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Federal Antitrust Agencies Encourage Appropriate Competitor Collaboration to Address the COVID-19 Crisis

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Antitrust Law

Client Alert

The U.S. antitrust agencies – the Department of Justice Antitrust Division (DOJ) and the Federal Trade Commission (FTC) – have recognized a need for "unprecedented cooperation between federal, state, and local governments and among private businesses to protect Americans' health and safety" during the COVID-19 crisis. To facilitate this necessary cooperation and clear the antitrust path for collaborative efforts among private businesses, including competitors, the agencies announced three joint steps:

- First, the agencies will expedite responses to formal requests from market participants for guidance regarding the agencies' enforcement intentions that relate to proposed steps by "individuals and businesses in any sector of the economy that are responding to" the COVID-19 national emergency. The agencies have committed to respond within seven calendar days of receiving information allowing them to assess the antitrust implications of any such proposal.
- Second, the agencies will expedite the processing of filings under the National Cooperative Research and Production Act (NCRPA), which provides certain protections from potential antitrust litigation for certain categories of standards development and joint venture conduct. The NCRPA's protections include rule-of-reason (rather than *per se*) treatment, single rather than treble damages, and the opportunity for defendants to recover attorneys' fees if they prevail in litigation.
- Finally, the agencies emphasized the latitude afforded many forms of collaborative activity by the antitrust laws. Perhaps most significantly, the agencies will take into account "exigent circumstances" in evaluating conduct aimed at addressing "the spread of COVID-19 and its aftermath" where the conduct is "limited in duration and necessary to assist patients, consumers, and communities affected by COVID-19 and its aftermath." Among the examples given are combining production and distribution capabilities to facilitate expanding output and getting supplies to where they are needed more quickly.

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The agencies' consideration of "exigent circumstances" in evaluating near-term COVID-19 responses and their commitment to a seven-day turnaround on requests for informal guidance are the most significant of these announcements. The agencies seem eager for the antitrust laws not to stand in the way of, or even delay, opportunities for appropriate collaboration – potentially even joint production and distribution by head-to-head competitors – to facilitate providing important goods and services to all who need them. The scope of potentially acceptable collaboration is deliberately broad: not just supplies to healthcare workers or patients, but anything communities may need during this crisis. And the policy applies not just to goods and services needed to prevent infection or treat illness, but those that may play a role in addressing potential dislocations in the crisis' aftermath.

That said, antitrust principles will not be suspended during the crisis. The agencies warned that they will not hesitate to enforce the antitrust laws against those who use the COVID-19 crisis as an opportunity to harm consumers. They specifically called out agreements to increase prices, suppress wages, or reduce quality, as well as efforts by monopolists to exclude rivals (and DOJ emphasized its role in pursuing certain such conduct as criminal violations). Obviously, naked price or wage fixing remains out of bounds. And though exigent circumstances might enable collaborations that would be hard to imagine outside of this crisis, the principles for evaluating whether particular collaborations pass muster appear fairly routine; for the most part, the agencies simply cited their standard guidance on collaborative activity. And they made clear that exigent circumstances will play a role only when joint efforts are both "limited in duration" and "necessary . . . to provide Americans with products or services that might not be available otherwise" – essentially a restatement of how the rule#of#reason would typically apply. Reasonable caution is thus warranted in interpreting the breadth of this standard and what it permits in practice.

Likewise, though the agencies will expedite consideration of requests for informal guidance – under DOJ's Business Review Letter Process and the FTC's Advisory Opinion process – and will consider proposals on a less extensive record than typically required, they have not dispensed with many of the key elements of those processes. They will continue to evaluate proposed conduct under extant antitrust standards, and they will require information addressing the competitive issues posed by the parties' proposal. That means that that the seven-day clock may not start ticking until the agencies evaluate what information they need and receive responses to follow-up questions. Also, under long-standing policy, the conduct covered by a request for guidance must be *proposed future conduct* and cannot be commenced before the guidance is received. It remains to be seen whether the

agencies will soften this requirement in cases where exigencies demand that action be taken immediately and then perhaps continued thereafter under a more formal arrangement. Moreover, perhaps most importantly, nothing about the new policy changes the fact that agency guidance will not bind private litigants or courts.

In order to take advantage of the new flexibility and expedited informal guidance tools, individuals and companies should – as usual – obtain guidance from experienced antitrust counsel in structuring any potential collaborative responses to COVID-19 and evaluating whether the protections of informal agency guidance or the NCRPA are worth pursuing.