Antitrust Laws Still Apply to Trade Association and Competitor Meetings During COVID-19 Outbreak

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Businesses are taking drastic measures to protect consumers and employees during the COVID-19 (commonly referred to as the coronavirus) outbreak, and they are utilizing trade associations and other meetings with competitors to learn about best practices and strategies for protecting their businesses, their employees and their customers. However, businesses must remember that there is no "emergency" exception to the federal, state and international antitrust laws, and companies must take care to avoid anticompetitive conduct that could have dire legal consequences as they navigate this pressing global health threat.

Antitrust Implications of Trade Association and Competitor Meetings During COVID-19 Outbreak

In recent days, trade association and competitor meetings have convened to discuss competitors' responses to the COVID-19 health crisis. Such meetings are important, procompetitive opportunities to identify best practices relating to safety, technology and logistics for remote working and other important strategies, and, therefore, are extremely beneficial to consumers and employees. These meetings also take the procompetitive form of webinars or other training formats for employers to learn the laws applicable to, e.g., requiring employees to work remotely and compensating them for the same. That said, these competitor meetings also can pose significant antitrust risks to businesses to the extent participants exchange competitively sensitive information or form anticompetitive agreements relating to topics such as prices, wages, benefits and business strategy.

As a reminder, under the federal and state antitrust laws, agreements between competitors and potential competitors regarding competitively sensitive topics are "per se" illegal, meaning that such agreements are deemed unlawful regardless of any procompetitive benefits that might exist. Such "per se" violations of the antitrust laws are punishable with criminal fines for businesses, and in severe situations, criminal fines and prison sentences of up to 10 years for culpable individuals. While merely exchanging competitively sensitive information (and not forming agreements with respect to it) is subject to the comparatively relaxed "rule of reason" standard (where procompetitive benefits are weighed against any potential anticompetitive effects), such exchanges still pose significant antitrust risks to the extent they can facilitate implicit agreements among competitors.

The Department of Justice (DOJ) and the Federal Trade Commission (FTC) have advised that there is no exception to these rules for emergency situations. In fact, in recent days the DOJ and the FTC both have issued statements warning businesses against engaging in anticompetitive practices (specifically, price gouging and false advertising) in the wake of the COVID-19 crisis. Businesses that engage in anticompetitive conduct at this time should expect a swift reaction from the federal enforcement agencies, particularly if their conduct exploits vulnerable workers or consumers.

The following non-exhaustive list of agreements during the COVID-19 crisis could pose grave antitrust risks to businesses participating in them:

(1) Agreements regarding pricing for competing products and services

(2) Agreements regarding the products or services that will be offered (or not offered) to customers (e.g., agreements that all competing businesses within a geographic area will close temporarily)

(3) Agreements to allocate customers between competitors

(4) Agreements regarding the pay and benefits that will be offered to employees whose work schedules are affected by the crisis

(5) Agreements regarding the solicitation of competitors' employees whose compensation may be affected by the crisis

Keep It Procompetitive; Antitrust Compliance Procedures

By contrast, it is less risky for meeting participants to discuss the various non-price and compensation-related interventions that their respective businesses have implemented or are considering (e.g., mandatory hand-washing procedures, strategies for protecting employees and clients such as work-from-home policies or rotation of in-office work teams), and the pros and cons of different approaches.

As with all trade association and competitor meetings, we recommend that meetings convened for the purpose of discussing the COVID-19 crisis practice good antitrust compliance procedures. These include:

(1) Working with antitrust counsel if there is any question concerning the nature of the issues to be discussed and circulating an agenda in advance of the meeting listing the procompetitive topics that will be discussed.

(2) Making an antitrust compliance statement before the meeting begins, noting that the participants will observe the relevant antitrust and competition laws, and that efforts to steer the conversation toward subjects of a competitively sensitive nature will not be tolerated

(3) Having antirust counsel attend the meeting (either in person or by phone) to monitor the conversations and provide appropriate guidance, where necessary, if the participants begin discussing competitively sensitive subjects.

Importantly, the antitrust laws do provide immunity for competitors and potential competitors that come together for the purpose of seeking government intervention. For example, the so-called *Noerr-Pennington* exemption would insulate competitors that jointly petition the government for emergency funding.

The antitrust laws are nuanced and complex, and their application to particular circumstances depends on the unique facts at play. We recommend that you consult with antitrust counsel prior to organizing or participating in any competitor meeting regarding the COVID-19 health crisis. To the extent your business is participating in a meeting organized by others, you should seek assurances that appropriate antitrust compliance procedures are in place before the meeting begins.

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