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Antitrust Guidance for Business Collaborations to Combat COVID-19

On March 24, the Federal Trade Commission (FTC) Bureau of Competition and the Department of Justice (DOJ) Antitrust Division issued a Joint Antitrust Statement Regarding COVID-19 providing guidance and expedited procedures for reviewing collaborations between businesses working to advance health and safety during the COVID-19 pandemic. The Joint Statement emphasizes that "there are many ways firms, including competitors, can engage in procompetitive collaboration" without violating the antitrust laws. In light of the pandemic, the agencies have announced an aim to "respond expeditiously to all COVID-19-related requests, and to resolve those addressing public health and safety within seven (7) calendar days of receiving all necessary information." This provides an opportunity for firms to gain clarity regarding the agencies' views of business collaborations related to COVID-19, including those involving competitors, on a significantly accelerated timetable.

In this memorandum, we discuss the agencies' Joint Statement as well as the agencies' roles with respect to potential collaborations under two relevant federal laws: the Defense Production Act and the Pandemic and All-Hazards Preparedness Act. These laws provide limited antitrust immunity under certain conditions when the federal government is involved in the collaboration.

Guidance

In the Joint Statement, the agencies acknowledge that the unprecedented nature of the COVID-19 pandemic may require competitors to work together to protect public health and safety. While collaborations among competitors can raise serious issues under the antitrust laws, in the Joint Statement the agencies, in line with longstanding guidance, continue to recognize that several types of collaborative activities are generally "consistent with the antitrust laws." These include various arrangements of particular relevance to the current situation, including: collaboration on research and development, sharing of "technical know-how," and joint purchasing agreements and other arrangements among healthcare providers.

Collaborations Necessary to Provide Certain Products and Services Related to COVID-19

The Joint Statement explicitly recognizes that "health care facilities may need to work together in providing resources and services to communities without immediate access to personal protective equipment, medical supplies, or health care." The Joint Statement also recognizes that certain firms "may need to temporarily combine production, distribution, or service networks to facilitate production and distribution of COVID-19-related supplies they may not have traditionally manufactured or distributed" in order to produce

products or provide services "that might not be available otherwise." Therefore, the agencies "will also account for exigent circumstances in evaluating" these collaborations. Key to the agencies' evaluation of the arrangement is the necessity of the collaboration in providing the products or services in question.

This is consistent with the agencies' views on the potential for pro-competitive benefits of collaborations outlined in their existing *Antitrust Guidelines for Collaborations Among Competitors*. These guidelines, issued in 2000, state that "a competitor collaboration may enable participants to offer goods or services that are cheaper, more valuable to consumers, or brought to market faster than would be possible absent the collaboration" and that "two firms may be able to combine their research or marketing activities to lower their cost of bringing their products to market, or reduce the time needed to develop and begin commercial sales of new products."

The March 24 Joint Statement also references the agencies' 1996 *Statements of Antitrust Enforcement Policy in Health Care* and states that the agencies "will not challenge, absent extraordinary circumstances, providers' development of suggested practice parameters – standards for patient management developed to assist providers in clinical decisionmaking – that also may provide useful information to patients, providers, and purchasers." The Joint Statement also notes that "most joint purchasing arrangements among healthcare providers, such as those designed to increase the efficiency of procurement and reduce transaction costs, do not raise antitrust concerns."

Expedited Procedures for Agency Review of Proposed Conduct

Recognizing that some firms will want to know the agencies' views on a particular proposed course of conduct related to efforts to combat COVID-19, both the FTC and DOJ are implementing expedited review procedures for their existing advisory programs. The DOJ, through its business review letter program, and the FTC, through its staff advisory opinion program, provide enforcement guidance to businesses on proposed conduct. The agencies said they will respond to COVID-19-related review requests within seven calendar days of receiving the necessary information and will "resolve those addressing public health and safety" within that timeframe. Requesting parties generally will be required to provide detail on timing, scope, geography, any contractual arrangements, a list of customers, and any information on the competitive significance of the request in addition to an explanation how they are related to COVID-19. The agencies' responses to such requests will be in effect for one year from the date of the response.

Reminder Regarding Common Types of Antitrust Violations

Not surprisingly, the FTC and DOJ were careful to remind individuals and businesses not to exploit COVID-19 as an opportunity to engage in the types of conduct that are otherwise common types of antitrust violations. They recognized that "[w]hile 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." Accordingly, they warned that the FTC and DOJ

"will not hesitate to seek to hold accountable those who do so." These types of conduct 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 DOJ also underscored that it "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 we have described in prior communications, the DOJ and other federal agencies are particularly focused on detecting and prosecuting anticompetitive conduct by companies involved in government procurement.

Defense Production Act

In the Joint Statement, the agencies also state that they "stand ready to assist" other government agencies under the Defense Production Act of 1950 (DPA). Among other things, the DPA authorizes the President to "require that performance under contracts or orders . . . which he deems necessary or appropriate to promote the national defense shall take priority over performance under any other contract or order, and, for the purpose of assuring such priority, to require acceptance and performance of such contracts or orders in preference to other contracts or orders by any person he finds to be capable of their performance." The Act also authorizes the President "to allocate materials, services, and facilities in such manner, upon such conditions, and to such extent as he shall deem necessary or appropriate to promote the national defense."

Furthermore, under the Act, the President may "control the general distribution of . . . material in the civilian market," but only upon a finding "that such material is a scarce and critical material essential to the national defense" and "that the requirements of the national defense for such material cannot otherwise be met without creating a significant dislocation of the normal distribution of such material in the civilian market to such a degree as to create appreciable hardship." In a March 18, 2020 executive order, the President found "that health and medical resources needed to respond to the spread of COVID-19, including personal protective equipment and ventilators" meet these criteria and designated authority to the Secretary of Health and Human Services with respect to these resources.

Beyond these actions already taken, and relevant to the issue of competitor collaborations, the DPA provides that "[u]pon finding that conditions exist which may pose a direct threat to the national defense or its preparedness programs, the President may consult with representatives of industry, business, financing, agriculture, labor, and other interests in order to provide for the making by such persons, with the approval of the President, of voluntary agreements and plans of action to help provide for the national defense."

There are multiple ways in which the DOJ and FTC may assist other government agencies under the DPA. The Act requires that the Attorney General or his delegate and the Chairman of the FTC or his delegate to participate in meetings where these voluntary agreements are developed. In addition, the DPA requires that if the President delegates authority with respect to voluntary agreements, the designee must consult with

the Attorney General and the FTC, and obtain approval of the Attorney General before engaging with businesses for the purposes of facilitating the contemplated agreements. The Act also requires the President's designee to establish "rules . . . incorporating standards and procedures by which voluntary agreements and plans of action may be developed and carried out" to be approved by the Attorney General after consultation with the Chairman of the FTC. The "voluntary agreement or plan of action may not become effective unless and until . . . the Attorney General (after consultation with the Chairman of the Federal Trade Commission) finds, in writing, that such purpose may not reasonably be achieved through a voluntary agreement or plan of action having less anticompetitive effects or without any voluntary agreement or plan of action." The Act requires the Attorney General and the Chairman of the FTC to monitor any voluntary agreements or plans of action.

Importantly, the DPA provides for a defense against federal and state civil and criminal antitrust actions against certain conduct if, among other things: the action was taken to develop the voluntary agreement or plan; or taken to carry out the agreement or plan, but only if "the action was specified in, or was within the scope of, an approved voluntary agreement." The defense is not "available unless the President or the President's designee has authorized and actively supervised the voluntary agreement or plan of action." The defense is also not available if "the action was taken for the purpose of violating the antitrust laws."

Pandemic and All-Hazards Preparedness Act

The Joint Statement also indicates that the DOJ and FTC are ready to work with other government agencies in accordance with the Pandemic and All-Hazards Preparedness Act. This law allows the Secretary of Health and Human Services "in coordination with the Attorney General and the Secretary of Homeland Security" to meet and consult with businesses "engaged in the development of . . . a qualified pandemic or epidemic product . . . for the purpose of the development, manufacture, distribution, purchase, or storage" of such a product. (Generally, a qualified pandemic or epidemic product is a drug, biologic or device used for treatment related to a pandemic or epidemic.) In addition to the businesses involved, the meeting is open to the Attorney General and the Chairman of the FTC. Participation in such a meeting or consultation itself, if conducted in accordance with the requirements of the Act, "shall not be a violation of the antitrust laws."

Conduct under agreements arising from these meetings or consultations may be exempt from the federal antitrust laws under certain conditions. Among other things, the agreement must be submitted to the Attorney General and Chairman of the FTC. The Attorney General, in consultation with the Chairman, decides whether to grant the request for exemption within fifteen business days (which may be extended by ten business days). The Attorney General, in consultation with the Chairman of the FTC and the Secretary of Health and Human Services, must find that the conduct "will not have any substantial anticompetitive effect that is not reasonably necessary for ensuring the availability of the . . . product involved." Any exemption is narrowly tailored to the covered agreement, and businesses may still be subject to antitrust liability for conduct not reasonably necessary to carry out the agreement or not expressly covered by the

exemption. Among other things, "[e]ntering into any agreement or engaging in any other conduct restricting or setting the price at which a . . . product is offered for sale" is not covered by the Act.

Conclusion

Businesses contemplating engaging in collaborations with competitors or potential competitors should seek antitrust counsel. The federal antitrust agencies have in place useful, relevant guidance on how the antitrust laws would apply to collaborations to combat the COVID-19 pandemic, and various federal laws – under certain narrow conditions – would provide limited antitrust exemptions and defenses. The new procedures announced by the DOJ and FTC may allow businesses seeking to respond to the COVID-19 pandemic through collaborations to gain clarity regarding the agencies' views of such practices on an expedited basis.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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