THOMPSON COBURN LLP

insights

TYPES NOT MAPPED YET April 02, 2020 | TTR not mapped yet | Nicole L. Williams

Federal agencies announce expedited antitrust procedures for COVID-19 public health efforts

On March 24, 2020, the Federal Trade Commission and the U.S. Department of Justice Antitrust Division – the two federal agencies responsible for enforcement of federal antitrust laws – issued a joint statement recognizing that dealing with the COVID-19 crisis will require "unprecedented cooperation…among private businesses." The joint statement details procedures and guidance aimed at collaborations of businesses working to protect the health and safety of Americans during the COVID-19 pandemic.

As to review of proposed collaborations, the agencies recognized that the existing procedures for review of competitor collaborations – the FTC's Staff Advisory Opinions and the DOJ's Business Review Letters – may not offer clarity quickly enough for businesses to take effective action. The expedited COVID-19 review procedure states that the agencies will "aim to respond expeditiously to all COVID-19-related requests, and to resolve those addressing public health and safety within seven (7) calendar days of receiving all necessary information."

Businesses wishing to utilize this expedited review procedure should either request an expedited FTC Staff Advisory Opinion or expedited Business Review Letter through special procedures that include a statement of how it is related to COVID-19. The responses will be in effect from one (1) year after the date of the opinion.

The agencies also stated that they would expeditiously process filings under the National Cooperative Research and Production Act (NCRPA), a law that covers the substantive application of the antitrust laws to joint research and development activities, joint production activities, and standards development organizations. Filing a notification under the NCRPA provides certain protections to those who register, including limitation of possible antitrust damage exposure. The agencies noted in particular the NCRPA's application during the COVID-19 crisis to "businesses to bring goods to communities in need, to expand existing capacity, or to develop new products or services."

The agencies also noted that "[m]any types of collaborative activities designed to improve the health and safety response to the pandemic would be consistent with antitrust laws," and in particular the existing Antitrust Guidelines for Collaborations Among Competitors and Statement of Antitrust Enforcement Policy in Health Care.

The following were provided as examples:

- Firms collaborating on research and development;
- Sharing technical know-how under certain circumstances;
- Development and sharing of suggested practice parameters for patient management and clinical decision-making;
- Joint purchasing arrangements among health care providers; and
- Private lobbying to address the use of federal emergency authority, including industry meetings with the federal government to discuss strategies in responding to COVID-19.

The agencies further explained that their evaluation of activities taking place during the COVID-19 crisis will account for exigent circumstances, such as:

- Health care facilities needing to work together to provide resources and services to communities without immediate access to personal protective equipment, medical supplies, or health care; and

- Businesses needing to temporarily combine production, distribution, or service networks to facilitate production and distribution of COVID-19-related supplies they may not have traditionally manufactured or distributed.

The agencies did note that they would hold accountable those who would use the COVID-19 crisis to subvert competition, commit fraud, or take advantage of vulnerable consumers.

Nicole Williams represents clients in matters involving antitrust, advertising, fraud investigations and litigation, RICO, and class actions. She is the managing partner of Thompson Coburn's Dallas office.

Click here to subscribe to News & Insights from Thompson Coburn related to our practices as well as the latest on COVID-19 issues.

authorsTest

nicole

Nicole L. Williams