

Antitrust Division's Expedited Review of Business Conduct Related to COVID-19: What Have We Learned So Far?

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The Department of Justice Antitrust Division's business review process provides companies an opportunity to ask the Division whether it would intend to pursue enforcement action with respect to specifically described business conduct. In recent years, however, companies have used this process infrequently, owing perhaps to the length of time required to get a response. Recognizing the value of collaborative conduct in the fight against COVID-19, the Division has adopted an expedited process that provides a response to business review requests within seven days of receiving the necessary information. In less than two months following the announcement of this expedited process, the Antitrust Division issued three business review letters approving proposed collaborations. These letters provide some clues regarding the Division's enforcement approach, at least as it relates to collaborative conduct specifically designed to respond to issues arising from the pandemic.

The Antitrust Division's Business Review Process

The Antitrust Division has, for many years, had a process by which it would review proposed business conduct and state whether it intended to take enforcement action with respect to the proposed conduct. See 28 C.F.R. §50.6. (The Federal Trade Commission has a similar business advisory process. See 16 C.F.R. §1.1.) A party seeking review must submit a request with a full and complete disclosure describing the conduct for which review is sought, all relevant data including background information, complete copies of all operative documents and detailed statements of all collateral oral understandings, if any. The Division may request additional information as needed. A party may withdraw a request for review at any time.

In response to such a request, the Division may provide a written response stating its present intentions with regard to antitrust enforcement; it may decline to take a position, or it may take such other position or action as it considers appropriate. Determinations made through the process are not binding and the Division remains free to take such action as it deems appropriate. That said, the DOJ regulations specifically note that the Division has never commenced a criminal prosecution where, following a true and full disclosure of proposed conduct, the Division has stated its intention to take no enforcement action.



At least in theory, the business review process could be an important tool in managing antitrust risk. However, in recent years, companies have used the process infrequently. Since 2005, the Division has not issued more than six business review letters in a single year and most commonly has issued only one or two letters in a year. One factor that might discourage companies from submitting requests is the length of time it takes for the Division to issue a letter. Since 2015, response times have ranged from nearly three months to close to a year.

Expedited Business Review Process for COVID-19 Related Collaborations

On March 24, 2020, the Antitrust Division and the FTC's Bureau of Competition, recognizing the potential value of various types of business collaborations in the fight against the COVID-19 pandemic, issued a joint statement "to make clear to the public that there are many ways firms, including competitors, can engage in procompetitive collaboration that does not violate the antitrust laws." (See "The Franchise Memorandum by Lathrop GPM," Issue No. 252, April 9, 2020.) The joint statement described the agencies' intent to expeditiously address all COVID-19-related requests and resolve requests relating to public health and safety within seven days of receiving all necessary information. In adopting this expedited process, the agencies noted the need for quick action to facilitate an effective response to the public health emergency.

In less than two months following the announcement of this expedited process, the Antitrust Division has issued three business review letters pertaining to collaborations related to COVID-19:

- *McKesson Corporation, et al.* (issued April 4, 2020) - Five medical supply companies, McKesson Corp., Cardinal Health, Henry Schein, Owens & Minor, and Medline Industries, sought expedited review of proposed collaborative activities intended to expedite and increase manufacturing, sourcing, and distribution of personal protective equipment - masks, gowns, gloves, and the like. The stated purposes of the collaborations were to eliminate bottlenecks in the supply chain, identify new sources of supply, identify and monitor areas of increased demand, negotiate competitive pricing, and similar activities.
- *AmerisourceBergen Corp.* (issued April 20, 2020) - AmerisourceBergen, a distributor of medications and other healthcare products requested expedited review of its efforts to work with other distributors to "identify global supply opportunities, ensure product quality, and facilitate product distribution of medications and other healthcare supplies to treat COVID-19 patients."
- *National Pork Producers Council* (issued May 15, 2020) - The NPPC, a trade association representing over 60,000 hog farmers across the country, sought review of activities intended to assist farmers in euthanizing and disposing of unmarketable hogs. Because flare ups of COVID-19 cases among employees, a number of large meat processing facilities either reduced capacity temporarily or shut down operations to try to prevent further spread of the disease. These reductions in processing capacity have resulted in farmers having a large number of hogs on their hands that they could not sell. The NPPC sought approval to work with the United States Department of Agriculture and state regulators to implement an orderly euthanizing and disposal process and to assist farmers needing help to dispose of unmarketable hogs.



Lessons Learned

In each case, the Antitrust Division concluded that the proposed conduct did not present antitrust concerns. Although obviously a small sample size, some common features emerge that may shed some light on the Division's enforcement views regarding business conduct related to COVID-19.

- Government involvement - The proposed collaborative conduct was to be undertaken in cooperation with, and under the direction of, federal and state agencies, although competitors were still allowed to communicate without outside presence of government representatives. Having some level of governmental involvement provides some assurance that the conduct will further the public interest rather than that of any particular private party.
- Limited duration - The parties committed that the conduct would continue only for the period that the problem to be addressed continued. Limiting the duration of the conduct helps to reduce the potential for anticompetitive spillover effects that go beyond the intended purpose of the collaboration. Although the parties forecasted that the conduct would continue for a matter of a few months, it remains to be seen how the intractable nature of the pandemic might affect those anticipated timelines.
- Safeguards - The parties committed to follow certain competition-related safeguards, especially relating to sharing of competitively sensitive information that would reduce the potential for spillover effects. These safeguards help to assure that any collaboration among competitors is limited to that necessary to accomplish the specified purpose of combatting COVID-19.

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