

NOW +

NEXT

ANTITRUST LAW ALERT | NIXON PEABODY LLP

MARCH 30, 2020



The FTC and DOJ offer seven-day review of proposed collaborative arrangements to respond to COVID-19

By Brian Whittaker, Alycia Ziarno, and Gordon Lang

On March 24, 2020, the U.S. Federal Trade Commission (FTC) and Department of Justice (DOJ) issued a joint statement announcing an expedited antitrust procedure to provide guidance to individuals and businesses seeking to collaborate to protect the health and safety of Americans during the COVID-19 pandemic.¹

The FTC and the DOJ already had a process for individuals and businesses seeking an evaluation of proposed conduct, but the agencies typically take several months to complete an evaluation. Now, the FTC and DOJ will attempt to respond within seven (7) calendar days of receiving all necessary information about proposed collaborative arrangements to address public health and safety issues related to the COVID-19 pandemic.

The joint statement also includes examples of collaborative arrangements to respond to COVID-19 that will generally be consistent with antitrust laws, including:

- collaboration on research and development;
- sharing technical information and knowledge, rather than company-specific prices, wages, outputs, or costs;
- development and sharing of best practices and standards for health care providers that might be useful for patients, providers, and purchasers;
- most joint purchasing arrangements among health care providers, particularly those intended to enhance procurement efficiencies and reduce costs;
- private lobbying related to use of federal emergency authority, including private industry meetings with the federal government regarding strategies to respond to COVID-19;

¹ U.S. Federal Trade Commission & U.S. Department of Justice, “Joint Antitrust Statement Regarding COVID-19” (Mar. 24, 2020), available at https://www.ftc.gov/system/files/documents/public_statements/1569593/statement_on_coronavirus_ftc-doj-3-24-20.pdf and <https://www.justice.gov/atr/joint-antitrust-statement-regarding-covid-19>.

- joint efforts by health care facilities that are limited in duration and necessary to assist patients, consumers, and communities affected by COVID-19; and
- assistance of the federal government by private businesses to respond to COVID-19, such as working with agencies to implement the Defense Production Act and the Pandemic and All-Hazards Preparedness Act.

Nevertheless, the FTC and DOJ warn in the joint statement that they “will not hesitate to hold accountable” individuals and businesses that engage in anticompetitive conduct, including “agreements between individuals and business[es] to restrain competition through increased prices, lower wages, decreased output, or reduced quality as well as efforts by monopolists to use their market power to engage in exclusionary conduct.” In particular, DOJ will investigate and criminally prosecute price-fixing, bid-rigging, or market allocation schemes.

As a result, businesses should not prematurely enter into collaborative arrangements with competitors to respond to the COVID-19 pandemic. Instead, they should consult with antitrust counsel to evaluate whether proposed arrangements are consistent with antitrust laws and to consider whether a submission to the FTC and DOJ using the expedited antitrust procedure would be appropriate.

For more information on the content of this alert, please contact our [Coronavirus Response team](#), your Nixon Peabody attorney, or:

- Brian Whittaker at bwhittaker@nixonpeabody.com or 202-585-8234
 - Alycia Ziarno at aziarno@nixonpeabody.com or 202-585-8265
 - Gordon Lang at glang@nixonpeabody.com or 202-585-8319
-