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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE**

## **The Role of Competition Policy in Promoting Economic Recovery – Note by the United States**

2 December 2020

This document reproduces a written contribution from the United States submitted for Item 2 of the 134th OECD Competition Committee meeting on 1-3 December 2020.

More documents related to this discussion can be found at  
<http://www.oecd.org/daf/competition/promoting-economic-recovery.htm>

Please contact Mr Ruben Maximiano if you have questions about this document.  
[Email: [Ruben.MAXIMIANO@oecd.org](mailto:Ruben.MAXIMIANO@oecd.org)]

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## United States

### 1. Introduction

1. The Antitrust Division of the Department of Justice (DOJ) and the U.S. Federal Trade Commission (FTC) (collectively the Agencies) offer this joint submission in response to the Competition Committee's review of the role of competition policy in promoting economic recovery. In this paper, we highlight some key steps that the Agencies have taken to respond to the present COVID-19 crisis in the United States and to help promote a rapid and sustained economic recovery.

2. The U.S. antitrust agencies have undertaken initiatives in several categories to help spur recovery from the COVID-19 crisis, including stepped-up criminal enforcement, policy guidance to health and emergency-related government agencies, and expedited review of private sector cooperative efforts. The Agencies strongly believe that competition policy has an important role to play in the COVID-19 recovery process and intend to continue to engage in partnership with domestic and international counterparts to ensure the protection of competition and consumers.

### 2. Deterrence of Cartel Activity, Price Gouging, and Other Harmful Activity

3. Deterrence of unlawful commercial activities has long been a key mission of the Agencies, rendered even more critical by the social and economic disruptions caused by the COVID-19 crisis.<sup>1</sup> While most Americans have acted to help their neighbors and communities during the past year, crisis-related disruption increases the risk that some individuals will make unlawful windfall profits at the expense of public safety and the health and welfare of their fellow citizens.<sup>2</sup>

4. While hoarding and exploitation are not themselves antitrust violations, such behaviors are often accompanied by criminal antitrust collusion, price fixing, and bid rigging, and other attempts to take advantage of the public. As with other natural disasters, the COVID-19 crisis increases the risk that individuals and organizations will engage in these unlawful commercial activities, necessitating increased vigilance by the Agencies.

#### 2.1. COVID-19 Hoarding and Price Gouging Task Force

5. To coordinate enforcement efforts, the Attorney General in March 2020 announced the creation of the COVID-19 Hoarding and Price Gouging Task Force.<sup>3</sup> The Task Force is charged with developing effective enforcement measures and best practices, and coordinating nationwide investigation and prosecution of illicit activities. Because health

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<sup>1</sup> See Makan Delrahim, Ass't Att'y Gen. for Antitrust, *Tackling the COVID-19 challenge—a view from the DOJ*, 32 J. of Antitrust Enforcement, Jun. 11, 2020, available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7314227/>.

<sup>2</sup> See Department of Justice, Press Release, "Justice Department Cautions Business Community Against Violating Antitrust Laws in the Manufacturing, Distribution, and Sale of Public Health Products," March 9, 2020, available at <https://www.justice.gov/opa/pr/justice-department-cautions-business-community-against-violating-antitrust-laws-manufacturing>.

<sup>3</sup> Office of the Att'y Gen., *Memorandum for All Heads of Department Components and Law Enforcement Agencies* (Mar. 24, 2020), <https://www.justice.gov/file/1262776/download>.

care products and markets are central in responding to the health care crisis and eventually to economic resilience and recovery, the Task Force focuses on protecting the availability of those products designated essential by the Department of Health and Human Services (HHS) under Section 102 of the Defense Production Act. The DOJ consults with HHS during this process, including advising on the antitrust implications of COVID-19 for affected markets and products.

6. The Task Force is currently being led by a coordinating U.S. Attorney, with assistance as needed from the Antitrust Division's Criminal Program. Each United States Attorney's Office, as well as other relevant Department components, is directed to designate an experienced attorney to serve as a member of the Task Force. The Antitrust Division's role in the Task Force involves investigating allegations of criminal antitrust harms, such as price fixing and bid rigging, and responding to citizen complaints about collusive or anticompetitive disaster-related behavior.

## 2.2. Procurement Collusion Strike Force

7. The DOJ is also stepping up efforts to combat crisis-related disruption through the newly-created Procurement Collusion Strike Force (PCSF). COVID-19 recovery will require substantial investment by national, state, and local authorities, with \$3.48 trillion appropriated to date.<sup>4</sup> The size and pace of such efforts unfortunately create opportunities for fraud and collusion affecting government procurement and grant-making. Through the creation of the PCSF, DOJ is dedicating significant resources to help identify and prevent these unlawful activities.<sup>5</sup>

8. The PCSF is an interagency partnership dedicated to protecting taxpayer-funded projects from antitrust violations and related crimes at the federal, state, and local levels. Under the umbrella of the PCSF, prosecutors from the Antitrust Division's five criminal offices and 13 U.S. Attorneys' Offices have partnered with agents from the FBI and four federal Offices of Inspector General, including the U.S. Postal Service and Department of Defense, to conduct outreach and training for procurement officials and government contractors on antitrust risks in the procurement process.

9. Since its creation in 2019, over 50 federal, state, and local government agencies have already sought training and assistance from the PCSF, as well as opportunities to work with the PCSF on investigations. So far, the PCSF has led over a dozen interactive virtual training programs for approximately 2,000 criminal investigators, data scientists, and procurement officials.<sup>6</sup> Over a third of the Antitrust Division's current investigations relate to public procurement, and the PCSF marks an important effort to marshal enforcement resources to tackle these cases. Several grand jury investigations already have been opened as a direct result of the work of the PCSF. In addition to playing a meaningful role in COVID-19 economic recovery, the PCSF will continue to be an important resource for detecting fraud and collusion in government procurement for years to come.

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<sup>4</sup> *How is the federal government funding relief efforts for COVID-19?*, Data Lab, <https://datalab.usaspending.gov/federal-covid-funding/>.

<sup>5</sup> See Makan Delrahim, Ass't Att'y Gen. for Antitrust, *Justice Department's Procurement Collusion Strike Force Caps Off Successful Inaugural Year by Adding Eleven New National Partners*, Nov. 12, 2020 (describing PCSF activities in response to COVID-19 crisis), available at <https://www.justice.gov/atr/blog/justice-department-s-procurement-collusion-strike-force-caps-successful-inaugural-year>.

<sup>6</sup> Antitrust Div., U.S. Dep't of Justice, *Antitrust Division Update Spring 2020* (Spring 2020), <https://www.justice.gov/atr/division-operations/antitrust-division-update-2020>.

### 2.3. Protecting Competition in Labor Markets

10. The DOJ and FTC are working to protect competition in labor markets, which have been subject to significant dislocation due to the economic impact of COVID-19. In April 2020, the Agencies issued a statement warning that antitrust enforcers are closely monitoring improper employer coordination that may disadvantage workers.<sup>7</sup> The statement affirmed that antitrust laws with respect to hiring and employment remain fully in effect despite the crisis, and stated that “COVID-19 does not provide a reason to tolerate anticompetitive conduct that harms workers, including doctors, nurses, first responders, and those who work in grocery stores, pharmacies, and warehouses, among other essential service providers on the front lines of addressing the crisis.”<sup>8</sup>

11. Given the special impact of COVID-19 on medical staffing and employment, the Agencies are focused on preventing employers, including health care staffing companies and recruiters, from engaging in collusion or other anticompetitive conduct in labor markets, such as agreements to lower wages or to reduce salaries or hours worked. This announced focus continues the Agencies’ policy of devoting resources to preventing labor malpractice in critical industries, especially health care. As one example, the DOJ in April 2020 reached a significant resolution in the criminal investigation of Florida Cancer Specialists (FCS) for entering into a market allocation agreement that gave FCS a monopoly for services in a densely populated part of southwest Florida. As part of the deferred prosecution agreement reached in that case, the Division obtained a \$100 million fine – the statutory maximum – and FCS agreed to waive certain non-compete provisions for current and former employees, including physicians and other healthcare professionals.<sup>9</sup> In another important matter, early this year, the FTC investigated, and the parties abandoned a proposed tie-up between two providers of nursing staff. The proposed merger had likely anticompetitive effects in multiple localities across the country on markets both for nursing services and for private duty nursing care.<sup>10</sup>

### 2.4. Consumer Protection

12. The FTC has worked aggressively to address consumer protection issues arising from the COVID-19 pandemic. Since late March, as the coronavirus emerged, the FTC has received nearly 225,000 consumer complaints relating to COVID-19, including concerns about fraud related to the government’s economic impact payments.<sup>11</sup> In addition, the FTC

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<sup>7</sup> U.S. Dep’t of Justice & Fed. Trade Comm’n, *Joint Antitrust Statement Regarding COVID-19 and Competition in Labor Markets* (Apr. 13, 2020), [https://www.ftc.gov/system/files/documents/advocacy\\_documents/joint-statement-bureau-competition-federal-trade-commission-antitrust-division-department-justice/statement\\_on\\_coronavirus\\_and\\_labor\\_competition\\_04132020\\_final.pdf](https://www.ftc.gov/system/files/documents/advocacy_documents/joint-statement-bureau-competition-federal-trade-commission-antitrust-division-department-justice/statement_on_coronavirus_and_labor_competition_04132020_final.pdf).

<sup>8</sup> *Id.*

<sup>9</sup> Press Release, U.S. Dep’t of Justice, *Leading Cancer Treatment Center Admits to Antitrust Crime and Agrees to Pay \$100 Million Criminal Penalty* (Apr. 30, 2020), <https://www.justice.gov/opa/pr/leading-cancer-treatment-center-admits-antitrust-crime-and-agrees-pay-100-million-criminal>.

<sup>10</sup> Joseph Simons, Chairman, Fed. Trade Comm’n, *Statement of the FTC Chairman Regarding Announcement that Aveanna Healthcare and Maxim Healthcare Services Have Terminated Their Acquisition Agreement* (Jan. 30, 2020), <https://www.ftc.gov/news-events/press-releases/2020/01/statement-ftc-chairman-regarding-announcement-aveanna-healthcare>.

<sup>11</sup> See FTC, *FTC COVID-19 and Stimulus Reports: Consumer Sentinel Network Reports*, <https://public.tableau.com/profile/federal.trade.commission#!/vizhome/COVID-19andStimulusReports/Map> (last

has been monitoring the marketplace for unsubstantiated health claims, illegal robocalls, privacy and data security concerns, online shopping fraud, and a variety of other scams related to the economic fallout from the COVID-19 pandemic.

13. Acting on this market information, the FTC has pursued a rigorous warning letter program and filed law enforcement actions for injunctive and other relief in federal courts.<sup>12</sup> In the health claims area, for example, the FTC and the Food and Drug Administration (FDA) have, to date, issued over 90 joint warning letters to marketers regarding claims that their products will treat, cure, or prevent COVID-19.<sup>13</sup> The FTC on its own has issued more than 225 additional warning letters to marketers.<sup>14</sup> The letters warn recipients that their conduct is likely to be unlawful, that they could face serious legal consequences if they do not immediately stop, and require a response to the FTC within 48 hours. In nearly every instance, companies that have received FTC warning letters have taken quick steps to correct or eliminate their problematic claims. The FTC also has issued warning letters, in conjunction with the Small Business Administration, to companies making potentially misleading claims about federal loans or other temporary small business relief.<sup>15</sup>

14. The FTC has also filed court actions involving COVID-19 health claims, distribution claims, and government stimulus check claims.<sup>16</sup> For example, the FTC filed four lawsuits in federal district courts against online merchandisers for failing to deliver on promises that they could quickly ship products like face masks, sanitizer, and other personal protective equipment (PPE) related to the coronavirus pandemic.<sup>17</sup>

15. Finally, the FTC has launched numerous consumer education campaigns, including a website on COVID-19 scams and a resource page that contains brochures, graphics, and videos in multiple languages.<sup>18</sup>

### 3. Guidance and Cooperation to Peer Agencies as Part of a Coordinated, Government-Wide Response Effort

16. The FTC and DOJ also have shared their competition expertise with other international and federal agencies in order to facilitate COVID-19 response and recovery while preserving competitive markets. Among other efforts, the Agencies have been working closely with the Federal Emergency Management Agency (FEMA) to develop a

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visited Oct. 16, 2020).

<sup>12</sup> A full list of the FTC's enforcement actions related to COVID-19 is available at <https://www.ftc.gov/coronavirus/enforcement>.

<sup>13</sup> A full list of FTC warning letters is available at <https://www.ftc.gov/coronavirus/enforcement/warning-letters>.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *See* n. 12, *supra*.

<sup>17</sup> *See* *FTC v. SuperGoodDeals.com, Inc. et al.*, No. 1:20-cv-03027 E.D.N.Y. 2020), <https://www.ftc.gov/news-events/press-releases/2020/07/ftc-takes-action-against-marketer-that-falsely-promised-next-day-shipping>; *see also* *FTC v. QYK BRANDS LLC d/b/a Glowyy, et al.*, No. 8:20-cv-01431-JLS-KES (C.D. Ca. 2020), *FTC v. ZAAPPAAZ LLC et al.*, No. 4:20-cv-02717 (S.D. Tex. 2020), and *FTC v. American Screening Inc.*, No. 4:20-cv-1021 (E.D. Mo. 2020), <https://www.ftc.gov/news-events/press-releases/2020/08/ftc-acts-against-online-sellers-falsely-promised-fast-delivery>.

<sup>18</sup> FTC, *Coronavirus Scams: What the FTC is Doing*, available at <https://www.ftc.gov/coronavirus> and other resources available at <https://www.ftc.gov/coronavirus/scams-consumer-advice> <https://www.ftc.gov/coronavirus/resources>.

Voluntary Agreement governing cooperation among industry participants seeking to respond to the pandemic.<sup>19</sup> The purpose of the Agreement is to maximize the effectiveness of the manufacture and distribution of critical healthcare resources nationwide to respond to the pandemic. Organized under the authority granted by the Defense Production Act, participants to the Agreement receive antitrust immunity for actions taken to carry out the Agreement. Before the Agreement can become effective, however, the Attorney General must find that the purposes of the Agreement may not be achieved through a voluntary agreement having less anticompetitive effects. These efforts also have helped inform the Agencies' responses to business review letters seeking approval for cooperation in the production of critical health care products, as discussed below.

### 3.1. International Advocacy

17. U.S. enforcers also have been leveraging our existing bilateral relationships and ties to multilateral organizations, such as the International Competition Network (ICN) and the Organisation for Economic Co-operation and Development (OECD), to increase communication and cooperation.

18. In the immediate aftermath of the declaration of a state of national emergency in the United States, the Agencies played a key role in facilitating communication and cooperation among international enforcers by collecting and sharing on a regular basis rapidly developing information on how COVID-19 has impacted competition law enforcement efforts around the world. After DOJ successfully developed a regular internal process for collecting and disseminating this information, the ICN integrated this project into its ongoing work streams. In early April, as the economic impact of COVID-19 and possible enforcement challenges began to emerge, the ICN Steering Group issued a statement on key considerations related to competition law enforcement during and after the COVID-19 pandemic.<sup>20</sup> The Agencies contributed with the FTC serving as a lead drafter of the statement recognizing the importance of competition to economies in crisis and urging agencies to remain vigilant regarding anti-competitive conduct. The statement also calls for transparency of operational and policy changes during the crisis and advocates for competition as a guiding principle for economic recovery efforts in the aftermath of the pandemic.

19. Since spring 2020, the Agencies have participated in several virtual events hosted by the ICN, the OECD, and the United Nations Conference on Trade and Development on international cooperation, investigations and competition law policy in the wake of COVID-19.<sup>21</sup> In September 2020, the U.S. Agencies hosted the ICN 2020 Virtual Conference, which brought together enforcers from around the world to discuss antitrust developments, including how to address enforcement and policy challenges raised by COVID-19.

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<sup>19</sup> Press Release, FEMA, *FEMA Establishes Voluntary Agreement with Private Sector to Assist in Pandemic Response* (Aug. 17, 2020), <https://www.fema.gov/press-release/20200817/fema-establishes-voluntary-agreement-private-sector-assist-pandemic-response>.

<sup>20</sup> ICN Steering Group Statement: Competition during and after the COVID-19 Pandemic (Apr. 8, 2020), <https://www.internationalcompetitionnetwork.org/featured/statement-competition-and-covid19/>.

<sup>21</sup> See Aimee Imundo, *United States: Department of Justice, Americas Antitrust Review 2021* (Oct. 20, 2020), <https://globalcompetitionreview.com/review/the-antitrust-review-of-the-americas/2021/article/united-states-department-of-justice>.

### 3.2. Doctrinal Responses

20. While procedural aspects of the Agencies' work have changed as a result of COVID-19, the Agencies' view of key U.S. antitrust standards has not changed. The Agencies have reiterated that the antitrust laws are flexible enough to account for changing market conditions, even during uncertain times.<sup>22</sup>

21. In particular, the Agencies continue to take the view that the failing firm defense is "narrow in scope," and should be invoked selectively.<sup>23</sup> The Agencies have continued to reiterate in speeches and publications that they will not relax the stringent conditions that define a genuinely "failing" firm and continue to apply the test set out in the U.S. Horizontal Merger Guidelines<sup>24</sup> and reflected in our long-standing practice, and that they will require the same level of substantiation as was required before the COVID pandemic.<sup>25</sup> As such, while it is possible that more firms may fail as a result of an economic crisis such as COVID-19, the view of the United States is that economic dislocation, on its own, does not provide a compelling reason why the assets of failing firms should be purchased by close competitors.

### 3.3. Competition Advocacy

22. The Agencies are continuing to advocate for changes to regulations that may impede competition, which may cause even greater harm in the context of the COVID-19 crisis. For example, the Agencies have submitted multiple letters to state legislatures in recent years expressing their concerns over "certificate of need" laws<sup>26</sup> and other

<sup>22</sup> Ian Conner, Dir. of Bureau of Competition, Fed. Trade Comm'n, *Antitrust Review at the FTC: Staying the Course during Uncertain Times* (Apr. 6, 2020), <https://www.ftc.gov/news-events/blogs/competition-matters/2020/04/antitrust-review-ftc-staying-course-during-uncertain>.

<sup>23</sup> Contribution by the United States, *OECD Competition Committee Roundtable on Failing Firm Defense* (Oct. 6, 2009), <https://www.justice.gov/sites/default/files/atr/legacy/2011/05/05/270422.pdf>.

<sup>24</sup> U.S. Dep't of Justice & Fed. Trade Comm'n, *Horizontal Merger Guidelines* (Aug.19, 2010), Section 11, <https://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf>.

<sup>25</sup> Ian Conner, Dir. of Bureau of Competition, Fed. Trade Comm'n, *On "Failing" Firms – and Miraculous Recoveries* (May 27, 2020), <https://www.ftc.gov/news-events/blogs/competition-matters/2020/05/failing-firms-miraculous-recoveries>.

<sup>26</sup> Certificate of need (CON) laws require new entrants and incumbent providers to obtain state-issued approval before constructing new facilities or offering certain health care services. By interfering with the market forces that normally determine the supply of facilities and services, CON laws can suppress supply, misallocate resources, and shield incumbent health care providers from competition. Based on decades of law enforcement, research, and policy experience regarding the effects of provider concentration generally and CON laws in particular, the FTC has identified at least three serious problems with CON laws. First, CON laws create barriers to entry and expansion, which can increase prices, limit consumer choice, and stifle innovation. Second, incumbent firms can use CON laws to thwart or delay otherwise beneficial market entry or expansion by new or existing competitors. Third, CON laws can deny consumers the benefit of an effective remedy following the consummation of an anticompetitive merger. *See, e.g.,* FED. TRADE COMM'N & U.S. DEPT OF JUSTICE, *IMPROVING HEALTH CARE: A DOSE OF COMPETITION*, Ch. 8 (2004), <https://www.ftc.gov/sites/default/files/documents/reports/improving-health-care-dose-competition-report-federal-trade-commission-and-department-justice/040723healthcarerpt.pdf>; Joint Statement of the Antitrust Division of the U.S. Department of Justice and the Federal Trade Commission on Certificate-of-Need Laws and Alaska Senate Bill 62, 2-3 (2017), [https://www.ftc.gov/system/files/documents/advocacy\\_documents/joint-statement-federal-trade-commission-antitrust-division-us-department-justice-regarding/v170006\\_ftc-doj\\_comment\\_on\\_alaska\\_senate\\_bill\\_re\\_state\\_con\\_law.pdf](https://www.ftc.gov/system/files/documents/advocacy_documents/joint-statement-federal-trade-commission-antitrust-division-us-department-justice-regarding/v170006_ftc-doj_comment_on_alaska_senate_bill_re_state_con_law.pdf); Statement of the Fed. Trade Comm'n to the Alaska

restrictions on the availability of health care resources.<sup>27</sup> Given the extraordinary disruptions created by COVID-19, the United States views protecting the free functioning of health care markets as even more urgent, and the Agencies plan to continue our advocacy to remove regulatory impediments to competition in the health care sector.

23. Directly relating to the COVID-19 public health emergency, FTC staff submitted a comment to the Centers for Medicare & Medicaid Services (CMS) on its Interim Final Rule with Comment Period (IFC).<sup>28</sup> The FTC comment supported the IFC's provisions that reduce or eliminate restrictive Medicare payment requirements for telehealth and other communication technology-based services during the public health emergency. FTC staff noted that if telehealth practitioners' entry is limited or reimbursement requirements are overly restrictive, consumers' access to care and choice of practitioner might be unnecessarily restricted, especially in areas where there is a shortage of healthcare professionals. The IFC's rule would reduce restrictions on Medicare reimbursement for telehealth services. This is especially important, not only to enhance the use of telehealth to care for Medicare beneficiaries, but also to encourage private payers to expand the use of telehealth. Reducing or eliminating restrictions on reimbursement of telehealth services could potentially enhance competition, improve access and quality, and decrease health care costs in both the public and private sectors. By connecting widely separated providers and patients, telehealth can alleviate primary care and specialty shortages.

24. The FTC continues to advocate against states issuing certificates of public advantage (COPA). For example, in September 2020 FTC staff submitted a public comment opposing issuance of a COPA to the Texas Health and Human Services Commission. FTC staff expressed concern that the proposed merger at issue would lead to significantly less competition for healthcare services in Midwest Texas.<sup>29</sup>

25. The FTC and its staff have also analyzed potential competitive concerns associated with professional regulations in the health care sector, including licensure and scope of practice.<sup>30</sup> For example, FTC staff sent advocacy letters to the Texas Attorney General and

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Senate Comm. on Health & Soc. Servs. on Certificate of Need Laws (2019), [https://www.ftc.gov/system/files/documents/advocacy\\_documents/statement-federal-trade-commission-alaska-senate-committee-health-social-services-certificate-need/v0800007\\_commission\\_testimony\\_re\\_alaska\\_senate\\_committee\\_032719.pdf](https://www.ftc.gov/system/files/documents/advocacy_documents/statement-federal-trade-commission-alaska-senate-committee-health-social-services-certificate-need/v0800007_commission_testimony_re_alaska_senate_committee_032719.pdf).

<sup>27</sup>Letter from Bilal Sayyed, Dir., Office of Policy Planning, Fed. Trade Comm'n, & Daniel E. Haar, Acting Chief, Competition Policy & Advocacy, Antitrust Div., U.S. Dep't of Justice, to Martin Daniel, Rep., Tenn. House of Representatives (Mar. 7, 2019); Letter from Bilal Sayyed, Dir., Office of Policy Planning, Fed. Trade Comm'n, & Daniel E. Haar, Acting Chief, Competition Policy & Advocacy, Antitrust Div., U.S. Dep't of Justice, to the Hon. David, Wilson, Alaska Senate (Mar. 11, 2019); Letter from Robert Potter, Chief, Competition Policy & Advocacy Section, Antitrust Div., U.S. Dep't of Justice, to Dan K. Morhaim, Delegate, Maryland House of Delegates (Sept. 10, 2018).

<sup>28</sup> Letter from FTC Staff to CMS (May 28, 2020), <https://www.ftc.gov/policy/advocacy/advocacy-filings/2020/05/ftc-staff-letter-centers-medicare-medicaid-services>.

<sup>29</sup> FTC Staff Comment to Texas Health and Human Services Commission (Sept. 11, 2020), <https://www.ftc.gov/news-events/press-releases/2020/09/ftc-staff-submits-public-comment-texas-opposing-certificate>.

<sup>30</sup> See, e.g., Prepared Statement of the Federal Trade Commission on Competition and Occupational Licensure, Before the Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the H. Comm. on the Judiciary, 115<sup>th</sup> Cong. (2017). (contributed to drafting), [https://www.ftc.gov/system/files/documents/public\\_statements/568171/140716professionallicensurehouse.pdf](https://www.ftc.gov/system/files/documents/public_statements/568171/140716professionallicensurehouse.pdf); FTC Staff Comment on New York's Proposal to Allow Licensure by Endorsement of Canadian Dental Licenses (2018), [https://www.ftc.gov/system/files/documents/advocacy\\_documents/ftc-staff-comment-new-yorks-proposal-allow-](https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-new-yorks-proposal-allow-)



the Texas Medical Board relating to regulations that could harm competition by impeding access to surgical and other health care services provided by certified registered nurse anesthetists.<sup>31</sup> FTC staff recommended that Texas maintain only CRNA supervision requirements that advance patient protection and avoid adopting regulations that impede CRNA practice.

26. DOJ hosted a virtual joint workshop with the USPTO in July 2020 that included debate on the role of innovation and public-private collaboration in responding to the COVID-19 pandemic.<sup>32</sup> The workshop, entitled “Promoting Innovation in the Life Science Sector and Supporting Pro-Competitive Collaborations: The Role of Intellectual Property,” comprised 10 sessions over two days. Panelists included leading figures from industry, government agencies, prominent research labs, the non-profit sector, academia, and the broader legal and economic community. Members of the public were also able to submit questions throughout the event.

#### 4. Facilitation of Cooperative Public and Private-Sector Efforts to Resolve the Crisis

27. The Agencies are working together to bolster the recovery by providing guidance relating to recovery-related collaborations on an expedited basis.<sup>33</sup> In a joint statement in April, the Agencies emphasized the potential importance of pro-competitive collaborations between private firms to bring essential goods and services to communities in need. In addition to providing high-level collaboration guidelines consistent with previous DOJ and FTC policies, the statement contained guidance specific to COVID-related business activities, including reaffirming that the Agencies will account for exigent circumstances in evaluating collaborative efforts to address the spread of COVID-19, and that medical providers’ development of suggested practice parameters to assist in clinical decision-making will not be challenged, absent extraordinary circumstances.<sup>34</sup>

28. The Agencies also announced an expedited business review letter program, under which all COVID-19-related requests will receive responses within seven calendar days of the Agencies receiving all necessary information. This expedited process for COVID-related business review letters is an outgrowth of the Agencies’ role in advising other executive branch agencies on facilitating COVID-related cooperation within the antitrust laws, and each of the letters issued through the expedited process in 2020 addresses

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<sup>31</sup> FTC Staff Comment to Attorney General of Texas (Sept. 11, 2020), <https://www.ftc.gov/news-events/press-releases/2020/09/ftc-comment-texas-attorney-general-raises-concerns>.

<sup>32</sup> U.S. Dep’t of Justice, *Promoting Innovation in the Life Science Sector and Supporting Pro-Competitive Collaborations: The Role of Intellectual Property*, <https://www.justice.gov/atr/promoting-innovation-life-science-sector-and-supporting-pro-competitive-collaborations-role>.

<sup>33</sup> U.S. Dep’t of Justice & Fed. Trade Comm’n, *Joint Antitrust Statement Regarding COVID-19* (Mar. 24, 2020), [https://www.ftc.gov/system/files/documents/public\\_statements/1569593/statement\\_on\\_coronavirus\\_ftc-doj-3-24-20.pdf](https://www.ftc.gov/system/files/documents/public_statements/1569593/statement_on_coronavirus_ftc-doj-3-24-20.pdf).

<sup>34</sup> *Id.* at 1.

proposed conduct that is critical to COVID-19 response. Since March 2020, DOJ has issued the following four expedited business review letters:

1. A letter approving a collaboration by McKesson Corporation, Owens & Minor Inc., Cardinal Health Inc., Medline Industries Inc., and Henry Schein Inc to expedite and increase manufacturing for the distribution of personal protective equipment (PPE) and coronavirus-treatment-related medication in a way unlikely to lessen competition;<sup>35</sup>
  2. A letter approving a collaboration by AmerisourceBergen with FEMA, HHS, and other government entities to “identify global supply opportunities, ensure product, quality, and facilitate product distribution of medications and other healthcare supplies to treat COVID-19 patients;”<sup>36</sup>
  3. A letter approving a collaboration by Eli Lilly and Company, AbCellera Biologics, Amgen, AstraZeneca, Genentech, and GSK to “exchange limited information about the manufacture of monoclonal antibodies that may be developed to treat COVID-19” in order to optimize COVID-19 vaccine production as part of Operation Warp Speed;<sup>37</sup> and
  4. A letter approving a collaboration by the National Pork Producers Council (NPPC) and the U.S. Department of Agriculture (USDA) “to address certain hardships facing hog farmers as a result of the COVID-19 pandemic.”<sup>38</sup>
29. The Agencies also pledged to expedite the processing of filings under the National Cooperative Research and Production Act, which provides flexible treatment of certain standards development organizations and joint ventures under the antitrust laws.

## 5. Revised Rules Regarding Merger Enforcement

30. The Agencies have adapted to changing work conditions and reallocated resources to maintain continuity of core operations and enforcement efforts. COVID-19 initially necessitated temporary changes to ensure the continuation of expeditious and thorough merger review.<sup>39</sup> Changes made by both Agencies include (1) extending standard timing agreement provisions so that the post-compliance period runs for sixty to ninety days (instead of thirty days) for pending or proposed transactions that may be subject to a Second

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<sup>35</sup> Press Release, U.S. Dep’t of Justice, *Department of Justice Issues Business Review Letter to Medical Supplies Distributors Supporting Project Airbridge Under Expedited Procedure for COVID-19 Pandemic Response* (Apr. 4, 2020), <https://www.justice.gov/opa/pr/department-justice-issues-business-review-letter-medical-supplies-distributors-supporting>.

<sup>36</sup> Letter from Makan Delrahim, Ass’t Att’y Gen. for Antitrust, U.S. Dep’t of Justice, to John G. Chou, Executive Vice President, AmerisourceBergen Corporation (Apr. 20, 2020), <https://www.justice.gov/atr/page/file/1269911/download>.

<sup>37</sup> Letter from Makan Delrahim, Ass’t Att’y Gen for Antitrust, U.S. Dep’t of Justice, to Thomas O Barnett, Covington & Burling (July 23, 2020), <https://www.justice.gov/atr/page/file/1297161/download>.

<sup>38</sup> Press Release, U.S. Dep’t of Justice, *Department of Justice Supports National Pork Producers Council’s Ability to Combat Meat Shortage* (May 15, 2020), <https://www.justice.gov/opa/pr/department-justice-supports-national-pork-producers-council-s-ability-combat-meat-shortage>.

<sup>39</sup> Ian Conner, Dir. of Bureau of Competition, Fed. Trade Comm’n, *Changes in Bureau Procedure During COVID-19 Coronavirus Pandemic* (Mar. 16, 2020), <https://www.ftc.gov/news-events/blogs/competition-matters/2020/03/changes-bureau-procedure-during-covid-19-coronavirus>.

Request, (2) requiring all merger filings with the FTC and DOJ to be submitted via the FTC's electronic filing system, and (3) committing to conducting all meetings and depositions by phone or video conference when possible, absent extenuating circumstances.<sup>40</sup> For the initial period of only two weeks at the start of the COVID crisis, the Agencies also suspended the granting of early termination, which can shorten the waiting period for non-problematic mergers. The option of early termination was resumed in March, and timing of grants of early termination has returned to pre-pandemic levels.<sup>41</sup>

31. Notably, COVID-19 did not sideline other important efforts to improve the Agencies' enforcement programs. Among other efforts, in June 2020, the Agencies for the first time issued joint Vertical Merger Guidelines.<sup>42</sup> In September, the Division also issued a modernized Merger Remedies Manual. As an update to the 2004 edition, the new manual provides "greater transparency and predictability regarding the Division's approach to remedying a proposed merger's competitive harm," including an emphasis on structural remedies and a renewed focus on enforcing consent decree obligations. The Division also has continued to follow through on its September 2018 commitment to modernize banking merger review, with the goal of expedited and efficient resolution for uncomplicated merger matters.<sup>43</sup> Economic downturns, as often occur in the wake of disasters such as the COVID-19 crisis, may impact merger activity, which is why continuing to improve the Agencies' approach to reviewing and remedying potentially anticompetitive mergers remains a priority.

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<sup>40</sup> Daniel Francis, Dep. Dir. of Bureau of Competition, Fed. Trade Comm'n, *The Hearing May be Virtual, but the Rules are the Same* (Aug. 14, 2020), <https://www.ftc.gov/news-events/blogs/competition-matters/2020/08/hearing-may-be-virtual-rules-are-same>. Press Release, U.S. Dep't of Justice, *Justice Department Announces Antitrust Civil Process Changes for Pendency of COVID-19 Event* (Mar. 17, 2020), <https://www.justice.gov/opa/pr/justice-department-announces-antitrust-civil-process-changes-pendency-covid-19-event>.

<sup>41</sup> Ian Conner, Dir. of Bureau of Competition, Fed. Trade Comm'n, *Resuming Early Termination of HSR Reviews* (Mar. 27, 2020), <https://www.ftc.gov/news-events/blogs/competition-matters/2020/03/resuming-early-termination-hsr-reviews>.

<sup>42</sup> Press Release, Federal Trade Comm'n, *FTC and DOJ Issue Antitrust Guidelines for Evaluating Vertical Mergers* (Jun. 30, 2020), <https://www.ftc.gov/news-events/press-releases/2020/06/ftc-doj-issue-antitrust-guidelines-evaluating-vertical-mergers>.

<sup>43</sup> Press Release, U.S. Dep't of Justice, *Antitrust Division Seeks Public Comments on Updating Bank Merger Review Analysis* (Sept. 1, 2020), <https://www.justice.gov/opa/pr/antitrust-division-seeks-public-comments-updating-bank-merger-review-analysis>.