

# Clients & Friends Memo

## COVID-19 Update: Competitor Collaborations in the Time of COVID-19

April 1, 2020

The Antitrust Division of the U.S. Department of Justice (“DOJ”) and the Federal Trade Commission (“FTC”) [jointly announced](#) on March 24, 2020, an expedited antitrust review process for proposed collaborative efforts aimed at protecting the health and safety of Americans during the COVID-19 pandemic. The agencies have committed to reviewing all proposed collaborations submitted to the DOJ’s [Business Review Letter](#) procedure and the FTC’s [Staff Advisory Opinion](#) procedure within seven calendar days of receiving all necessary information (both processes generally take several months). The DOJ and FTC also pledged to expedite requests under the [National Cooperative Research and Production Act](#) for flexible treatment of certain standard development organizations and joint ventures. For more details regarding the joint announcement and the requirements for companies seeking to use this expedited procedure, please see Cadwalader’s recent summary.<sup>1</sup>

The agencies’ [joint statement](#) also provided substantive guidance for proposed collaborations to address the COVID-19 pandemic and examples of collaborative activities that would be consistent with antitrust laws. Based on this guidance, there are several possible outcomes for the review of proposed collaborations during the COVID-19 pandemic.

- **Direct facilitation of COVID-19 healthcare-related relief.** Although the agencies’ joint statement did not provide express “safe harbors” for any specific conduct, the agencies clearly intended to encourage the formation of certain COVID-19-related joint ventures. Collaborations formed to speed the production and/or distribution of products and services designed to treat COVID-19 patients likely would face a relatively low level of antitrust risk, assuming no anticompetitive effects (such as price/profit increases) are anticipated as a result of the joint venture. Obvious examples that would fit within this category would be production joint ventures to manufacture ventilators or physician joint ventures aimed at providing efficient medical coverage in a given area.

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<sup>1</sup> [COVID-19 Update: DOJ and FTC Launch Expedited Review Process for COVID-19-Related Collaborative Efforts](#), Peter Moll, Brian Wallach, Gregory Langsdale and Lindsay Barnes, Cadwalader, Wickersham & Taft LLP, March 26, 2020.

- **Collaboration aimed at joint preservation of parties.** Reduced demand for products and services throughout the economy has threatened the viability of many businesses. Companies at all points along the supply chain of many industries are affected, and there have been discussions along some of these supply chains, both vertically and horizontally, about whether companies may take collective action to stabilize their industries. The agencies' joint statement does not speak directly to these situations, and companies considering such proposals would do well to review the specific proposed conduct with antitrust counsel. If the parties are comfortable under the antitrust "rule of reason" analysis<sup>2</sup> that the collaboration is low risk, the parties may opt to proceed with their joint venture without seeking antitrust review. If, however, the parties are less comfortable with the antitrust risk posed by the collaboration, they may wish to consider the DOJ and FTC's new (and, as yet, untested) seven-day antitrust review procedures.<sup>3</sup>
- **Coordination to prevent ruinous fallout or market collapse due to COVID-19.** Collaborations where the primary effect is to coordinate on price or output as a means to prevent or remediate industry lost profits, decreased demand or higher costs associated with the COVID-19 pandemic likely would receive no special protection from the antitrust laws. Parties to such proposed joint ventures should evaluate with antitrust counsel whether the net procompetitive advantages of the collaboration are sufficiently compelling under a rule of reason analysis to apply for a Business Review Letter approval from the enforcement authorities under the new expedited review procedures.

#### How can Cadwalader help?

Cadwalader's antitrust team, located in key jurisdictions in the United States (New York, Washington, DC and Charlotte), is composed of specialists that offer 'end-to-end' advice on compliance, investigations and related litigation. Our practitioners are experienced in counseling on the full gamut of antitrust issues.

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<sup>2</sup> Restraints that are always (or almost always) so inherently anticompetitive and damaging to the market are condemned under the "*per se*" rule without further inquiry into their actual effects on the market or the existence of procompetitive justifications. *Per se* treatment under the antitrust laws is limited to certain hardcore antitrust violations, such as price fixing, customer allocations and market divisions. Conduct that restrains trade, but does not fit into the *per se* category, is analyzed under the so-called "rule of reason" test to determine if the practice is an unreasonable restraint of trade, based on economic factors. Rule of reason analysis is the default under modern antitrust case law.

<sup>3</sup> [COVID-19 Update: DOJ and FTC Launch Expedited Review Process for COVID-19-Related Collaborative Efforts](#), Peter Moll, Brian Wallach, Gregory Langsdale and Lindsay Barnes, Cadwalader, Wickersham & Taft LLP, March 26, 2020.

If you have any questions, please feel free to contact any of the following Cadwalader attorneys.

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