



Antitrust ADVISORY ■

APRIL 6, 2020

Production and R&D Joint Ventures in a Pandemic: Reducing Antitrust Risk

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Coordinated response efforts—even in response to a pandemic like COVID-19—raise questions about what businesses are able to do [without running afoul of the antitrust laws](#). The U.S. Department of Justice Antitrust Division (DOJ) and Federal Trade Commission (FTC) [issued a joint statement](#) recognizing that “[a]ddressing the spread of [COVID-19] will require unprecedented cooperation ... among private businesses to protect American’s health and safety.” In addition to highlighting some specific types of “collaborative activities designed to improve the health and safety response to the pandemic [that] would be consistent with the antitrust laws,” the DOJ and FTC also vowed to “work to expeditiously process filings under the National Cooperative Research and Production Act [NCRPA].” While seldom used, an NCRPA filing can provide firms looking to form a joint venture a way to reduce antitrust risk.

The [NCRPA](#) was designed to provide flexible treatment under the antitrust laws to promote innovation and trade. The NCRPA originally applied to certain research and development (R&D) and production joint ventures. It was amended by the [Standards Development Organization Act of 2004](#) and now applies to standard development organizations (SDOs) as well. R&D and production joint ventures and SDOs engaged in a broad array of activities may file notifications under the NCRPA. Types of covered activities include:

- **R&D joint ventures.** The collection, exchange, and analysis of research or production information; testing in connection with the production of a product, process, or service; and theoretical analysis, experimentation, or systematic study of phenomena or observable facts, among others.
- **Production joint ventures.** The production of a product, process, or service; related testing; or the collection, exchange, and analysis of research or production information.¹

¹ A joint venture for production is not eligible to file a notification unless: (1) “the principal facilities for such production are located in the United States or its territories”; and (2) each person who controls the joint venture “is a United States person or a foreign person from a country whose law accords antitrust treatment no less favorable to United States persons than to such country’s domestic persons with respect to participation in joint ventures for production.”

- **Standard development organizations.** Planning, developing, establishing, or coordinating voluntary consensus standards through processes and procedures outlined by the Office of Management and Budget Circular A-119.

NCRPA Basics

The NCRPA provides three benefits to those who qualify:

- Application of “rule of reason” analysis to covered joint ventures and SDOs, rather than the more stringent per se rule, which makes certain conduct automatically illegal and risks criminal penalties. The rule of reason analysis requires the antitrust authorities and courts to balance the potential procompetitive benefits of an agreement against any potential anticompetitive harm.
- Limits damages for certain entities to actual monetary damages if the venture is challenged, as opposed to treble damages that are traditionally available in federal and state antitrust actions.
- Allows a joint venture or SDO that prevails over frivolous or bad-faith antitrust cases filed against them to recover attorneys’ fees.

Application of the rule of reason and the attorneys’ fee provisions are automatic. But to avoid the threat of treble damages in any antitrust action, an entity must file a notification with the DOJ and FTC within 90 days of entering the joint venture. Notifications must include the identity and activities of the joint venture or SDO, as well as a description of the nature and objectives of any venture or SDO, and, for production ventures, the location of the venture’s principal production facilities. If there are changes to the venture or SDO, supplemental notifications must be filed with the DOJ and FTC within 90 days to continue to receive the detrebling protections of the Act.

There are no filing fees associated with NCRPA notifications, and properly filed and complete applications are published in the *Federal Register*. The DOJ maintains a [webpage](#) with information on the process for filing notifications under the NCRPA and exemplars of the notices published in the *Federal Register*.

Application to COVID-19 Collaborations

Shortly after the law was passed, the NCRPA was lauded by the health care industry as providing “[health care joint ventures’ industrial strength’ antitrust relief](#).” But the NCRPA has not been used frequently—there were just 203 filings pursuant to the Act between 2007 and 2016. In today’s environment, however, with companies needing to move at breakneck speed to respond to various demands of our current crisis, knowing that a newly formed joint venture can enjoy certain, automatic protections may be a welcome relief. To be sure, while the NCRPA offers some protections for certain competitor collaborations, its benefits do not provide a means for covered joint ventures or SDOs to escape antitrust liability altogether.

The NCRPA, through certain antitrust review processes and potential immunities, can provide protection to companies seeking to work together and form joint ventures to respond to the coronavirus pandemic. The ability to bring together scientists and engineers from competing firms to collaborate, share data, and combine resources through R&D joint ventures may help companies respond more efficiently to growing

needs for innovative solutions. Combining resources and sharing best practices through a production joint venture may help to solve some of the burgeoning shortages of life-saving equipment and medical supplies that are needed to help respond to the crisis at hand.

The news is full of examples of competitors working together to help respond to the COVID-19 pandemic, in some instances through partnerships developed or supported by the federal government, as is the case for Project Airbridge, a venture between large medical product suppliers/wholesalers and two major shipping companies. Around the time last week when its participants were coordinating with the White House coronavirus task force, the medical supply distributors requested an antitrust review under the new expedited procedures the DOJ and FTC announced on March 24 for analyzing coronavirus-related collaborations. On April 4, 2020, the DOJ issued its [first business review letter](#) under those procedures, stating it did not intend to challenge Project Airbridge's activities under the federal antitrust laws. But for companies wishing to partner together without government facilitation or even the expedited business review procedures, competitor collaborations may still find some level of antitrust protection through the NCRPA. Regardless of whether you intend to take advantage of the NCRPA or file an NCRPA notification, it is critical that you consult with antitrust counsel before collaborating with your competitors to evaluate various antitrust risks and potential protections from them.

Alston & Bird has formed a multidisciplinary [task force](#) to advise clients on the business and legal implications of the coronavirus (COVID-19). You can [view all our work](#) on the coronavirus across industries and [subscribe](#) to our future webinars and advisories.

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