

CLIENT ALERT

DOJ Approves Group Purchasing Activities that Fall Outside “Antitrust Safety Zone”

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The Department of Justice (“DOJ”) Antitrust Division recently released a [business review letter](#) (“BRL” or “letter”) approving the expansion of the American Optometric Association’s (“AOA”) group purchasing activities even though the proposed expansion fell outside of the “antitrust safety zone,” implicated products that will be re-sold to consumers, and involved joint activity by competing group members. The letter serves as a helpful reminder about the types of group purchasing activities that are permissible, as well as the safeguards that group purchasing organizations can implement to ensure that their activities result in efficiencies and promote competition.

Background

The AOA had requested a written opinion from the DOJ regarding the AOA’s proposed expansion of group purchasing organization (“GPO”) activities, which would involve joint price negotiations for optometric products, such as contact lenses, frames, and glasses, that AOA members sell to consumers. Under the proposed expansion of activities, the AOA’s GPO agent would engage in negotiations for optometric products that AOA members could sell to consumers, in hopes that the group could achieve lower pricing and allow AOA’s members to better compete with the other healthcare providers and retail outlets that sell these products.

DOJ Analysis

The DOJ utilized the framework from Statement 7 of the 1996 *Statements of Antitrust Enforcement Policy in Health Care* (the “Health Care Statements”), which sets forth an “antitrust safety zone” when (1) the group’s joint purchases account for less than 35% of total sales in the relevant market for the purchased products, and (2) the aggregate cost of the products purchased jointly accounts for less than 20% of total revenues from all products or services sold of each competing participant.

Here, the DOJ concluded that the first prong was satisfied but not the second prong. Nonetheless, the DOJ found that the AOA’s proposed expansion of its GPO activities incorporated three safeguards referenced in the Health Care Statements: (1) not requiring GPO participants to make any of their optometric purchases through the GPO; (2) utilizing a third party to negotiate prices with the GPO’s suppliers; and (3) keeping communications between the GPO and each individual participant regarding price confidential from other GPO participants.

The DOJ concluded that the presence of all three safeguards demonstrated that the GPO’s expanded activities were designed to achieve lower costs and promote competition. The letter also concluded that the expanded GPO would be unlikely to raise collusion concerns for two additional reasons: (1) other GPOs for optometric products exist, and thus the proposed GPO would not significantly increase the standardization of costs; and (2) the significant competition – in the form of large retail stores, online channels, other healthcare providers, and vertically-integrated manufacturers – that would help to defeat any attempt by the GPO to raise prices.

Takeaways

The AOA business review letter underscores two key points:

- (1) The agencies are unlikely to challenge GPOs that employ appropriate safeguards ensuring that each members' participation is voluntary, negotiations are conducted by a third party, and competitively sensitive information regarding individual participants is kept confidential; and
- (2) The presence of significant remaining competition in the relevant market will likely be a key factor in any analysis regarding the likelihood of anticompetitive effects from competitor collaborations such as joint purchasing activities.

Organizations operating or considering implementing or expanding joint purchasing activities should consider these safeguards to ensure that the activities are appropriately geared to the realization of procompetitive efficiencies.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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