April 7, 2020

DOJ Issues Expedited Antitrust Guidance Regarding COVID-19 Equipment and Medication Distribution Collaboration

On April 4, the Department of Justice (DOJ) issued a business review letter stating that it does not intend to challenge a collaboration among several medical supplies distributors "to expedite and increase manufacturing, sourcing, and distribution of personal-protective equipment . . . as well as medication to treat COVID-19 patients." This is the first business review letter issued in accordance with the recent DOJ/FTC Joint Antitrust Statement Regarding COVID-19, which we discussed in a prior memorandum. The issuance of the letter demonstrates the DOJ's commitment to the expedited review process whereby the DOJ has stated that it 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." As we wrote previously, this process provides an opportunity for firms to gain clarity regarding the agencies' views of business collaborations related to COVID-19, including those involving competitors, on a significantly accelerated timetable.

According to the business review letter, the collaboration at issue involves five distributors who are responding to government agencies' requests that "distributors . . . use their industry expertise and contacts to address PPE supply chain shortages, in addition to applying their expertise to evaluate potential laboratory and medication supply issues." This includes working with FEMA and the Department of Health and Human Services (HHS) to help in addressing supply bottlenecks, identifying supply sources, monitoring demand, and expediting distribution. As such, the business review letter notes that the "primary collaborative activity in these areas occurs at the direction of, and in the presence of FEMA, HHS, other government entities, and their agents" and includes the participation of the DOJ Antitrust Division. The distributors have committed to follow certain safeguards with respect to conduct that may have an effect on competition. As part of its analysis, the DOJ notes that "[c]onduct by federal agencies is not subject to scrutiny under the antitrust laws" and that "[c]ourts have extended this immunity to conduct by private parties acting individually or together" when the conduct is compelled by an agreement with the government and a federal agency "supervises the conduct." In alignment with the earlier Joint Antitrust Statement, the DOJ also noted that conduct may be "consistent with the antitrust laws" when it is necessary to provide products that would not otherwise be available.

The business review letter makes clear that it is limited to conduct related to the "government's efforts to guide PPE and medications to the places they are needed most." The letter also notes that the "circumstances that led to this request are exceptionally pressing and unlikely to recur frequently."

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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