

Seven U.S. business review letters in seven months reflect interest in Antitrust Division's views on proposed business conduct

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The U.S. Department of Justice Antitrust Division has issued more business review letters in 2020 than in any year since 2002. Recent years have averaged only one letter. So why is there this sudden interest in a statement of the Antitrust Division's enforcement intentions with respect to proposed business conduct?

Concerns about how the Antitrust Division might view coordination to address the COVID-19 pandemic explains some of this interest. Four of the seven letters issued so far in 2020 were pursuant to the Justice Department temporary [review procedure responding to the COVID-19 pandemic](#). Under this policy, businesses can obtain antitrust enforcement intentions on an expedited basis, generally within seven days. The Antitrust Division admits that usually it has taken months after all necessary information was received to provide its view. In light of the expedited turnaround, companies might just be more open to requesting a business review letter concerning COVID-19 business practices. Operating in a pandemic is also new territory for everyone.

Three of the 2020 letters, however, have been outside the scope of cooperation to

take on the pandemic. These three involved group purchasing activities, online bidding platforms, and patent pooling. What explains this? Perhaps, there is more uncertainty about current antitrust enforcement or, perhaps, there is a desire to obtain the blessing of an agency that might be perceived as more business-friendly than the one that is coming down the road. Of course, the business review letters do not provide immunity. The Justice Department always reserves the right to bring an enforcement action in the future if the actual operation of the proposed conduct proves to be anticompetitive in purpose or effect.

Below are brief summaries of the seven U.S. business review letters issued so far this year:

In a July 28 business review letter to counsel for Avanci LLC, the Justice Department concluded Avanci's new platform for licensing Fifth Generation or 5G telecommunications technology in the automotive industry was unlikely to harm competition. The platform Avanci proposed is a joint patent-licensing pool, pursuant to which Avanci would license patent claims that have been declared "essential" to implementing 5G cellular wireless standards for use in automobile vehicles and distribute royalty income among the platform's licensors. The government noted that Avanci's 5G Platform may make licensing standard essential patents related to vehicle connectivity more efficient by providing automakers with a "one stop shop" for licensing 5G technology. The platform also has the potential to reduce patent infringement and ensure that patent owners who have made significant contributions to the development of 5G "Release 15" specifications are compensated for their innovation.

The Justice Department stated on July 23 that it has no present intention to challenge proposed efforts by Eli Lilly and Company, AbCellera Biologics, Amgen, AstraZeneca, Genentech, and GlaxoSmithKline to exchange limited information about manufacturing facilities that could expedite the production of monoclonal antibody treatments that may safely and effectively treat COVID-19 patients. The Justice Department expressed its position in the fourth expedited business review letter pursuant to the temporary review procedure responding to the COVID-19 pandemic.

In a May 15 letter to the National Pork Producers Council, the Justice Department said that it would not challenge the proposed collaborative efforts of the council to work with the U.S. Department of Agriculture to address certain hardships facing

hog farmers as a result of the COVID-19 pandemic. The council submitted its business review request pursuant to the expedited, temporary review procedure.

On April 20, another expedited business review letter expressed the Justice Department's position that it had no present intention to challenge collaborative efforts of AmerisourceBergen Corporation to identify global supply opportunities, ensure product quality, and facilitate product distribution of medications and other healthcare supplies to treat COVID-19 patients.

The Justice Department determined that a proposal by the Association of Independent Commercial Producers to operate an online bidding platform did not warrant an antitrust challenge. The AICP planned on operating the online platform for advertisers to solicit bids from companies that provide production services for commercial advertisements. The Antitrust Division cleared the proposed conduct in an April 16 business review letter.

The first expedited letter business review letter concerning a response to the pandemic was issued on April 4. The Antitrust Division gave medical supply distributors McKesson Corporation, Owens & Minor Inc., Cardinal Health Inc., Medline Industries Inc., and Henry Schein Inc. the okay to collaborate on manufacturing, sourcing, and distributing personal-protective equipment or PPE and coronavirus-treatment-related medication.

Lastly (or firstly), in the first business review letter issued in 2020, the Antitrust Division explained that it did not intend to challenge a proposal by the American Optometric Association to expand the Association's group purchasing organization to include the purchase of optometric products for resale to consumers. The proposed safeguards would likely reduce the risk that the expanded purchasing arrangement would result in price fixing or other anticompetitive conduct, according to the government.