LEGAL UPDATES

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Antitrust Agencies Pivot on HSR Early Termination and Provide COVID-19 Collaboration Guidance

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Over the past week, U.S. antitrust authorities have further refined their temporary merger review procedures and provided additional guidance to expedite proposed healthcare collaborations during the COVID-19 pandemic.

FTC resumes HSR Act early terminations

While the Federal Trade Commission (FTC) continues the temporary e-filing measures under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR Act), it stated on March 27, 2020 that it and the U.S. Department of Justice Antitrust Division (DOJ) will resume the practice of granting early termination of the HSR Act's waiting period where appropriate.

The FTC's statement makes it clear that the reviewing antitrust agency will fully investigate any competitive concerns and any doubts will be resolved against granting early termination. The FTC also reminds the public that its standards for an antitrust investigation have not been relaxed despite the "difficult circumstances" caused by the COVID-19 pandemic, and that it reserves the right to modify its policy as circumstances warrant. It also states that if the FTC's competitive concerns cannot be eliminated or resolved during the initial waiting period, the FTC will issue a Second Request and will continue to investigate its concerns.

Expedited antitrust review possible for COVID-19 collaborations

The FTC and DOJ announced last week that they recognize the potential public health benefits of collaborations between competitors during the COVID-19 pandemic. The FTC will accept requests by parties seeking a staff advisory opinion for proposed collaborations (as opposed to Commission advisory opinions which take longer and must be voted on by the

Commissioners). For proposed collaborations involving public health and safety, the FTC will try and respond to staff advisory opinion requests within seven calendar days of receiving the necessary information. It should be noted that the advisory opinion process is voluntary, and it should not be undertaken lightly as it requires a significant amount of resources to provide the necessary information and may result in unintended consequences, such as negative opinion. It is also important to note that the process does not immunize the conduct from liability; rather, the agency provides its opinion as to whether it would seek to challenge the proposed conduct.

Due to the rapid spread of COVID-19, companies who need to begin collaborating immediately may find current antitrust agency guidance helpful. The agencies' joint announcement highlighted the types of competitor collaborations that typically present the least amount of antitrust risk or may be permissible given the extraordinary circumstances:

Joint development of research and development, e.g., joint activities regarding test kit development, research regarding a possible vaccine;

Sharing technical know-how (as opposed to company-specific information about prices, wages, outputs, or costs) that is necessary to achieve certain benefits—e.g,. sharing information about methods of vaccine production or other research and development activities to get the vaccine to market quicker is permissible;

Providers' development of standards for patient management developed to assist providers in clinical decision-making;

Most joint purchasing arrangements among healthcare providers;

Private lobbying regarding the use of federal emergency authority, including industry meetings with the federal government to discuss COVID-19 response strategies, consistent with the Noerr-Pennington doctrine;

Healthcare facilities working together to provide resources and services to communities without access to personal protective equipment, medical supplies, or healthcare; and

Temporarily combining production, distribution, or service networks to facilitate production and distribution of COVID-19 supplies.

The antitrust agencies reiterated that while many businesses and individuals will act in ways that will further goals of public health, others may use it as "an opportunity to subvert competition or prey on vulnerable Americans." Thus, joint conduct by competitors that constitutes a naked agreement to fix

prices or wages, allocate markets or customers, or rig bids will be still be prosecuted as a per se illegal violation under antitrust law.

However, a competitor collaboration that aims to provide significant benefits to healthcare workers or patients—including shortening the development time for a vaccine, increasing the distribution of personal protective equipment, or ramping up joint production of ventilators—may be permissible under antitrust law if it is narrowly tailored to achieve these goals and any competitive restraints are reasonably necessary to achieve the stated benefits. Since competitor collaborations remain subject to antitrust laws, even if their purpose is to aid in the fight against COVID-19, we strongly recommend that any proposed collaboration is reviewed by experienced counsel with an eye towards the risk of antitrust scrutiny or liability.

Contact us

Husch Blackwell's antitrust team continues to monitor the antitrust agencies' guidance and enforcement actions in this area. Should you have any questions, please do not hesitate to contact Wendy Arends, Mark Tobey, or your Husch Blackwell attorney.

COVID-19 resource

Husch Blackwell has launched a COVID-19 response team providing insight to businesses as they address challenges related to the coronavirus outbreak. The page contains programming and content to assist clients and other interested parties across multiple areas of operations, including labor and unemployment, retailing, and supply chain management, among others.