
March 30, 2020

VIA ELECTRONIC DELIVERY

The Honorable Makan Delrahim
Assistant Attorney General
U.S. Department of Justice
Main Justice Building
Room 3109
950 Pennsylvania Ave NW
Washington, DC 20530

Re: Urgent COVID-19-Related Request for a Business Review Letter

Dear Mr. Delrahim:

We write to ask for expedited treatment of a Business Review Letter to confirm that our immediate efforts to expedite and increase manufacturing, sourcing, and distribution of personal-protective equipment (“PPE”)—including masks, gowns, gloves, and other paraphernalia intended to help protect first responders and other members of the medical community against Coronavirus-related infection—do not in any way transgress the antitrust laws. We ask for your urgent help to ensure we can engage in cooperative efforts that are essential to delivering these critically-needed supplies as quickly as possible to save American lives.

We are grateful that the Antitrust Division of the Department of Justice (“the Division”) has taken the lead in recognizing that the Coronavirus Disease 2019 (“COVID-19”) pandemic “will require unprecedented cooperation between federal, state, and local governments and among private businesses to protect Americans’ health and safety.”¹

McKesson Corporation (“McKesson”), Cardinal Health, Inc. (“Cardinal”), Owens & Minor, Inc. (“OMI”), Medline Industries, Inc. (“Medline”), and Henry Schein, Inc. (“Henry Schein”), collectively the “Requesting Parties,” strongly share that belief as well as your commitment to the antitrust laws. We pledge to work with you and currently are engaged with the Federal Emergency Management Agency (“FEMA”), the Department of Health and Human Services (“HHS”) and other parts of the

¹ THE ANTITRUST DIVISION OF THE DEPARTMENT OF JUSTICE (“THE DIVISION”) AND THE BUREAU OF COMPETITION OF THE FEDERAL TRADE COMMISSION (THE “BUREAU,” AND COLLECTIVELY THE “AGENCIES”) JOINT STATEMENT REGARDING COVID-19 (March 24, 2020), <https://www.justice.gov/atr/joint-antitrust-statement-regarding-covid-19> (hereinafter, “DOJ/FTC COVID-19 STATEMENT”).

U.S. Government, to ensure the fast, fair and pro-competitive distribution of necessary medical supplies to the most-needed places during the current health crisis.

An expedited Business Review Letter² regarding our joint efforts to identify global supply opportunities, ensure product quality, and facilitate manufacturing, sourcing, and product distribution to the most imperiled communities will give the supply chain the certainty it needs to move as swiftly as possible to protect the health of Americans. Our collective efforts are focused on, and limited to, facilitating the government's efforts to guide PPE and medications to the places where they are needed most; in other respects, the Requesting Parties will continue to pursue their respective business strategies as before.³ The collaboration is limited only to Coronavirus-related efforts and will only last for as long as such efforts are necessary for the welfare of our country.

1. Background

PPE includes masks, gowns, gloves, and other equipment designed to protect against infection. Earlier this month, the World Health Organization warned that “severe and mounting disruption to the global supply of PPE—caused by rising demand, panic buying, hoarding and misuse—is putting lives at risk from the new coronavirus and other infectious diseases.”⁴ Recognizing this, U.S. Government agencies, including FEMA and HHS, have asked the Requesting Parties and other 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. We will be able to work together most effectively if we have the clear support of the Division for our critical and pro-competitive efforts.

This is urgent work. On March 29, a planeload of medical supplies—nearly 2 million masks and gowns, over 10 million gloves, and over 70,000 thermometers—arrived at JFK airport from China, the first in a large series of flights organized by the White House to help fight the coronavirus.⁵ Sunday's airlift was part of “Project Airbridge” a public-private partnership between the federal government and U.S. healthcare distributors, such as the Requesting Parties, led by senior staff in the White House.⁶

2. The Proposed Conduct

At the direction of FEMA, HHS, and other government agencies, the Requesting Parties and other distributors are collaborating to:

² 28 C.F.R. § 50.6.

³ DOJ/FTC COVID-19 STATEMENT, *supra* note 1.

⁴ World Health Organization, Shortage of Personal Protective Equipment Endangering Healthcare Workers Worldwide (March 3, 2020) (“Without secure supply chains, the risk to healthcare workers around the world is real. Industry and governments must act quickly to boost supply, ease export restrictions and put measures in place to stop speculation and hoarding. We can't stop COVID-19 without protecting health workers first.”), <https://www.who.int/news-room/detail/03-03-2020-shortage-of-personal-protective-equipment-endangering-health-workers-worldwide>.

⁵ Remarks by President Trump in a Meeting with Supply Chain Distributors on COVID-19 (March 29, 2020), (announcing a goal to “have a total of 51 flights”) <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-meeting-supply-chain-distributors-covid-19/>.

⁶ Reuters, White House-led airlift of urgently needed medical supplies arrives in New York (March 29, 2020), <https://www.reuters.com/article/us-health-coronavirus-trump-airlift-idUSKBN21G0LB>.

- Help FEMA, HHS, and foreign governments address bottlenecks with our existing foreign suppliers;
- Help FEMA and HHS identify and qualify new sources of supply;
- Help FEMA and HHS identify and monitor areas of increased demand for supplies and medications;
- Help expedite distribution of supplies and medications to FEMA-designated COVID-19 hotspots;
- Help FEMA and HHS understand competitive prices for these supplies and medications;
- Help FEMA and HHS negotiate competitive prices, through bilateral communication with FEMA;
- Provide FEMA and HHS with data necessary to do the above;
- Provide FEMA and HHS with claims data and data otherwise requested by FEMA⁷;
- Other related activities to manufacture, source, and distribute medications and healthcare products as directed by FEMA, HHS, or additional government agencies.

Currently, the Proposed Conduct is directed towards addressing PPE and laboratory supply shortages, as well as potential medication disruptions. It is possible that in the future, the U.S. Government will ask some of the Requesting Parties to coordinate with FEMA or other agencies of the U.S. Government to address other shortages.

Due to the fast-moving nature of the COVID-19 crisis, the Requesting Parties will engage in the Proposed Conduct directly with FEMA or other government agencies. But to be effective and responsive, the Requesting Parties also will need to engage in the Proposed Conduct when agency representatives are not participating in the call or email chain.

The Requesting Parties' assistance is ongoing, and may have to change depending on the disruptions due to the COVID-19 pandemic. As a result, we recognize that the Division's review of the Requesting Parties' behavior may require more flexibility than traditional Division business reviews.⁸ We will work with the Division to ensure necessary oversight. The Requesting Parties welcome the participation of Division attorneys in their engagements with FEMA or other government agencies to help assure conduct is consistent with the spirit and the letter of antitrust laws.

3. Analysis

The Requesting Parties do not believe that coordinating, among themselves or with other distributors, to support the mission of FEMA and other agencies to improve and enhance the supply chain for PPE and other healthcare products violates any federal antitrust law enforced by the Division. As the Division recognizes, "a competitor collaboration may enable participants to offer goods . . . that

⁷ The Requesting Parties understand that the Division is counseling FEMA regarding antitrust issues to help mitigate any concerns with respect to data-sharing.

⁸ See, e.g., Letter from The Hon. Makan Delrahim to Victoria L. Smith, regarding The American Optometric Association and the AOAExcel GPO, LLC Business Review Request (Jan. 15, 2020) (reviewing the proposed expansion of a GPO to include optometric products), <https://www.justice.gov/atr/page/file/1235051/download>.

are . . . brought to market faster than would be possible absent the collaboration.”⁹ Further, “[a] collaboration may allow its participants to better use existing assets” than would be possible absent collaboration.¹⁰ The Requesting Parties’ collaboration is necessary to allow participants to offer PPE, lab supplies, and medications more quickly than otherwise would be possible and to address scarcity.

We recognize that the Division also must weigh any potential anticompetitive harms of collaboration.¹¹ We do not believe that the Proposed Conduct will result in anticompetitive harms, and any speculative harms are in any case greatly outweighed by the pro-competitive health and public welfare benefits of the joint conduct. The Requesting Parties are not using the collaboration to increase prices, reduce output, reduce quality, or otherwise engage in COVID-19 profiteering against which the Division has warned.¹² The collaboration also is limited to the time period necessary to assist FEMA and other government agencies in responding to COVID-19 shortages.

These “joint efforts” among distributors are “necessary to assist patients, consumers, and communities affected by COVID-19 and its aftermath,” which the DOJ noted as a “necessary response to exigent circumstances that provide Americans with products or services that might not be available otherwise.”¹³

4. The Defense Production Act and the Pandemic and All-Hazards Preparedness Act

In addition to this request for business review, the Requesting Parties are exploring all options for enhancing the efficacy of our efforts to assist the federal government pursuant to the Defense Production Act and the Pandemic and All-Hazards Preparedness Act. We would appreciate the Division’s willingness to help us, and the other relevant government departments, work through these additional related protections, which are vital to ensuring supply to providers and patients.¹⁴

5. Conclusion

The Division recognizes that “there are many ways firms, including competitors, can engage in procompetitive collaboration that doesn’t violate the antitrust laws.”¹⁵ We agree. And we believe that there is no similar time in recent American history where such pro-competitive collaboration could be more critical. Medical supply distributors 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. We therefore request an expedited Business Review Letter confirming that the Division views our efforts to address COVID-19-related scarcity in conjunction with FEMA and other government agencies as consistent with the antitrust laws, and has no present intention to bring an enforcement action against the Requesting Parties for the Proposed Conduct.

⁹ FED. TRADE COMM’N AND U.S. DEP’T OF JUSTICE, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS 6 (2000), <https://www.justice.gov/atr/page/file/1098461/download>.

¹⁰ *Id.*

¹¹ *See, e.g., id.*

¹² DOJ/FTC COVID-19 STATEMENT, *supra* note 1.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

Very truly yours,

MCKESSON CORPORATION

By: 

Name: Lori A. Schechter
Title: Executive Vice President,
Chief Legal Officer, and
General Counsel

OWENS & MINOR, INC.

By: 

Name: Nicholas J. Pace
Title: Executive Vice President,
General Counsel &
Corporate Secretary

CARDINAL HEALTH, INC.

By: 

Name: Jessica L. Mayer
Title: Executive Vice President,
Chief Legal and Compliance Officer

MEDLINE INDUSTRIES, INC.

By: 

Name: Alex Liberman
Title: General Counsel

HENRY SCHEIN, INC.

By: 

Name: Michael S. Ettinger
Title: Senior Vice President,
Corporate & Legal Affairs and
Chief of Staff

CC: The Honorable Alex M. Azar II, Secretary, U.S. Department of Health and Human Services
The Honorable Peter T. Gaynor, Administrator, Federal Emergency Management Agency
The Honorable Joseph J. Simons, Chairman, Federal Trade Commission