

First U.S. Business Review Letter Issued Clearing Medical Supply Distributor Cooperation to Fight COVID-19

AntitrustConnect Blog

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Medical supply distributors McKesson Corporation, Owens & Minor Inc., Cardinal Health Inc., Medline Industries Inc., and Henry Schein Inc. have received approval from the Department of Justice Antitrust Division to collaborate on manufacturing, sourcing, and distributing personal-protective equipment (PPE) and coronavirus-treatment-related medication. On April 4, the Antitrust Division issued to these companies its first business review letter pursuant to an expedited, temporary review procedure responding to the COVID-19 pandemic.

Under the expedited procedure, the Antitrust Division pledges to respond to requests for the agency's enforcement intentions in seven calendar days. The Antitrust Division was ahead of schedule, as the companies made their request on March 30.

Stating that it had no present intention to challenge the requesting parties' conduct, the Antitrust Division noted that the circumstances that led to the request were exceptionally pressing and unlikely to recur frequently. "The Department likewise understands that the Requesting Parties are responding cooperatively to

requests from the U.S. Government, as part of a collaborative process with government personnel and consultants, in which the Department's Antitrust Division is regularly involved," the letter states.

"Addressing potential disruptions to global PPE supply is central to the U.S. Government's effort to save American lives and livelihoods from the destructive effects of COVID-19," the letter continues. According to the government, the distributors' primary collaborative activity will occur at the direction of, and in the presence of the Federal Emergency Management Agency (FEMA), the Department of Health and Human Services (HHS), other government entities, and their agents. FEMA and HHS have asked the distributors to use their industry expertise and contacts to address PPE supply chain shortages, in addition to applying their expertise to evaluate potential laboratory and medication supply issues.

More specifically, the distributors will work with FEMA and HHS to:

- address bottlenecks with our existing foreign suppliers;
- identify and qualify new sources of supply;
- identify and monitor areas of increased demand for supplies and medications;
- expedite distribution of supplies and medications to FEMA-designated COVID-19 hotspots;
- understand competitive prices for these supplies and medications;
- negotiate competitive prices, through bilateral communication with FEMA;
- provide data necessary to do the above; and
- provide claims data and data otherwise requested by FEMA.

In addition, the distributors will collaborate with the government regarding other related activities to manufacture, source, and distribute medications and healthcare products as directed by FEMA, HHS, or additional government agencies.

The letter notes that, to the limited extent the distributors need to engage in the conduct when government representatives are not participating, the distributors have agreed to not use any collaboration to increase prices, reduce output, reduce quality, or otherwise engage in COVID-19 profiteering. They also agreed not to share competitively sensitive information among themselves, in addition to other safeguards.

The distributors represent that they are working together to expand existing

capacity and bring goods to communities in need. 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. Based on these representations and given the current circumstances, the government concluded that the procompetitive aspects of the conduct appear to outweigh any potential harm.

The government also pointed out that, to the extent the conduct describes efforts to influence FEMA's, HHS's, or another governmental agencies' decisions regarding the government's policy of expediting health and medical resources in response to COVID-19, such conduct would likely be covered by *Noerr-Pennington* immunity.