

COVID-19: The Reaction of U.S. Antitrust Agencies

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COVID-19 has impacted nearly every aspect of American life right now, and there are myriad legal issues companies are facing from the pandemic's fallout. These include antitrust considerations, ranging from potentially criminal conduct to government closures and delays affecting antitrust premerger filings and investigations. To be sure, U.S. antitrust agencies are making sure that they do not miss a beat in enforcing the antitrust laws.

Increased Scrutiny of Conduct Related to the COVID-19 Fallout

As the COVID-19-driven global economic crisis is impacting U.S. companies' supply chains, customer contracts, distribution, and other aspects of their business operations, companies may be inclined to band together to address these concerns. While there may be health and safety topics permissible for group discussion – such as sharing information about experiences and perhaps best practices – companies should be careful to avoid spillover into impermissible topics. Indeed, there is an increased focus by U.S. antitrust agencies on conduct arising from the pandemic.

The U.S. Department of Justice (DOJ) Antitrust Division and Federal Trade Commission (FTC) have both put out guidance in recent days warning companies and would-be scammers that they will use their consumer protection and competition enforcement powers to go after anyone who tries to take advantage of consumers during this trying time. The **FTC announced** that it is already working with the Food and Drug Administration (FDA) to

prevent companies from making false claims about products' ability to protect buyers from COVID-19. Similarly, **Attorney General William Barr stated** that "[t]he Department of Justice stands ready to make sure bad actors do not take advantage of emergency response efforts, healthcare providers, or the American people during this crucial time."

Hart-Scott-Rodino Premerger Notification Filings

The FTC's Premerger Notification Office (PNO) announced on **Friday, March 13**, that because of the COVID-19 pandemic emergency, it is implementing a temporary e-filing system for all Hart-Scott-Rodino (HSR) filings. The FTC and DOJ are not accepting hard copy or DVD HSR filings. HSR filings must be made via the temporary e-filing system. The PNO's announcement states that while this temporary system is in place, early termination will not be granted for any filing (and the PNO has subsequently clarified that this means that early termination also will not be granted for filings made before implementation of the e-filing system). The PNO also issued **guidance for filing parties** on how to submit HSR filings using the temporary e-filing system.

Although that guidance states that PNO and DOJ review of filings will continue as normal, Lowenstein's antitrust team cannot be certain that the FTC and the Antitrust Division will be able to complete substantive review of all HSR-reported transactions as expeditiously as before the pandemic emergency. The FTC's Bureau of Competition has **stated** that (1) virtually all of its employees are working remotely and that parties should assume that any meetings

that are held will be held remotely, and (2) they are conducting a matter-by-matter review of investigations to consider “appropriate modifications of statutory or agreed-to timing.” The Antitrust Division has issued **a similar statement**, mentioning in particular that it is requesting that parties to proposed mergers add an additional 30 days to timing agreements after the parties have complied with document requests. It is thus possible that HSR filings that otherwise would have gotten early termination or otherwise have been cleared within the usual 30-day waiting period will result in second requests unless the parties opt to use the procedure allowing for withdrawal and refile, so as to afford more time for review.

In addition, we have heard that Congressional Democrats and Republicans are discussing legislative provisions that could be attached to COVID-19 emergency legislation and would allow the FTC and DOJ to extend the HSR waiting period for some period of time without issuing second requests.

To see our prior alerts and other material related to the pandemic, please visit the Coronavirus/ COVID-19: Facts, Insights & Resources page of our website by clicking **here**.

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