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## DOJ completes its first expedited antitrust review of collaborative efforts by businesses to respond to COVID-19

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As we recently [reported](#), the U.S. Federal Trade Commission (FTC) and Department of Justice (DOJ) announced an expedited antitrust procedure to provide guidance to businesses seeking to collaborate to protect the health and safety of Americans during the COVID-19 pandemic. Since then, some businesses have used the procedure and received quick guidance.

On April 4, 2020, the DOJ issued a Business Review Letter<sup>1</sup> to multiple medical supplies distributors—McKesson Corporation, Owens & Minor Inc., Cardinal Health Inc., Medline Industries Inc., and Henry Schein Inc. The medical supplies distributors submitted a letter five days earlier, requesting an antitrust review of their collaborative efforts to expedite and increase manufacturing, sourcing, and distribution of medications and personal protective equipment (PPE), including masks, gowns, gloves, and other equipment intended to protect first responders and other medical professionals against infection while responding to the COVID-19 pandemic. The DOJ's Business Review Letter explains its decision not to challenge those collaborative efforts.

### Collaborative efforts proposed by the medical supplies distributors

The medical supplies distributors proposed to collaborate with, and at the direction of, federal agencies, particularly the Federal Emergency Management Agency (FEMA) and the U.S. Department of Health and Human Services (HHS), to:

- Help address bottlenecks with our existing foreign suppliers
- Help identify and qualify new sources of supply
- Help identify and monitor areas of increased demand for supplies and medications
- Help expedite the distribution of supplies and medications to FEMA-designated COVID-19 hotspots

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<sup>1</sup>Available at <https://www.justice.gov/atr/page/file/1266511/download> (last visited Apr. 8, 2020).

- Help understand competitive prices for these supplies and medications
- Help negotiate competitive prices, through bilateral communication with FEMA
- Provide FEMA and HHS with data necessary to do the activities identified above
- Provide FEMA and HHS with claims data and data otherwise requested by FEMA
- Help with other related activities to manufacture, source, and distribute medications and health care products as directed by FEMA, HHS, or additional government agencies

### **Key aspects of the collaborative efforts**

The medical supplies distributors agreed to the following conditions with respect to their collaborative efforts:

- They will not collaborate to fix prices, reduce output, reduce quality, or engage in profiteering.
- They will take all reasonable efforts to ensure that any competitively sensitive business information requested by the federal government will not be shared with each other or competitors.
- The proposed collaborative efforts are limited to the time period necessary to assist federal agencies in responding to PPE shortages resulting from the COVID-19 pandemic.

### **Key reasons for DOJ’s decision**

- Most importantly, the DOJ concluded that the proposed collaborative efforts satisfy the general rule that the DOJ will not challenge conduct by private parties acting individually or 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.” Therefore, it is significant that the medical supplies distributors will act pursuant to agreements with, and will be supervised by, the federal government.
- The DOJ found that the proposed collaborative efforts likely do not raise competitive issues. The “procompetitive aspects of any arrangement far outweigh any potential harm” because the “proposed conduct is limited in scope and duration, necessary to address COVID-19-related scarcity, and will not extend beyond what is required to facilitate the availability of needed supplies.”
- The DOJ also noted that the collaborative efforts might be subject to other antitrust exemptions and immunities. For example, the *Noerr-Pennington* doctrine will protect certain collaborative efforts related to petitioning the government, and “implied immunity” will protect certain collaborative efforts when application of the antitrust laws might “disrupt” or be “repugnant” to regulatory authority responding to the COVID-19 pandemic.

### **Takeaways for other businesses**

- The DOJ’s Business Review Letter for the medical supplies distributors demonstrates that its expedited antitrust procedure can result in quick guidance in response to at least some COVID-19-related requests.
- Businesses considering collaborative efforts to respond to COVID-19 should consult with antitrust counsel to evaluate whether they are consistent with antitrust laws and to consider whether a submission to the FTC or DOJ using the expedited review procedure would be

appropriate.

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