Alert

March 27, 2020

COZEN O'CONNOR

Antitrust Agencies Offer COVID-19 Guidance and Warnings to Competitor Collaborations

On March 24, the Antitrust Division of the Department of Justice (the Division) and the Bureau of Competition of the Federal Trade Commission (the Bureau) released a joint statement pertaining to the enforcement of competition laws during the COVID-19 pandemic. Although both the Division and Bureau already offer review/comment processes for proposed cooperative conduct, the agencies will now resolve **all** COVID-19-related requests as well as public health/safety issues, within **seven calendar days of receiving all necessary information**. This marks a substantial acceleration in review time, but places added pressure on companies to provide information quickly to facilitate any review.

The expedited COVID-19 procedure offers quicker review than existing FTC and DOJ programs that are designed to provide guidance to businesses concerned about the legality of proposed conduct under the antitrust laws. The FTC's "Staff Advisory Opinion" procedure and DOJ's "Business Review Letter" procedure allow any firm, individual, or group of firms or individuals to submit a proposal to the agencies and to receive a statement advising whether the agencies would challenge the proposed cooperative activity under the antitrust laws.

For entities that need to take immediate action in the wake of COVID-19, the agencies provided several examples of collaborative actions that would not violate the antitrust laws. These include collaboration on research and development, sharing technical know-how, and various standards for patient management in the health care context. Additionally, the agencies reiterated that most joint purchasing agreements in the health care context generally do not violate the antitrust laws as they increase procurement efficiency while reducing final transaction costs.

Outside of the health care context, the agencies note that other businesses may need to "temporarily combine production, distribution, or service networks" to bolster supply chains related to COVID-19 products. The agencies do not provide any type of blanket protection for these agreements, but note that joint efforts that are "limited in duration and necessary to assist patients, consumers, and communities affected by COVID-19" may be required as part of an overall public health response to the epidemic.

In addition to the above guidance, the agencies also included the following important warning to companies looking to cooperate in the current environment:

> While many individuals and businesses have and will demonstrate extraordinary compassion and flexibility in responding to COVID-19, others may use it as an opportunity to subvert competition or prey on vulnerable Americans. The Division and the Bureau will not hesitate to seek to hold accountable those who do so. In particular, the Division and the Bureau stand ready to pursue civil violations of the antitrust laws, which include agreements between individuals and business to restrain competition through increased prices, lower wages, decreased output, or reduced quality as well as efforts by monopolists to use their market power to engage in exclusionary conduct. The Division will also prosecute any criminal violations of the antitrust laws, which typically involve agreements or conspiracies between individuals or businesses to fix prices or wages, rig bids, or allocate markets.

As companies confront a host of new challenges to their businesses, exploring various forms of cooperation could present opportunities to meet these unique circumstances. Cooperative arrangements like joint ventures and information exchange/benchmarking exercises with competitors illustrate just a few examples that could allow for increases in efficiency and benefits to consumers. But the antitrust laws are intricate, and the line between pro-competitive and illegal conduct under these laws is highly dependent on the details. This is true even for good faith efforts

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to reduce health risks to company employees or making sure businesses have the financial strength and resources to weather the COVID-19 storm.

As a general guide, below is a brief overview of the U.S. antitrust laws, and a discussion of some of the more common antitrust issues encountered by businesses under this law.

The "Per Se" Violations

Section 1 of the Sherman Act (15 U.S.C. § 1) prohibits any agreement among competitors that unreasonably restrains competition. The Supreme Court uses two types of analyses to determine the lawfulness of activities under the Sherman Act: *per se* and Rule of Reason. *Per se* agreements are so likely to harm competition and to have no significant pro-competitive effect that they are presumed to be illegal without consideration of any evidence that the agreement might have a legitimate business purpose. As noted in the joint statement's warning, types of agreements held *per se* illegal include agreements among competitors to fix prices or output, rig bids, or share or divide markets by allocating customers, suppliers, or territories.

Per se agreements are the most likely to result in substantial antitrust penalties. To avoid *per se* violations, businesses should adhere to the following basic guidelines:

- Do not agree on, and avoid even discussing, commercially sensitive topics with competitors, such as prices, pricing procedures, costs, customer lists, discounts, profits, credit terms, or production levels.
- Do not agree with any competitors to refuse to sell to certain customers, serve only some areas, or buy from only certain suppliers.
- Note that an "agreement" is the essence of a Section 1 violation. But an agreement does not have to be written or specifically stated. It can also be oral or inferred from conduct, surrounding circumstances, and documents such as notes, minutes, and memoranda.
- Do not notify other companies prior to reducing prices, establish or agree on uniform price increases or discounts, or agree to maintain floor prices.
- For all contracts that require competitive bidding, limit the number of people in your firm who are familiar with the bid terms. The fewer people in your firm who know the bid terms, the less likely sensitive information will be disclosed to a competitor.

The Rule of Reason: Joint Ventures and Information Exchanges

All other agreements under Section 1 of the Sherman Act are evaluated under the Rule of Reason, which involves a factual inquiry into an agreement's overall competitive effect. Examples of agreements that are typically evaluated under the Rule of Reason analysis include joint ventures and information exchanges.

Joint Ventures are one of the most perplexing areas of antitrust law. Federal antitrust agencies have acknowledged that joint ventures are often pro-competitive, allowing companies to combine their expertise to make better use of their assets. Indeed, the joint statement acknowledges there could be an immediate need for pro-competitive cooperatives to address specific COVID-19 issues. On the other hand, joint ventures can create the opportunity for collusion, enhance market power, or eliminate potential competition in the marketplace. Below are a few tips for keeping joint ventures lawful:

- Carefully evaluate the potential anti-competitive harms of the agreement. Does it reduce the parties' ability or incentive to compete independently, create barriers for other competitors to compete, or increase the parties' ability to raise prices or reduce production, service quality, or technical innovation?
- Be prepared to provide a business justification for any joint venture. Does the agreement allow the parties to serve more customers, bring services to customers faster or cheaper, or combine assets or use them more efficiently?
- Avoid oral or informal joint ventures. Consider using letters of intent to define the scope of the joint venture, as well as each party's specific responsibilities.
- Consider the term of the proposed joint venture. The shorter the duration, the more likely the parties will compete against each other in the future.

In the context of COVID-19, businesses may also need to exchange information or best practices

with other companies on their policies and practices, business continuity plans, telework or "shelter-in-place" policies, travel restrictions, or more fundamental market intelligence on supply and demand trends or other business challenges resulting from this crisis. Information exchange agreements are also judged under the Rule of Reason standard because these agreements have the potential to assist companies in better understanding the marketplace, reducing operational costs, making more informed business decisions, and competing more effectively. But — even now — any agreement or understanding among competitors to disclose or exchange certain data or information can still present the presumption of an antitrust violation, depending on the specific data exchanged, the method of disclosure, and what companies ultimately do with the information once it's shared.

In 2016, the DOJ released guidance for HR professionals on how the U.S. antitrust laws apply to workplace decisions, employee hiring, and compensation practices. On information exchanges, the DOJ guidelines note that an exchange among companies may be lawful if: (1) a neutral third party manages the exchange, (2) the exchange involves information that is relatively old (i.e., at least three months old), (3) the information is aggregated to protect the identity of the underlying sources, and (4) enough sources are aggregated to prevent competitors from linking particular data to an individual source.

Below is some additional guidance on keeping information exchanges lawful include:

- Identify a clear objective and pro-competitive basis for the information exchange up front.
- Never enter into agreement *based on* the information exchanged. This could constitute a *per se* violation of Section 1 of the Sherman Act.
- The exchange of data and information that is publicly available is generally permissible.
- While one-on-one exchanges are not necessarily unlawful, they present greater risk because data cannot be anonymized or aggregated.
- Never exchange any data regarding future pricing, discounts, marketing approaches, or costs.
- Limit oral discussions relating to the data exchanged. Do not impose any monitoring or tracking mechanisms to see how each party individually uses the information and data obtained in the exchange.
- Any best practices must be voluntary. Each company must be able to decide for itself whether adoption of a best practice is in the best individual interests of its company and employees.

A Note on Antitrust Immunity

As the U.S. government seeks to finalize its stimulus relief package and adopt other measures to contain the spread of this virus and help U.S. businesses cope with the aftermath, the ability of businesses to communicate effectively with the U.S. government will be critical. In the United States, any joint private efforts to influence government officials to take or not take legislative, administrative, or regulatory action are generally immune from the antitrust laws. This immunity extends to most judicial and administrative proceedings as well. However, the activities involved must genuinely be intended to influence government action, and any collaborative efforts deemed to be a sham could be subject to antitrust penalties.

In addition, there are a number of statutory and regulatory provisions that offer limited antitrust immunity to specific industries. Many of these industries are facing unique and unprecedented challenges in the current crisis, including airlines, ocean transportation companies, railroads, motor carriers, agricultural cooperatives, and export trade groups may be afforded certain degrees of immunity. Multi-employer labor groups are also afforded antitrust immunity in limited circumstances. Importantly, the DOJ/FTC joint statement released this week is focused on limited activities (particularly in health care) that would directly address urgent COVID-19 problems, but it specifically does not immunize all cooperative business activities that attempt to respond to the commercial consequences of the virus. For this reason, companies that benefit from some limited antitrust immunity should be careful to continue to operate and cooperate within the specific structures of those immunity regimes, and should not assume that either DOJ or FTC have given even these distressed industries broad authority to cooperate in ways that the agencies would normally view as prohibited.

Cozen O'Connor is ready to assist companies to take advantage of the relief being offered by the DOJ and FTC and to ensure that all their business practices (even those in response to critical efforts to respond to the COVID-19 crisis) comply with the antitrust laws. For our clients, we have formed a multidisciplinary COVID-19 Task Force to help guide you through the various legal issues presented in the current environment.