MINTZ

U.S. Department of Justice Issues First COVID-19-Related Business Review Letter to Medical Supplies Distributors

April 06, 2020 | Blog | By **Bruce D. Sokler**, **Joseph M. Miller**, **Tinny T. Song**

VIEWPOINT TOPICS

- Antitrust
- COVID-19

RELATED PRACTICES

- Antitrust

RELATED INDUSTRIES

Back in March, we wrote a **blog post** regarding the FTC and DOJ's joint statement on antitrust guidance for COVID-19 public health efforts. As part of the press release, the Agencies announced that companies could request an expedited staff opinion on requests for review of collaborative COVID-19-related business efforts. The Agencies would endeavor to respond to all requests within seven business days.

On Saturday, the DOJ issued its **first business review letter**, allowing to come to fruition a joint effort by McKesson, Owens & Minor, Cardinal Health, Medline, and Henry Schein (the "Medical Supplies Distributors") to expedite and increase manufacturing, sourcing, and distribution of personal-protective equipment (PPE) and COVID-19-related medication. The Medical Supplies Distributors' request letter is available **here**, and provides an in-depth description of the anticipated collaborative efforts among the parties. According to the letter, FEMA and HHS asked the Medical Supplies Distributors to 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."

Faced with this request, and the COVID-19 pandemic, generally, the parties proposed a number of collaborative efforts directed toward addressing PPE and laboratory supply shortages, as well as potential medication disruptions. Interestingly, many of the proposed actions are more general than specific, but are noted to be proposed "at the direction of, and in the presence of FEMA, HHS, and other government entities and their agencies." Those actions include:

- Help FEMA, HHS, and foreign governments address bottlenecks with our existing foreign suppliers;
- Help FEMA and HHS identify and qualify new sources of supply;
- Help FEMA and HHS identify and monitor areas of increased demand for supplies and medications;
- Help expedite distribution of supplies and medications to FEMA-designated COVID-19 hotspots;
- Help FEMA and HHS understand competitive prices for these supplies and medications;
- Help FEMA and HHS negotiate competitive prices, through bilateral communication with FEMA;
- Provide FEMA and HHS with data necessary to do the above;
- Provide FEMA and HHS with claims data and data otherwise requested by FEMA; and
- Other related activities to manufacture, source, and distribute medications and healthcare products as directed by FEMA, HHS, or additional government agencies.

One such project noted to already be underway was referred to as Project Airbridge, a partnership between U.S. healthcare distributors and the U.S. government to quickly bring large quantities of medical supplies to the country. The parties noted that attorneys from the DOJ's Antitrust Division have been involved in regular communications with the federal agencies organizing Project Airbridge, and in many cases directly observe the associated collaborative activity. Nevertheless, while the Medical Supplies Distributors proposed to engage in the conduct directly with FEMA or other government agencies, they also noted that the fast-moving nature of the COVID-19 crisis will require them to engage in the proposed actions when government representatives are not directly participating.

According to the DOJ **response**, it does not intend to challenge the Medical Supplies Distributors' proposed joint efforts. Recognizing that the COVID-19 pandemic "will require unprecedented cooperation between federal, state, and local government and among private business to protect Americans' health and safety," the Department acknowledged that coordinated efforts such as those proposed by the parties may be a "necessary response to exigent circumstances that provide Americans with products or services that might not be available otherwise."

The DOJ noted that the antitrust laws do not apply to private parties acting together when (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; such conduct is, in reality, the product of the federal agency decision-making and not the private parties' anticompetitive agreement. The Department concluded that the proposed joint effort fits within this two-part framework. First, the parties would be acting pursuant to agreements with FEMA, which has broad authority to implement policies in response to the spread of COVID-19. Second, FEMA and its agents will be actively directing and supervising their conduct.

Moreover, per the FTC/DOJ Competitor Collaboration Guidelines, to the extent the parties collaborate without direct agency supervision, the Department will evaluate actions under the rule of reason. Specific to COVID-19, the Department concluded that the proposed conduct and similar conduct offers "unusually strong" procompetitive benefits that outweigh any hypothetical anticompetitive harm. The Medical Supplies Distributors' proposed collaborations "may well increase the supply of and access to PPE at a time when supply shortages could threaten the health and safety of millions of Americans" and "limit the tremendous damage physically and economically the pandemic is causing." The Department is satisfied that the risk of anticompetitive harm is low, as the proposed collaborations are limited in scope and duration to addressing the pandemic and will not involve the exchange of competitively sensitive information. Additionally, the parties have committed to follow several safeguards to further lower the risk of anticompetitive harm:

- Any collaboration between the Medical Supplies Distributors is specifically intended to further U.S. government policy and efforts;
- The Medical Supplies Distributors will not use any collaboration to increase prices, reduce output, reduce quality, or otherwise engage in COVID-19 profiteering;
- If FEMA, HHS, other government entities, or their consultants and designees request any competitively sensitive information from any of the Medical Supplies Distributors, McKesson, Cardinal, OMI, Medline, and Henry Schein each will make all reasonable efforts to share this information only with the requesting government agency, and not with any other party or competitor;
- The Medical Supplies Distributors' collaborations are limited to the "time period necessary to assist FEMA and other government agencies in responding to COVID-19 shortages;"
- Upon resolution of the COVID-19-related disruptions and the disbanding of the related U.S. Government response initiatives, the Medical Supplies Distributors will formally dissolve this competitor collaboration and immediately notify the Department, in writing;
- The Medical Supplies Distributors will commit to work with the Department to determine appropriate sequestration of competitively sensitive material that was produced during the collaboration period.

Finally, the DOJ noted that other antitrust doctrines may support the proposed collaborations. For example, efforts by the parties to jointly influence FEMA's, HHS's, or other governmental agencies' decisions in response to COVID-19 will likely be covered by *Noerr-Pennington* immunity. Additionally, parties may benefit from implied immunity where application of the antitrust laws would "disrupt" or be "repugnant" to the regulatory scheme established by FEMA or HHS in response to the pandemic.

Now that the DOJ has issued its first business review letter under the expedited COVID-19 review process, companies have more guidance and insight into how antitrust regulators in the United States view COVID-19-related collaborations. Should you have any questions about this, about filing a request for a business review letter, or any other antitrust or competition law question, please feel free to contact any of the attorneys listed above.

Authors

Bruce D. Sokler, Member / Co-chair, Antitrust Practice

Bruce D. Sokler is a Mintz antitrust attorney. His antitrust experience includes litigation, class actions, government merger reviews and investigations, and cartel-related issues. Bruce focuses on the health care, communications, and retail industries, from start-ups to Fortune 100 companies.

Joseph M. Miller, Member / Co-chair, Antitrust Practice

Joseph M. Miller is Co-chair of Mintz's Antitrust Practice. He draws on in-house, law firm, and government experience to advise clients on transactions, government investigations, and merger reviews.

Tinny Song

More Viewpoints

Federal Trade Commission and Justice Department Release Joint Antitrust Guidance for COVID-19 Public Health Efforts

March 25, 2020 | Blog | By **Bruce Sokler**, **Joseph Miller**

Read more