

FTC and DOJ Antitrust Division Encourage Cooperation to Fight COVID-19 With Expedited Seven-Day Antitrust Review

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Recognizing that the fight against the COVID-19 pandemic will “require unprecedented cooperation,” the U.S. Federal Trade Commission (FTC) and Department of Justice (DOJ) Antitrust Division (collectively, “the agencies”) provided new antitrust guidance and announced an expedited seven-day advisory opinion procedure for business collaborations responding to the coronavirus crisis, in a [joint statement](#) issued on March 24, 2020. Antitrust review of similar joint ventures would previously take months, but has now been shortened to days. The guidance is particularly relevant to the health care sector and businesses working to produce COVID-19-related supplies, but also applies broadly to any sector of the economy responding to the crisis.

The FTC and DOJ statement emphasizes that businesses in all sectors of the economy—including competitors—can legally and procompetitively cooperate in the fight against coronavirus. However, the agencies announced they will account for exigent circumstances in evaluating efforts to address the spread of COVID-19 and its aftermath. The agencies give examples that health care facilities may need to coordinate providing resources and services, and other businesses may need temporarily to combine production, distribution, or service networks to facilitate production and distribution of COVID-19-related supplies. The agencies recognize that such joint efforts may be necessary for a limited period of time to assist patients, consumers, and communities affected by the pandemic. The statement also acknowledges that some individuals and businesses may need to act immediately to address the ongoing pandemic, and reiterates that existing agency guidance recognizes many forms of business collaboration can be procompetitive, including joint research and development, technical information exchange, patient care standards development, and joint purchasing arrangements among providers.

Yet, at the same time, the agencies remind businesses that the antitrust laws continue to apply during the pandemic, and they will pursue action against those that might seek to restrain competition and take advantage of the crisis. As Winston has emphasized in other recent [posts](#) and [podcasts](#), there is no COVID-19 defense for cartels or illegal agreements.

In order to facilitate procompetitive collaboration and give businesses comfort that they will not face enforcement actions, the agencies have created an expedited process for reviewing collaborative COVID-19 response efforts, building on the existing procedures by which the FTC issues staff advisory opinions and the Antitrust Division provides Business Review Letters. Under the expedited procedure, the agencies will prioritize responding to all COVID-19-related requests, and have committed to resolve requests addressing public health and safety within

seven calendar days of receiving all necessary information. Both the agencies have created dedicated email addresses for parties to submit COVID-19-related requests and outlined the necessary supporting information. Any agency responses will be in effect for one year from the date of response.

When the agencies respond favorably in advisory opinions and business review letters, they state that they do not intend to challenge the conduct described. These opinions and letters do not immunize businesses from civil liability or private actions, as they are not binding on courts, but they give clarity that the agencies will not take enforcement action and can be significantly persuasive in any subsequent filed private action challenging the cooperating conduct.

The FTC and DOJ also commit to expedited review of filings under the National Cooperative Research and Production Act, and to working with other government agencies to facilitate the response to COVID-19, including under the Defense Production Act and the Pandemic and All-Hazards Preparedness Act.

Businesses that are considering—or have already begun—collaborating with competitors and other industry participants to respond to COVID-19 should continue to be mindful of the antitrust laws, but under this new policy may benefit from quickly obtaining agency guidance before proceeding with any particular collaborative efforts in the fight against coronavirus.

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