

# COVID-19: WARNING FROM THE U.S. DEPARTMENT OF JUSTICE: REMAIN COMPLIANT WITH ANTITRUST LAWS DURING CORONAVIRUS (COVID-19) CRISIS

Date: 12 March 2020

**U.S. Antitrust, Competition, and Trade Regulation, Health Care, and Corporate Alert**

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On March 9, 2020, the Department of Justice ("DOJ") Antitrust Division released a public warning to the business community that they must remain compliant with U.S. antitrust laws in the midst of the global health and economic crisis arising from the outbreak of the coronavirus disease 2019 (COVID-19).[1] DOJ warned that they will "hold accountable" anyone who takes advantage of "emergency response efforts, healthcare providers, or the American people" by violating the antitrust laws.[2] The warning called out in particular companies that are involved in the manufacture, distribution, and sale of public health products such as face masks, respirators, and diagnostics.

DOJ warned that individuals or companies that fix prices or rig bids—particularly for personal health protection equipment such as sterile gloves and face masks—could face criminal prosecution. Likewise, competitors who enter into agreements with each other to allocate markets amongst themselves could face criminal prosecution. DOJ further warned companies that its recently announced Procurement Collusion Strike Force (which is discussed in depth [here](#)) will be on high alert for collusive practices in the sale of personal health protection products to federal, state, and local agencies. DOJ instructed anyone with information on potential anticompetitive conduct to contact the Antitrust Division's Citizen Complaint Center, either by phone or online.

Companies and individuals should consider DOJ's announcement as a warning that DOJ will closely analyze, investigate, and prosecute any COVID-19 response conduct that potentially violates the antitrust laws or consumer protection laws. Read on for practical tips companies can take to mitigate their antitrust risk during this turbulent time.

## **VIOLATIONS OF THE ANTITRUST LAWS CAN RESULT IN SEVERE PENALTIES**

The purpose of the federal antitrust laws is to promote a competitive marketplace and protect consumers. Violations of the antitrust laws can result in serious consequences for employers and any individuals directly or indirectly involved in an illegal agreement. Such consequences include:

- Criminal prosecution under felony charges for both the corporation and culpable individuals (e.g., internal management, employees, or third parties). Corporations found guilty of criminal violations of the antitrust laws face significant fines (up to \$100 million), while individuals may be subject to imprisonment (up to 10 years) and significant fines (up to \$1 million).

- Civil enforcement actions by the Agencies that can result in broad-ranging injunctions governing future conduct.
- Private civil actions by employees or third parties injured by the violation. Such lawsuits can be extremely costly to defend, both in terms of monetary costs and lost time of officers and employees, and can result in treble damages (three times the losses suffered by the complaining party).

## **AVOIDING LIABILITY**

There are a few important steps businesses and individuals can take to avoid liability under the antitrust laws.

- Refrain from engaging in agreements—or potentially problematic communications—with competitors regarding price-fixing, bid-rigging, and market allocation. Such agreements among competitors are considered "per se" illegal under the antitrust laws (meaning that the agreement need not result in actual adverse competitive effects to be deemed illegal) and are subject to criminal prosecution.
- Abstain from sharing with competitors competitively sensitive information regarding prices, sales, margins, and customers absent a reasonable and legitimate purpose for doing so. Competitors that share this type of information absent a reasonable, legitimate purpose for doing so risk violating antitrust laws since such information sharing can be used as evidence of an implicit illegal agreement.

## **PRACTICAL GUIDANCE**

Companies and individuals should consider DOJ's announcement as a warning that DOJ will closely analyze, investigate, and prosecute any COVID-19 response conduct that potentially violates the antitrust laws or consumer protection laws. All companies and individuals—but particularly those involved in the manufacture, distribution, or sale of public health products—should consider the following:

- Ensure that management and personnel involved in the manufacture, distribution, and sale of public health products understand the types of conduct that are permissible and impermissible under the antitrust and consumer protection laws. Effective training and education should include practical examples on the do's and don'ts, especially as it relates to your company's particular business or industry.
- Closely monitor all bidding, pricing and sales of public health products to the government to ensure personnel is not engaging in anticompetitive conduct, such as bid-rigging, price-fixing or market allocation.
- Involve antitrust counsel in high-risk collaborations or exchanges of competitively sensitive information with competitors. In certain circumstances, competing companies might have a legitimate, procompetitive purpose for engaging in certain collaborations or sharing competitively sensitive information with each other during their response to the current health crisis. If you believe you might fall into this category, first document the legitimate business justification for your policy or practice and then seek the opinion and guidance of antitrust counsel.

## NOTES

[1] Department of Justice Antitrust Division, *Justice Department Cautions Business Community Against Violating Antitrust Laws in the Manufacturing, Distribution, and Sale of Public Health Products* (Mar. 9, 2020), available at <https://www.justice.gov/opa/pr/justice-department-cautions-business-community-against-violating-antitrust-laws-manufacturing>.

[2] *Id.*

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