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Department of Justice Approves Cooperation Among U.S. Healthcare Competitors That Distribute Personal Protective Equipment in an Effort to Help Combat COVID-19

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On April 4, 2020, the United States Department of Justice (DOJ) Antitrust Division issued a business review letter to McKesson Corporation, Owens & Minor, Inc., Cardinal Health, Inc., Medline Industries, Inc., and Henry Schein, Inc., permitting them to cooperate with each other regarding the supply of vital supplies used to treat Coronavirus Disease 2019 (COVID-19). The business review letter was issued pursuant to the expedited review process set forth in the Joint Federal Trade Commission (FTC)-DOJ Antitrust Statement Regarding COVID-19 dated March 24, 2020. The DOJ's business review letter was issued only five days after the parties' request letter was submitted on March 30. In their joint statement, the FTC and DOJ recognized that businesses may need to temporarily combine production, distribution, or service networks to facilitate production and distribution of COVID-19-related supplies that they may not have traditionally manufactured or distributed. These sorts of joint efforts, the agencies concluded, are limited in duration and are necessary to assist patients, consumers, and communities affected by COVID-19 and its aftermath, and may be a necessary response to exigent circumstances that provide Americans with products or services that might not be otherwise available.

The FTC-DOJ joint statement further concluded that such collaborative activity is frequently procompetitive in nature, and would not otherwise violate the antitrust laws, such as:

- Collaborating on research and development, which can result in efficiency-enhancing integration of economic activity;
- Sharing technical know-how, rather than company-specific data about prices, wages, outputs, or costs, which may be necessary to achieve the procompetitive benefits of certain collaboration;
- Developing suggested practice parameters – standards for patient management developed to assist providers in clinical decision-making – that also may provide useful information to

patients, providers, and purchasers;

- Participating in joint purchasing arrangements among healthcare providers, such as those designed to increase the efficiency of procurement and reduce transaction costs; and

- Lobbying addressed to the use of federal emergency authority, including private industry meetings with the federal government to discuss strategies on responding to COVID-19.

The parties had requested clarification from DOJ that their proposed efforts to expedite and increase manufacturing, sourcing, and distribution of personal-protective equipment (PPE) — including masks, gowns, gloves, and other equipment intended to help protect first responders and other medical community members infection related to COVID-19, as well as medication to treat COVID-19 patients – would not lead to antitrust enforcement by the agencies. DOJ Assistant U.S. Attorney General Makan Delrahim, who authored the letter, explained the favorable decision, highlighting that these efforts came in response to the unprecedented COVID-19 pandemic and its aftermath, and that the parties involved are cooperating with the federal government in facilitating the supply of PPE and medications to the places where such items are needed. Specifically, the requesting parties identified the following types of activities that might occur with, and at the direction of, the federal government:

- Help FEMA, HHS, and foreign governments address bottlenecks with 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 these efforts;

- Provide FEMA and HHS with claims data and data otherwise requested by FEMA; and

- Engage in other related activities to manufacture, source, and distribute medications and healthcare products as directed by FEMA, HHS, or additional government agencies.

Employing well-developed “Rule of Reason” joint-venture analysis, which generally mirrored the approach taken by the FTC and DOJ in their 2000 “Antitrust Guidelines for Collaborations Among Competitors,” Delrahim concluded that the proposed activities would be procompetitive. In his conclusion, he cited the involvement of the federal government and that the activity also would likely be protected under the Noerr-Pennington “petitioning immunity” exemption and the implied immunity doctrine.

In approving the proposed conduct, however, Delrahim did require that the parties adhere to several safeguards, to which the requesting parties agreed. Among them:

- Any collaboration between the requesting parties must be specifically intended to further federal policy and efforts;
- Joint activities of the requesting parties cannot function 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 requesting parties, those parties will make all reasonable efforts to limit the disclosure of this information only with the requesting government agency, and not share it with any other requesting party or competitor;
- The requesting parties' joint activities would be 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 related federal response initiatives, the requesting parties formally will dissolve this competitor collaboration and immediately so notify the DOJ, in writing; and
- The requesting parties will commit to work with DOJ to determine appropriate sequestration of competitively-sensitive material that was produced during the collaboration period.

Finally, the joint statement notes that collaboration outside of the COVID-19 pandemic would not be covered by the DOJ business review letter. The review letter is in effect for one year but can be extended at the request of the parties.

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