

DOJ Will Not Challenge COVID-19 Response Distribution Collaboration

Article By:

Katharine O'Connor

Ashley McKinney Fischer

Anthony S. Ferrara

DOJ is open to companies collaborating outside of the presence of government to find creative solutions to combat COVID-19 as long as they commit to adequate antitrust safeguards.

IN DEPTH

The United States Department of Justice Antitrust Division (DOJ) has issued a second [Business Review Letter](#) pursuant to the [expedited review process](#) it announced on March 24, 2020 to review conduct related to COVID-19 within seven days. The letter released on April 20, 2020 issued to AmerisourceBergen Corporation, which follows a [letter issued last week to medical/surgical distributors](#), again shows DOJ is open to creative solutions that combat COVID-19, especially when those solutions are “focused on facilitating the government’s efforts” to get medical supplies where they are needed most.

The Business Review Letter states that DOJ has no present intention to challenge AmerisourceBergen’s collaboration with federal government agencies, including FEMA and HHS and other private sector distributors to ensure supply and facilitate distribution of medications and other healthcare products to treat COVID-19 patients.

KEY TAKEAWAYS FOR BUSINESSES

DOJ is likely to view conduct undertaken at the direction of and in conjunction with government agencies positively. Even where private companies collaborate outside the presence of government representatives to address coronavirus-related challenges, DOJ is likely to view that collaboration favorably if the companies commit to adequate antitrust safeguards. Appropriate safeguards include making reasonable efforts to limit the flow of competitively sensitive information between competitors, committing not to increase prices or reduce output, and limiting the collaboration to COVID-19-related purposes. Businesses should also limit their collaboration to the time period necessary to respond to the relevant COVID-19 challenges.

Antitrust enforcers at the state level have [recently expressed concern](#) about companies using the excuse of lingering coronavirus issues as a way to continue collaborating, and companies should take care not to pursue collaborations longer than reasonably necessary.

THE CONDUCT AT ISSUE

AmerisourceBergen's request stated that it is making various efforts to identify global supply opportunities, ensure product quality and facilitate distribution of medications and other healthcare supplies to treat COVID-19 patients.

AmerisourceBergen is making these efforts in response to requests from federal government agencies, as part of a collaborative process with the federal government and other private sector companies. For example, AmerisourceBergen, along with other distributors, is helping FEMA distribute hydroxychloroquine from the Strategic National Stockpile to FEMA-designated COVID-19 hotspots. AmerisourceBergen is also gathering data at FEMA's request to help the agency identify medications critical to combating COVID-19 and to prevent shortages of such medications.

AmerisourceBergen explained that while it will engage in much of this conduct directly with government agencies, it will need to engage in some of the proposed conduct with other distributors without agency representatives present.

AmerisourceBergen has committed to abiding by several safeguards when agency representatives are not present. For example, AmerisourceBergen stated that any competitor-collaboration would be "specifically intended to further US government policy and efforts." AmerisourceBergen also stated that it would not use the collaboration "to increase prices, reduce output, reduce quality or otherwise engage in COVID-19 profiteering." The company further promised to limit the information it shares with or seeks from competitors and to "sequester[e] . . . competitively sensitive material that was produced during the collaboration period" once the collaboration is over.

DOJ INDICATES THE CONDUCT IS LAWFUL

In its Business Review Letter, the DOJ indicated that AmerisourceBergen's proposed conduct is lawful under antitrust principles and is procompetitive.

DOJ explained that much of AmerisourceBergen's proposed conduct is directed and supervised by federal agencies, and thus is immune from scrutiny under the antitrust laws. For example, FEMA has directed AmerisourceBergen to distribute medications from the Strategic National Stockpile to locations designated by FEMA. In this context, AmerisourceBergen "is simply an instrumentality transporting products owned by the US Government to locations designated by the U.S. Government on terms dictated by the US Government."

DOJ also concluded that AmerisourceBergen's proposed collaboration with other distributors, outside the presence of government representatives, is lawful so long as the distributors abide by the safeguards outlined in AmerisourceBergen's request letter. DOJ noted that this collaboration offers "unusually strong" procompetitive benefits, including increasing the short-term supply of medications and other supplies from the Strategic National Stockpile at a time when those products are needed most. DOJ concluded that the procompetitive benefits of the proposed conduct "far outweigh" any potential anticompetitive harm, especially given the safeguards to which AmerisourceBergen has committed.

DOJ also noted that certain aspects of AmerisourceBergen's proposed conduct may be allowed under the *Noerr-Pennington* doctrine, which allows competitors to collaborate in petitioning the government to take a particular action, or under implied immunity from the antitrust laws, which immunizes conduct where application of the antitrust laws would "disrupt" a government regulatory scheme.

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National Law Review, Volume X, Number 115

Source URL: <https://natlawreview.com/article/doj-will-not-challenge-covid-19-response-distribution-collaboration>