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Competitor Collaborations in the U.S. During COVID-19

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U.S. companies may see opportunities to increase collaborations amongst one another during the current pandemic, but should be aware that they are still subject to the antitrust laws.

Fortunately, yesterday, the [Federal Trade Commission \("FTC"\)](#) and the [Antitrust Division of the Department of Justice \("DOJ"\)](#) (collectively, the "Agencies") issued a joint statement (1) emphasizing ways in which competitors may collaborate to combat COVID-19 and (2) introducing an expedited process to obtain FTC staff advisory opinions and DOJ business review letters of proposed business conduct related to the COVID-19 response.

The antitrust laws recognize that many collaborations are permissible and beneficial. This collaboration can take many forms, and in their joint statement, the Agencies point to several examples of conduct that would be permissible under the antitrust laws no matter the circumstances, including:

- Collaborating on research and development is typically procompetitive because it is usually efficiency-enhancing activity.
- Sharing technical know-how or best practices is usually permitted so long as the parties do not share specific data about prices, wages, outputs, or costs.
- Development and sharing suggested standards for patient management to assist providers in clinical decision making with patients, providers, and purchasers is permitted.
- Joint purchasing arrangements among providers do not raise antitrust concerns, especially when they are designed to reduce transaction costs.

The Joint Statement also explained that the Agencies will be take into account the "exigent circumstances in evaluating efforts to address the spread of COVID-19 and its aftermath." If collaboration efforts between competitors are limited in duration and are necessary to help patients, consumers, and communities affected by COVID-19, they may be reasonable and permissible under the antitrust laws given these exigent circumstances. To that end, the Agencies announced that they will be providing expedited guidance (within 7 calendar days) to businesses on specific proposed conduct related to the response to COVID-19 by instituting a temporary fast-track procedure for staff advisory opinions from the FTC and Business Review Letters from the DOJ. The criteria for obtaining an opinion from the FTC and DOJ are mostly the same, but to qualify for an expedited review, the parties must explain how the proposed conduct is related to the COVID-19 response. Normally this process can take months, so this is a material adjustment by the Agencies.

The Agencies warned, however, that responding to COVID-19 should not be used as an opportunity for "monopolists to use their market power to engage in exclusionary conduct." Further, COVID-19 is not an excuse to "restrain competition through increased prices, lower wages, decreased output or reduced quality." For example, competing provider hospitals should not fix wages of nursing staff or enter into "no hire" agreements with each other. Yesterday's announcement does not mean the Agencies will turn a blind eye to anticompetitive agreements, and they have broad power to aggressively prosecute violations. For example, the DOJ's [recent intervention](#) in a private, no-hire action indicates that (1) the Agencies will continue to police "no poach" agreements; (2) the Agencies will intervene even in private actions; and (3), as at least one court has done, the Agencies may be ordered to monitor future agreements by the parties.

Competitors should steer clear of the following conduct, even during the COVID-19 pandemic:

- Discussing employee pay and benefits information (for example, asking other grocery stores whether they will increase hourly rates for delivery personnel or how much overtime pay they will pay their cashiers)
- Agreeing not to recruit or hire one another's employees (for example, agreeing with other medical staffing companies not to recruit each other's nurses)
- Soliciting information on prices or supply volumes (for example, inquiring with other equipment manufacturers how many N95 respirator masks they will make available or what they are charging for isolation gowns)
- Allocating customers (for example, agreeing with a competitor to divide the market by geography and not to solicit customers from each other's territory)

If you are collaborating or plan to collaborate with a competitor to respond to COVID-19, please seek guidance from antitrust counsel. In almost all cases, the Goodwin [antitrust team](#) will be able to provide collaboration guardrails without the need to seek further input from the Agencies. Should your business proposal require such a review by either the FTC or DOJ, Goodwin's antitrust team stands ready to shepherd you through the expedited review process as well.

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Visit Goodwin's [Coronavirus Knowledge Center](#), where firm lawyers from across the globe are issuing new guidance and insights to help clients fully understand and assess the ramifications of COVID-19 and navigate the potential effects of the outbreak on their businesses.

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