CLIENT ALERT

DOJ AND FTC ANNOUNCE EXPEDITED ANTITRUST REVIEW PROCEDURE AND GUIDANCE IN RESPONSE TO COVID-19

by L. Pahl Zinn and Jeremy Belanger

On March 24, 2020, the Antitrust Division of the U.S. Department of Justice ("DOJ") and the Bureau of Competition of the Federal Trade Commission ("FTC") released a Joint Antitrust Statement Regarding COVID-19 (the "Joint Statement") to announce expedited guidance and review of proposed collaborations between competitors[1] or antitrust compliance issues arising as part of the response to COVID-19. With health care providers and services specifically in mind, the agencies' ambitious goal is to respond to all COVID-19 requests within seven calendar days of receiving "all necessary information."

When businesses, particularly competitors, seek to engage in any collaboration, it can implicate Section 1 of the Sherman Act. One way to obtain antitrust guidance on a particular collaboration is to submit a request to the DOJ's Business Review Process or the FTC's Advisory Opinion Process (Review Processes). Recognizing that COVID-19 may "require unprecedented cooperation between . . . and among private businesses to protect Americans' health and safety," the agencies released the Joint Statement as a reminder of previous antitrust guidance on collaborations between competitors.

Recognizing that the Review Process can take months or longer, the agencies outline an expedited business review process for proposed collaborations in response to COVID-19. This is not a process that automatically applies by requesting a review; the expedited review needs to be specifically requested in writing and needs to include the following:

1. A description as to how it relates to COVID-19;
2. A description of the nature and rationale of the proposal (including the participants, the products or services provided under the proposal, and any temporal and geographic limitations);
3. Any proposed contractual or other arrangements among the parties (including copies of the operative documents);
4. Identification of major expected customers (e.g., hospitals, manufacturers of equipment, etc.);
5. Any available information regarding the competitive significance of other providers of the products or services (for example, if two hospitals were to collaborate on sharing services, they would need to identify who the other competitors in the market are and what their market share is); and
6. The name and contact information of a person that can provide additional information.

The request for the expedited review must be sent via email to ATR.COVID19@DOJ.GOV. Any additional information needed or requested can also be submitted via email or, at the agencies' discretion, orally. Because these expedited reviews are intended to be limited to responding to the emergency situation related to COVID-19, the statement of the agencies' intention to not enforce the antitrust laws against a proposed collaboration is limited to one year from the date the agencies respond to the request. If further time were needed, a new request would need to be submitted.

In addition, the agencies offer reminders of certain guidelines which, if met and absent extraordinary circumstances, generally safeguard collaborations from antitrust scrutiny. The previous guidelines include collaborations related to Health Care, Information Exchange, and Collaborations Among Competitors. Relevant to responding to COVID-19, the Joint Statement identifies certain instances where collaborations adhering to these guidelines offer a pathway to help businesses who have to act quickly:

- Research and development collaborations are typically procompetitive;
- Sharing technical know-how may be necessary for certain collaborations to "achieve [their] pro-competitive benefits";
- Absent extraordinary circumstances, collaboratively developing patient management standards to assist in clinical decision-making;
- Joint purchasing arrangements consistent with the safety zones among health care practices; and
- Private lobbying efforts consistent with *Noerr-Pennington* doctrine[2], including lobbying the government for federal emergency relief.

Notably, the agencies reiterate their dedication to enforcing against collaborations among competitors that are "naked" agreements to restrain trade, such as agreements to increase prices, share information related to prices, wages, or costs, fix prices or wages, rig bids, or allocate markets or customers.

Many states are releasing directives meant to address public health concerns, particularly related to concerns over having sufficient personnel or equipment for health care entities. For example, on March 30, 2020, the Governor of the State of Michigan released an Executive Order, E.O. 2020-30, which among other directives, permits the personnel of one health facility to be used by another facility. While this may address issues related to access to care, if the practice is the result of an agreement or collaboration between competitors such as hospitals, then it can implicate the federal antitrust law. While recognizing that facilities may need to share resources and services, there is no "safe passage" for such conduct in the Joint Statement and health care providers are wise to consult with legal counsel.

Dickinson Wright's health care and antitrust attorneys have considerable experience in assisting businesses in complying with the various requirements of state, federal, and local laws and requirements.

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[1] Under Section 1 of the Sherman Act, "[e]very contract, combination . . ., or conspiracy, in restraint of trade or commerce . . . is declared illegal." 15 U.S.C. 1. Section 2 prohibits monopolizing, attempts to monopolize, or conspiracies to monopolize "any part of trade or commerce." 15 U.S.C. 2. The penalties for violating the Sherman Act are steep and can include a fine up to $100,000,000 for a corporation or $1,000,000 for an individual, imprisonment up to 10 years, or both. Additionally, there can be civil penalties up to three times the amount of damages.

[2] *Noerr-Pennington* offers antitrust immunity to certain types of conduct by private parties who petition or solicit governmental actions which could result in restrictions on competition. It is born from a series of antitrust cases arising from the intersection of free speech and antitrust law in the context of various governmental branches.