General Counsel  
Medline Industries, Inc.

Jessica L. Mayer  
Executive Vice President, Chief Legal  
and Compliance Officer  
Cardinal Health, Inc.

Nicholas J. Pace  
Executive Vice President, General  
Counsel & Corporate Secretary  
Owens & Minor, Inc.

Re: McKesson Corporation, Owens & Minor, Inc., Cardinal Health, Inc.,  
Medline Industries, Inc., and Henry Schein, Inc. Business Review Request  
Pursuant to COVID-19 Expedited Procedure

Dear Ms. Schechter, Ms. Mayer & Messrs. Ettinger, Liberman, and Pace:



# Will COVID-19 Change Merger Reviews?

TECHNOLOGY

## House antitrust chairman proposes merger ban during pandemic

The proposal would bar transactions, unless one of the companies is in bankruptcy or about to fail, until the coronavirus outbreak passes.

POLITICS APRIL 28, 2020 / 2:25 PM / 15 DAYS AGO

## Warren, Ocasio-Cortez want to stop many company mergers during coronavirus pandemic

## Dems Want Fed, Treasury To Bar Mergers By Bailed Out Cos.

By Nadia Dreid



**Christine S. Wilson** ✓  
@CSWilsonFTC

## Let's (NOT) Stop All the Mergers: The Case for Letting the Agencies Do Their Jobs

Noah Phillips — 5 May 2020 — [Leave a comment](#)

POLITICS


## Blocking all mergers during pandemic is 'misguided,' DOJ antitrust chief says

PUBLISHED WED, MAY 13 2020 9:17 AM EDT | UPDATED WED, MAY 13 2020 9:56 AM EDT


## Merger moratorium disparaged by House antitrust Republicans in letter to US DOJ, FTC

13 May 20 | 16:00 GMT

Those who wish to ban deals at this time seem to imagine [@FTC](#) being overwhelmed by a flood of merger notifications. Actually, HSR filings are down by nearly 60%. This gap between rhetoric and reality suggests that proposals to block mergers based on the size of the acquirer are not a good-faith effort to save small businesses, but rather an attempt to use #COVID19 tragedy to push a pre-existing agenda ... without regard to whether those mergers harm consumers.



We will not suspend our usual rigorous approach to ferreting out anticompetitive harm and seeking appropriate relief, even in the face of uncertainty. . . . We will continue to follow the facts, adjust to changing market conditions, and master the many details that comprise a thorough antitrust review.



- Ian Conner, Director of FTC's Bureau of Competition

# Increased Importance of Efficiencies Analysis?



- Typically, “efficiencies” is a last resort argument with high burden of proof for defendants
- Agencies and courts consider efficiencies as a rebuttal factor
- COVID-19 pandemic and economic fallout may lead to increased opportunities for merging parties to use the efficiencies defense
- May include lower prices/costs, improved access, new services, higher quality

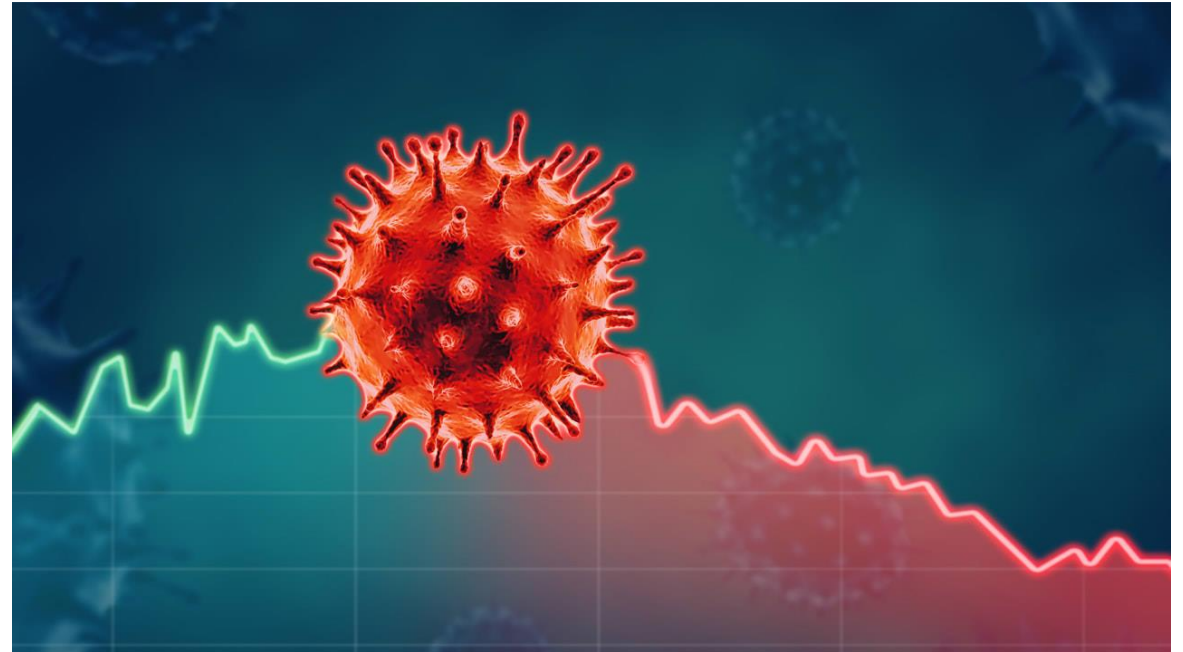


# Resurgence of Failing or Flailing Firm Defenses?



# Elements of the Failing Firm Defense

- Imminent danger of financial failure
- Dim or nonexistent prospects of reorganizing under bankruptcy proceedings
- Lack of a viable alternative buyer despite reasonable good faith search



# Impact of Past Government Enforcement of Hospital Consolidation

# Impact of Past Enforcement of Hospital Consolidation

PostEverything • Perspective

## We're short on hospital beds because Washington let too many hospitals merge

Consolidation has contributed to a shortage of hospital beds, and the Federal Trade Commission has done nothing about it.

## 20 Years of Decisions to Close Hospitals Have 'Come Home to Roost'

BY AARON SHORT MAY 12, 2020 8:00 AM

 REPRINTS

# What Does the Future Look Like?



# Practical Advice on Health Care Deals



**Engage Early**

**Address Issues Up Front**



Questions?



# Speakers



## Neely Agin

Partner  
Washington, D.C.  
nagin@winston.com

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Neely guides leading companies in the United States and around the world through merger review and clearance processes, and develops creative strategies for clients contemplating M&A transactions to reduce their antitrust risk. She has steered hundreds of transactions through the U.S. and global merger control review process and regularly represents clients in merger and other antitrust investigations by the U.S. Department of Justice (DOJ), Federal Trade Commission (FTC), and state attorneys general, as well as in Hart-Scott-Rodino (HSR) matters. Neely uses her deep experience to counsel clients on a variety of antitrust issues, including distribution restrictions, the formation and operation of joint ventures, trade association activities, information exchanges, and pricing practices.

# Speakers



## David Dahlquist

Partner and Co-Chair, Health Care & Life Sciences Industry Group  
Chicago  
ddahlquist@winston.com

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In an ever changing health care industry, David is a highly sought-after advisor to health care clients looking to overcome the increasingly high hurdles presented by both federal and state regulators, as well as acting as trusted litigation counsel with a winning track record in bet-the-company trials. An antitrust attorney by training, his practice includes not only antitrust litigation, but also merger reviews and challenges brought by the Department of Justice (DOJ) and Federal Trade Commission (FTC), as well as commercial litigation involving complex elements of unfair competition and contract law. He has significant first-chair trial experience, including jury trials and bench trials, in multiple jurisdictions across the United States. David was recently recognized by *National Law Journal* as a 2019 Healthcare Law Trailblazer and in *Chambers USA's* 2020 guide, which published that David has an “exceptional knowledge of antitrust issues in healthcare.”