GIBSON DUNN

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COMPETITOR COLLABORATIONS DURING COVID-19 PANDEMIC: PRACTICAL ANTITRUST GUIDELINES AND AN UPDATE FROM THE DOJ AND FTC

To Our Clients and Friends:

In response to emergency conditions presented by the COVID-19 pandemic, the need and opportunity to engage in legitimate competitor collaboration to overcome supply chain disruptions, ensure supply continuity, and better serve markets and customers can be expected to increase. While the antitrust laws are not lifted in these circumstances, they are flexible enough to enable competitors to collaborate where the result is improved supply and output, mitigation of market disruptions, enhanced efficiency, and enhanced customer welfare, provided that appropriate precautions are taken.[1] This Client Alert aims to provide **practical guidance** for companies considering competitor collaborations or discussing such plans with competitors. First, we discuss a statement issued jointly by the Antitrust Division of the Department of Justice ("DOJ") and the Federal Trade Commission ("FTC") on March 24, 2020 that details expedited antitrust review of those competitor collaborations related to the COVID-19 pandemic. Second, we provide practical antitrust guidance for companies exploring competitor collaborations during this time.

1. The DOJ/FTC Joint Statement

The DOJ and FTC have announced that each will issue expedited advisory guidance on whether a specific proposed collaborations between firms would face government antitrust scrutiny including investigations or legal challenges. In issuing their statement, the DOJ and FTC identified examples of likely permissible collaborations including partnerships between health care facilities to provide resources to communities lacking sufficient medical equipment (such as personal protective equipment), coordination of production facilities to manufacture COVID-19-related supplies, and coordination of competitor distribution or service networks to improve transportation and dissemination of medical equipment or health care services.

An applicant requesting guidance regarding a potential COVID-19 related collaboration must provide the following information:

- Nature of the proposed collaboration, including the duration and geographic scope;
- Rationale for the proposal;
- Products and/or services covered by the collaboration;
- Description of proposed contractual arrangements;

- Identity of potential customers;
- Explanation of the collaboration's relationship to the COVID-19 pandemic; and
- Any available information on alternative providers for the product or service at issue.

Once receiving all required information, the agencies will provide a response within seven calendar days that describes whether the agency would take enforcement action regarding the proposed arrangement and the basis for the agency's conclusion. The agencies' response and related guidance would be effective for one year from the date of issuance. Potential applicants should not commence the collaboration before receiving a response from the agencies.

An affirmative response from the agencies should not be construed as a broad grant of immunity for the contemplated collaboration. Third parties, such as affected competitors or class action plaintiffs, may still attempt to challenge collaborations that harm competition. At the same time, however, it is not necessary for parties engaging in a collaboration to seek or secure government pre-approval for a collaboration, and there is no mandatory waiting period to allow for government review (unlike, for example, an HSR filing before a merger). Parties exploring a cooperative relationship, whether or not government pre-approval is sought, should observe the guidance in the following section to minimize potential antitrust risk from the arrangement.

The agencies' press release can be found here: https://www.ftc.gov/news-events/press-releases/2020/03/ftc-doj-announce-expedited-antitrust-procedure.

The joint DOJ/FTC guidance can be found here: https://www.ftc.gov/system/files/documents/public_statements/1569593/statement_on_coronavirus_ftc-doj_3-24-20.pdf.

2. Practical Antitrust Guidance

The joint DOJ/FTC guidance sets out a revised process for reviewing COVID-19-related collaborations, but there are numerous cooperative situations that do not call for advisory guidance from the agencies. The agencies have longstanding guidance—the 2000 Antitrust Guidelines for Collaborations Among Competitors (the "Competitor Collaboration Guidelines")[2]—that sets out the analytical framework and related antitrust considerations in these situations. Under the Competitor Collaboration Guidelines, proposed collaborations often do not raise substantial antitrust concerns provided that they are reasonably necessary to achieve procompetitive objectives and do not result in harm to competition. A proper evaluation of a proposed cooperative relationship requires the early and active involvement of antitrust counsel to assess the goals and effect of the proposed collaboration.

We recommend the following steps when considering a competitor collaboration, whether in response to COVID-19 or in non-public health contexts:

1. Before proceeding with any joint effort with a competitor, identify a legitimate objective for the collaboration. From an antitrust perspective, a legitimate objective is one that is

competitively neutral (i.e., it neither enhances nor reduces competition, but serves some other goal), enhances efficiency or overcomes a market failure, or enhances competition. One example of a legitimate objective is the development of a product that neither participant could develop on its own, using its own assets and resources, but there are many others. On the other hand, if one of the goals of the collaboration is to reduce competition with a competitor, or to hinder other companies in their ability to compete, stop immediately and seek guidance from counsel.

2. Once you identify a legitimate objective, make sure that all actions undertaken jointly with a competitor are limited to those that are reasonably necessary to achieve the objective. This includes limiting the activities by scope, geography, duration, and any other dimension. In some jurisdictions outside the U.S., there is an additional test which requires that there are no less restrictive means to achieve the same objective - or to put it another way, the parties have sought to achieve their objectives through the least restrictive means possible.

3. Joint actions are more likely to be acceptable from an antitrust perspective if they are (i) voluntary (i.e., any party may choose to participate in its own independent discretion), (ii) non-exclusive (i.e., any party may participate jointly while retaining the discretion to compete independently), and (iii) short-term and limited in duration to the period necessary to achieve the legitimate objective.

4. Conversations with competitors regarding any potential collaboration (or otherwise) should follow an agenda that is prepared in advance and reviewed by counsel.

5. Once the objective of the joint effort is achieved, or once the emergency circumstances necessitating the joint effort have abated, the joint effort should be discontinued. Any long-term joint efforts should be reviewed by counsel in advance. Similarly, if a joint effort that is intended to be a short-term project extends for a longer term, counsel should review the project on an ongoing basis to ensure that antitrust compliance is not compromised by changed circumstances.

6. **Watch out:**

   - If any joint effort with a competitor is likely to have the effect of raising customer prices or decreasing supplier prices, reducing output, or reducing the quality of goods or services, stop immediately and seek guidance of counsel.

   - Do not discuss product pricing, pricing strategies, margins, the terms or conditions upon which you will deal with others, allocating suppliers, customers or markets, or the impact any particular action may have on pricing. If a discussion of these subjects is necessary to achieve the legitimate objective of the joint effort, seek guidance of counsel before proceeding.

- Do not use the collaboration to discuss issues unrelated to the procompetitive objective, such as employee wages, layoffs, or hiring plans. If the collaboration will have its own employees, such as a joint venture, seek guidance of counsel before proceeding.

- Do not exchange competitively sensitive information, such as current or future prices, costs, or output. If an exchange of competitively sensitive information is necessary to achieve the legitimate objective of the joint effort, seek guidance of counsel before proceeding.

- It may be necessary and legitimate for participants in a collaboration to adopt a non-compete provision. If so, the non-compete should be limited in time and scope, and should not limit any participant's ability to compete outside the scope of the collaboration. Any non-compete should correspond to the area where the participants are collaborating, and should end at the time the collaboration ends (or shortly thereafter). Again, seek legal guidance before proceeding.

- Do not agree not to do business with a third party, and do not agree on the terms on which you will do business with a third party. Likewise, do not agree on any joint effort that will hinder a third party in its ability to compete.

- If a joint effort may create a situation in which a supplier, customer, or competitor could claim that it is disadvantaged in its business as a result of the joint effort, seek guidance of counsel before proceeding. For example, if a joint effort will create "winners and losers" (e.g., competitors collaborate to jointly select a supplier) beware of the possibility that a "losing" company could pursue an antitrust claim.

- Beware of spillover effects – i.e., effects on other lines of business as a result of the joint effort. If a joint effort with a competitor could potentially have effects on another line of business or on other geographies or time periods outside the scope of the legitimate objective, stop and seek guidance of counsel before proceeding.

If you have any doubts about the propriety of any discussion or action, stop and seek guidance of counsel before proceeding with the discussion or action.

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[1] Department of Justice, Federal Trade Commissions, *Antitrust Guidelines for Collaborations Among Competitors*, April 2000, available at: https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf.

[2] *Id.*

Gibson Dunn's lawyers are available to assist with any questions you may have regarding developments related to the COVID-19 outbreak. For additional information, please contact any member of the firm's ***Coronavirus (COVID-19) Response Team****.*

The following Gibson Dunn lawyers prepared this client update: Adam Di Vincenzo, Kristen Limarzi, Josh Lipton and Chris Wilson. Gibson Dunn lawyers regularly counsel clients on issues raised by this pandemic, and we are working with many of our clients on their response to COVID-19. Please also feel free to contact the Gibson Dunn lawyer with whom you usually work, the authors, or any of the following leaders and members of the ***Antitrust and Competition Practice Group****:*

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