crowell moring

CLIENT ALERT

DOJ Continues Expedited Approval of COVID-19 Related Competitor Collaborations

Apr.24.2020

Earlier this week, the U.S. Department of Justice issued a business review letter approving a competitor collaboration intended to accelerate and increase the manufacture, sourcing, and distribution of medications and other healthcare supplies needed to treat COVID-19 patients. This is the second business review letter that the DOJ has issued under the expedited process created to review COVID-19-related competitor collaborations. The DOJ's business review letters provide helpful guidance for companies considering participating in a competitor collaboration designed to help reduce the health and economic harm caused by COVID-19.

Overview of DOJ and FTC Joint Statement Regarding COVID-19 Competitor Collaborations

Recognizing that "[a]ddressing the spread of [COVID-19] will require unprecedented cooperation . . . among private businesses," the DOJ and Federal Trade Commission recently announced the establishment of an expedited process for completing any requested review of a proposed competitor collaboration intended to help minimize the harm caused by the COVID-19 pandemic. Under this expedited process, the agencies committed to completing their antitrust review of such competitor collaborations within seven days of receiving all necessary information. In shortening a process that typically takes several months down to one week, the agencies indicated that providing companies with prompt guidance on whether a proposed collaboration exposes them to an antitrust enforcement action was necessary because "businesses are trying to address a rapidly evolving crisis as quickly as possible" and are often being called upon to assist with the government's response to this crisis.

In addition to establishing this expedited process, the agencies' joint statement highlighted several key principles that will guide their assessment of whether a proposed collaboration raises any antitrust concerns:

- The agencies recognize that joint ventures and collaborations may be necessary to "bring goods to communities in need, to expand existing capacity, or to develop new products or services" needed during the COVID-19 crisis.
- The agencies recognize that many types of collaborations "designed to improve the health and safety response" to COVID-19 are typically consistent with the antitrust laws. Such procompetitive joint ventures and collaborations include:
    - "Most joint purchasing arrangements among healthcare providers, such as those designed to increase the efficiency of procurement and reduce transaction costs."
    - The sharing of technical know-how rather than company-specific data about prices, wages, outputs, or costs.
    - Healthcare "providers' development of suggested practice parameters – standards for patient management developed to assist providers in clinical decisionmaking."
    - Research and development collaborations.
    - Private lobbying addressed to the use of federal emergency authority, including meetings with government officials to discuss strategies to respond to COVID-19.

- The agencies recognize that healthcare facilities may need to collaborate to provide "resources and services to communities without immediate access to personal protective equipment, medical supplies, and health care," and that other businesses may need to "temporarily combine production, distribution, or service networks."
- The joint statement emphasizes that the scope and duration of COVID-19 collaborations should be limited to addressing the needs of patients, consumers, and communities during the COVID-19 crisis and its aftermath.
- The joint statement reiterates that the agencies will bring enforcement actions against collaborations that restrain competition by increasing prices, lowering wages, decreasing output, reducing quality, or excluding competitors.

DOJ's Recent Business Review Letters Approving COVID-19 Competitor Collaborations

Since the agencies announced their expedited review process about a month ago, the DOJ has issued two business review letters approving COVID-19-related competitor collaborations in the healthcare industry.

On April 4, 2020 (a Saturday), the DOJ issued a business review letter approving a competitor collaboration among several major distributors of medical equipment and medications that is intended to help the federal government's efforts to "expedite and increase manufacturing, sourcing, and distribution" of personal-protective equipment (PPE) for medical professionals and first responders and medications used to treat COVID-19 patients. On April 20, 2020, the DOJ issued another business review letter approving a competitor collaboration proposed by a distributor of medical equipment and medications that is "focused on facilitating the government's efforts to guide medications and other healthcare supplies to the places where they are needed most [during COVID-19 crisis]."

The DOJ relied on the following factors to support its conclusion that the unique procompetitive benefits presented by the proposed collaborations outweighed any potential antitrust concerns:

- **Federal Government's Response to COVID-19 Would Greatly Benefit from the Proposed Collaborations:** The DOJ concluded that the proposed collaborations would significantly aid the federal government's efforts to respond to the COVID-19 pandemic because "[a]ddressing potential disruptions to the global medical supply is central to the U.S. Government's effort to save American lives and livelihoods from the destructive effects of COVID-19."
- **Proposed Collaborations Would Involve Significant Government Oversight and Involvement:** Relying on well-established precedent, the DOJ stated that it will not prosecute COVID-19 related competitor collaborations where (i) the collaboration is "compelled by an agreement with a federal agency or a clearly defined federal government policy" and (ii) a federal agency supervises the conduct. The DOJ concluded that most of the proposed collaborative activity falls within this framework because (i) the participating companies would be acting pursuant to agreements with the federal government (*i.e.,* the Federal Emergency Management Agency (FEMA) and Department of Health and Human Services (HHS)), (ii) federal government agencies would be actively directing and supervising the collaborative conduct, and (iii) any joint decisions regarding prices, wages, output, quality, bids or allocations would only occur if directed by a federal agency.
- **Proposed Collaborations Would Provide Significant Benefits to Patients and Healthcare Providers:** The DOJ concluded that the proposed collaborations "offer unique procompetitive benefits under the exigent circumstances presented by COVID-19 that outweigh any hypothetical anticompetitive harm." For instance, the proposed collaborations would help "FEMA and HHS identify and quality new sources of supply" for PPE and medications, which would help "save lives and

limit the tremendous damage physically and economically the pandemic is causing." The collaborations would also help FEMA and HHS distribute medical supplies in a more efficient and effective manner to COVID-19 hotspots.

- **Proposed Safeguards Adequately Protect Against Competitive Risks Created by Collaborative Conduct Outside Government Oversight:** The DOJ concluded that the participating companies also adequately addressed the competitive risks presented by any collaborative activity that does not include any government oversight by instituting safeguards that have the effect of ensuring that such activity will be "specifically intended to further U.S. government policy and efforts" related to COVID-19, and will not allow the companies to "increase prices, reduce output, reduce quality, or otherwise engage in COVID-19 profiteering" or improperly exchange competitively sensitive information that could be used to harm competition and consumers during or after the crisis. Moreover, the DOJ noted that the proposed collaborations will be terminated as soon as the federal government no longer needs assistance in responding to COVID-19.
- **Other Potential Protections from Antitrust Liability:** The DOJ noted that the participating companies' collaborative activity could potentially be immune from the antitrust laws under the *Noerr-Pennington* doctrine to the extent that this activity seeks "to influence FEMA's, HHS's, and other governmental agencies' decisions regarding the U.S. Government's policy of expediting health and medical resources in response to COVID-19." The DOJ also noted that the participating companies' collaborative activity could be immune from the antitrust laws if imposing antitrust liability would "disrupt" or be "repugnant" to FEMA and HHS's regulatory authority and decisionmaking with respect to responding to the exigent circumstances presented by the COVID-19 pandemic.

Key Takeaways

The business review letters discussed above suggest that the DOJ will promptly approve a COVID-19-related competitor collaboration where the collaboration:

- seeks to limit the health and economic harm caused by the COVID-19 crisis by, for example, addressing any potential disruption to the efficient distribution of medical supplies and medicines;
- is compelled by a governmental contract/program or is being undertaken at the request of government agencies as part of their COVID-19 response;
- will include significant government involvement and oversight of the parties' collaborative activity;
- offers unique procompetitive benefits that cannot be effectively and efficiently achieved absent the proposed collaboration;
- includes safeguards that prevent the participating companies from using the collaboration to increase prices, reduce output, lower quality and innovation, or otherwise engage in COVID-19 profiteering;
- limits information exchanges to bilateral exchanges between a collaborator and the government, or otherwise does not involve the unnecessary exchange of competitively sensitive information (especially forward-looking information) between collaborators that could harm competition and consumers during or after the COVID-19 crisis; and
- will be terminated once its intended purpose of assisting with the COVID-19 response is achieved.

While the FTC has yet to issue a Competition Advisory Opinion regarding a proposed COVID-19 competitor collaboration, one would expect that the FTC will make every effort to reach similar decisions in order to ensure that companies receive consistent

guidance about their antitrust exposure while trying to respond to a rapidly evolving crisis and assist in the government's efforts to minimize the health and economic harm caused by COVID-19.

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

Juan A. Arteaga
Partner – New York, Washington, D.C.
Phone: +1 212.803.4053
Email: jarteaga@crowell.com

Alexis J. Gilman
Partner – Washington, D.C.
Phone: +1 202.624.2570
Email: agilman@crowell.com

Ryan C. Tisch
Partner – Washington, D.C.
Phone: +1 202.624.2674
Email: rtisch@crowell.com