



# Antitrust Enforcement During the COVID-19 Pandemic: Frequently Asked Questions

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Although the COVID-19 coronavirus has shuttered wide swaths of the U.S. economy, it has also spurred a flurry of activity by some of the country’s largest firms. To respond to the virus, major medical-supply companies have announced [collaborative efforts](#) to manufacture, source, and distribute medical equipment. Large [pharmaceutical companies](#) and [tech firms](#) have likewise partnered with rivals to develop new products to treat and track the virus. And while economic uncertainty has led to [sharp declines](#) in mergers, some commentators [predict](#) that dominant, cash-rich firms will ultimately benefit from virus-induced financial turmoil by acquiring smaller, less secure competitors at bargain prices.

These developments potentially implicate federal antitrust law, which prohibits [anticompetitive agreements between firms](#) and [mergers and acquisitions](#) that threaten to “substantially lessen” competition. This Legal Sidebar responds to certain frequently asked questions involving the intersection of antitrust enforcement and COVID-19.

## Will companies that collaborate with one another in response to COVID-19 face antitrust liability?

Under [Section 1 of the Sherman Antitrust Act](#), courts evaluate most types of inter-firm cooperation using the “[Rule of Reason](#),” which condemns *anticompetitive* agreements as unlawful but permits other types of collaboration. Because this inquiry is highly fact-intensive, it is difficult to draw categorical conclusions about the boundaries of permissible inter-firm cooperation. But collaboration on research and development (R&D), the sharing of technical “know-how,” and joint-purchasing agreements among firms that lack market power ordinarily survive Rule-of-Reason scrutiny. In contrast, agreements between competitors to share their internal information about prices, wages, costs, and output are more likely to violate antitrust law.

In March, the Department of Justice (DOJ) and Federal Trade Commission (FTC)—the agencies charged with enforcing federal antitrust law—released a [Joint Statement Regarding COVID-19](#) reiterating these principles. In their Joint Statement, the agencies identified several examples of virus-related collaboration that are likely to be permissible, including joint ventures involving the production or distribution of medical supplies, joint-purchasing arrangements among healthcare providers, and collaborative R&D efforts. To provide greater certainty to companies seeking to enter into such arrangements, the antitrust regulators also announced plans to expedite COVID-19-related requests under the DOJ’s [Business](#)

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[Review Process](#) and the FTC’s [Advisory Opinion Process](#), which allow firms to seek the agencies’ input on proposed collaborative activity.

On April 4, the DOJ [issued](#) its first expedited approval of a cooperative venture, green-lighting a proposal from a group of medical-supply distributors to collaborate with each other, the Federal Emergency Management Agency (FEMA), and the Department of Homeland Security to produce and distribute personal-protective equipment. In its letter approving the proposal, the DOJ [explained](#) that cooperative activities that include and are supervised by federal agencies generally do not raise antitrust concerns. The DOJ also [concluded](#) that the proposed activities were unlikely to harm competition even if they occurred outside of FEMA’s supervision given their limited scope and duration, their alleviation of virus-induced scarcity, and the requesting parties’ commitment not to use the collaboration to increase prices or reduce output.

### **What about companies that engage in price-fixing or bid-rigging?**

The analysis here is far less complicated. While the Rule of Reason applies to most claims under Section 1 of the Sherman Act, some types of conduct—including price-fixing and bid-rigging—are *per se* unlawful. This means that courts need not balance a challenged price-fixing or bid-rigging scheme’s alleged [procompetitive benefits](#) against its anticompetitive harms before determining that the scheme is illegal, as they would under the Rule of Reason. Instead, “[naked](#)” price-fixing and bid-rigging agreements (as opposed to “ancillary” agreements connected to a broader productive venture) are categorically unlawful. The DOJ has [said](#) that it intends to vigorously prosecute companies that engage in price-fixing or bid-rigging involving health products related to COVID-19.

### **COVID-19-relief legislation has [generated](#) aggressive lobbying by industry groups. Does joint lobbying of the government violate federal antitrust law? Are firms allowed to lobby for policies that have anticompetitive effects (*i.e.*, by entrenching dominant firms at the expense of smaller rivals)?**

The [Noerr-Pennington doctrine](#) shields most forms of lobbying activity from antitrust liability. This doctrine—which is derived in part from First Amendment principles—protects both coordinated efforts to influence government action and advocacy of anticompetitive policies. But [Noerr-Pennington](#) also has [certain limits](#). Among other things, the doctrine does not insulate [inter-firm agreements](#) intended to influence government action but which harm competition independent of government action. For example, while [Noerr-Pennington](#) would safeguard the oil industry’s advocacy for government-imposed output restrictions, it would not protect agreements among oil companies to restrict their output independent of a legally mandated limit. Similarly, the doctrine would not shield anticompetitive agreements between firms that engage in joint lobbying when those agreements are unrelated to the firms’ lobbying efforts.

### **Some companies are [reportedly](#) charging unreasonable prices for highly demanded products like toilet paper, hand sanitizer, and face masks. Does federal antitrust law prohibit price gouging?**

Federal antitrust law does not prohibit price gouging. However, the Defense Production Act [allows](#) the President to prohibit hoarding and price gouging related to certain scarce materials. In response to COVID-19, the President has [delegated](#) part of this authority to the Secretary of Health and Human Services, who has [designated](#) certain medical products as items that are subject to the relevant prohibitions. Separately, some [lawmakers](#) have [introduced](#) legislation that would make it unlawful to engage in price gouging related to certain consumer products during the duration of the COVID-19 pandemic. Many states have also adopted statutes that [ban](#) excessive price increases for some goods and services in certain circumstances, like a declared emergency. Other states prohibit price gouging through general consumer-protection statutes barring unfair and deceptive trade practices.

### Will COVID-19 affect the government’s merger-review process?

The [Hart-Scott-Rodino Antitrust Improvements Act](#) (HSR Act) requires that parties to mergers valued at more than \$94 million report their proposed transactions to the DOJ and FTC. Before such mergers can close, the parties must abide by a waiting period of thirty days to allow the agencies to evaluate potential antitrust issues. But companies can also request early termination of this waiting period, and the agencies sometimes grant such requests for deals that do not raise competition concerns. If the DOJ or FTC have antitrust concerns at the end of the statutory waiting period, the agencies can ask the parties for additional information through a “[Second Request](#).” And after the parties comply with a Second Request, they must wait another thirty days before closing their proposed transactions. However, the agencies often ask merging firms to enter into [timing agreements](#) that extend this second waiting period beyond thirty days to facilitate their review of proposed deals.

The DOJ and FTC have announced several changes to this process in response to COVID-19. In March, the FTC said that it will temporarily [require](#) parties to submit HSR materials electronically to facilitate the agency’s shift to telework. The DOJ and FTC also announced changes to their review of requests for early termination of the initial HSR waiting period. After originally suggesting that they would not grant any such requests during the COVID-19 crisis, the agencies have [said](#) they will approve requests for early termination of the waiting period only on a “limited basis.” Finally, the DOJ has [announced](#) that it will ask companies that have received or will receive Second Requests to enter into timing agreements extending the second HSR waiting period for another thirty days.

The DOJ and FTC have also sought legislative changes to the merger-review process. The agencies have [reportedly asked Congress](#) to extend the HSR waiting periods for fifteen days during emergencies like disease outbreaks, natural disasters, and government shutdowns. However, as of the publication of this Sidebar, Congress has not enacted legislation adopting this proposal.

### Will COVID-19-induced economic turmoil affect the substance of the government’s merger reviews?

Only in certain circumstances. [Section 7 of the Clayton Antitrust Act](#) prohibits mergers that threaten to “substantially lessen” competition. In reviewing horizontal mergers between rivals, the DOJ and FTC typically evaluate the level of [market concentration](#) that would result from a proposed transaction to assess its impact on competition. And in reviewing vertical mergers between firms at different levels of a supply chain, the agencies [examine](#) whether a proposed deal will foreclose potential sources of supply or distribution or raise entry barriers in either of the relevant markets. With both types of transactions, the DOJ and FTC also weigh potential harms to competition against any [efficiencies](#) that firms would realize from a proposed merger (*e.g.*, economies of scale, the elimination of duplicative functions, or enhanced R&D capabilities).

COVID-19-induced economic disruptions do not alter the substance of these inquiries; the agencies will apply the same legal standards during the COVID-19 pandemic that they employed beforehand. And while the virus may highlight certain efficiencies—especially those involving R&D—it is unclear whether merging firms will be able to successfully show that any such benefits are *merger-specific* given the ways that companies can legally cooperate on R&D without merging.

But the DOJ and FTC have recognized that there are limited circumstances in which financial distress can affect their evaluations of proposed mergers. Specifically, the agencies have [explained](#) that an otherwise anticompetitive merger may be permissible when one of the companies involved in the transaction is on the verge of failure. However, the DOJ and FTC closely scrutinize invocations of this “failing-firm” defense. The antitrust regulators credit this argument only if the allegedly failing firm (1) cannot meet its financial obligations “in the near future,” (2) cannot successfully reorganize under Chapter 11 of the Bankruptcy Code, and (3) has made unsuccessful good-faith efforts to elicit reasonable alternative offers that pose a less severe danger to competition. While troubled companies may thus rely on

COVID-19-induced turmoil to defend proposed mergers, the agencies will accept such arguments only in limited circumstances.

While the “failing-firm” defense may *support* the legality of certain mergers in these limited circumstances, some [lawmakers](#) have advocated legislation *tightening* merger-review standards during the COVID-19 pandemic. These policymakers have proposed a [Pandemic Anti-Monopoly Act](#) that would prohibit certain categories of mergers until the FTC determines “that small businesses, workers, and consumers are no longer under severe financial distress” from COVID-19. The proposal—which has yet to be distilled into legislative text—would also pause all statutory merger-review deadlines and direct the FTC to issue a rule establishing a presumption against mergers that “pose a risk to the government’s ability to respond to a national emergency.”

**European antitrust authorities have [raised concerns](#) that Chinese state-owned firms will try to capitalize on COVID-19 by acquiring companies in critical industries for bargain prices. Does U.S. antitrust law prohibit acquisitions of critical American companies by Chinese firms?**

In evaluating proposed mergers, the DOJ and FTC analyze only whether a transaction will harm competition. Because few Chinese companies have significant market power in the United States, acquisitions of American corporations by Chinese firms rarely face challenges under Section 7 of the Clayton Act. Instead, [the Committee on Foreign Investment in the United States](#) (CFIUS)—an interagency body chaired by the Treasury Secretary—reviews proposed direct foreign investments for national-security concerns. CFIUS can block certain foreign investments in critical U.S. industries and has used this authority to prevent [several proposed acquisitions](#) by Chinese firms.

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