

Deputy attorney general issues new mandate prioritizing enforcement of antitrust laws amid COVID-19 outbreak

Companies around the globe are being forced to respond quickly and creatively to the COVID-19 pandemic and resulting economic fallout. As the saying goes, “Desperate times call for desperate measures.” And in these challenging economic times, some employees, even unwittingly, may take greater risks to protect their business, leaving companies with criminal antitrust exposure.

As the outbreak spreads, the United States is experiencing a surge in reported COVID-19-related criminal activity. On Tuesday, in response to this trend, Deputy Attorney General Jeffrey Rosen issued a sweeping memorandum (the Rosen Memorandum) to the heads of all DOJ law enforcement components, heads of litigating divisions, and U.S. Attorneys.¹ The Rosen Memorandum marks a new mandate to identify and punish criminal behavior related to COVID-19. Criminal antitrust offenses—price fixing, bid rigging, and market allocation—feature prominently among these enforcement priorities.² Prior to the Rosen Memorandum, DOJ announced that the recently created Procurement Collusion Strike³ Force will be on “high alert” for collusive practices in the sale of COVID-19-related products and services to federal, state, and local agencies.

In addition, DOJ has asked Congress to enact legislation that will pause the statute of limitations in criminal cases during a national emergency and for one year following the end of the national emergency. This legislation would effectively give DOJ additional time to conduct investigations and file cases. As a result, companies should be aware that DOJ has not only prioritized criminal antitrust enforcement relating to COVID-19,

¹ [U.S. Department of Justice Memorandum from Deputy Attorney General, Jeffrey Rosen, to all heads of law enforcement components, heads of litigating divisions, and U.S. Attorneys, March 24, 2020](#)

² Other priorities listed in the memorandum include: fraudulent or otherwise illegal schemes (*i.e.* mail fraud, wire fraud, and fraud in connection with major disasters and emergencies); sales of fake drugs or cures; malicious hoaxes, threats to individuals or the public, and purposeful exposure and infection of others with COVID-19; accumulation of medical supplies or devices beyond reasonable need with the purpose of selling in excess of prevailing market prices. *Id.*

³ [U.S. Department of Justice takes aim at criminal antitrust violations in public procurement, October 31, 2019](#)

but that DOJ will likely have an extended period of time (beyond the existing 5-year statute of limitations for criminal antitrust cases) to pursue these cases well after the pandemic has ended.

As companies develop COVID-19 response strategies, here are several key antitrust compliance risks to consider:

- **Increased Scrutiny in Government Funding and Contracts**

Recently, DOJ launched a new “Procurement Strike Force,” targeting criminal antitrust violations in public procurement. This Procurement Collusion Strike Force followed an uptick in DOJ cases involving criminal anticompetitive conduct by government contractors.

Federal and state governments are already channeling funding into the private sector in response to the COVID-19 outbreak, most significantly through the \$2 trillion stimulus bill that is expected to pass Congress this week. One aspect of the stimulus bill is a \$500 billion lending program whereby the Treasury Department can provide \$500 billion in loans, loan guarantees, and investments to businesses, states, and municipalities. Approximately \$50 billion has already been allocated to passenger air carriers, cargo air carriers, and businesses that work in national security, but Treasury has been given wide latitude to allocate the remaining \$454 billion. Given DOJ’s increased focus on government procurement more generally, as well as DOJ’s commitment to criminal antitrust enforcement relating to COVID-19, companies receiving or seeking COVID-19-related government funding or contracts must be especially vigilant in addressing antitrust, fraud, and corruption compliance.

- **Increased Competitor Contact**

In times of crisis, companies may be drawn to coordinated industry efforts to provide efficient and impactful solutions to clients and consumers feeling the strain of difficult times. They may even think that regulators would allow collective actions that benefit the public. But there is no “public good” exception that would excuse criminal anticompetitive conduct in the United States. Companies must continue to work to prevent anticompetitive conduct, regardless of potentially noble intentions or justifications.

As a result, the FTC and DOJ announced Tuesday that companies, including competitors, contemplating collaborative efforts in response to the COVID-19 crisis may qualify for expedited antitrust guidance from regulators, particularly if the collaboration is designed to address the growing public health crisis. The DOJ’s Business Review Process and the Federal Trade Commission’s Advisory Opinion Process generally take months to complete, rendering them inaccessible to firms that must act quickly to respond to a rapidly developing crisis. To address the need for prompt guidance on the antitrust laws, the DOJ and the FTC announced on March 24th that they will “aim to respond expeditiously to all COVID-19 related requests,

and to resolve those addressing public health and safety within seven (7) calendar days of receiving all necessary information.”⁴

- **Increased Opportunity for Internet Price Gouging and Price Fixing**

As people are increasingly required to shelter in place and more business is conducted remotely, companies, individuals, and governments will be left with no choice but to turn to the internet to purchase goods and services, increasing the potential for price fixing and price gouging. Yesterday, a group of 33 attorneys general called on Amazon, eBay, Facebook, Walmart and Craigslist to prevent price gouging on COVID-19-related products.⁵ Companies have been advised to take on strong policies that deter price gouging, trigger protections from price gouging and maintain a way for consumers to report potential violations. The FTC and DOJ will have similar concerns about price gouging on COVID-19-related purchases and will certainly pursue enforcement of price gouging on the internet.

Taking proactive steps now to reinforce antitrust compliance will help companies mitigate the risks of future government investigations and antitrust litigation.

Companies with questions about implementing successful compliance strategies should consider consulting experienced outside counsel prior to bidding on government contracts, coordinating industry efforts to respond to COVID-19, or selling goods or services, especially related to COVID-19, through e-commerce.

⁴ [Joint Antitrust Statement Regarding COVID-19, March 24, 2020](#)

⁵ [State AGs call on Amazon, Facebook and others to crack down on coronavirus price gouging, March 25, 2020](#)

Contacts



Kathryn M. Hellings
Partner, Washington
T: +1 202 637 5483
kathryn.hellings@hoganlovells.com



Daniel Metroka
Partner, Philadelphia
T: + 1 267 675 4662
daniel.metroka@hoganlovells.com



Daniel E. Shulak
Senior Associate, Washington
T: +1 202 637 6508
daniel.shulak@hoganlovells.com



Collin T. Phillips
Associate, Washington
T: +1 202 637 6508
collin.phillips@hoganlovells.com



Ben Peachey
Associate, Washington
T: +1 202 637 6579
ben.peachey@hoganlovells.com

www.hoganlovells.com

"Hogan Lovells" or the "firm" is an international legal practice that includes Hogan Lovells International LLP, Hogan Lovells US LLP and their affiliated businesses.

The word "partner" is used to describe a partner or member of Hogan Lovells International LLP, Hogan Lovells US LLP or any of their affiliated entities or any employee or consultant with equivalent standing. Certain individuals, who are designated as partners, but who are not members of Hogan Lovells International LLP, do not hold qualifications equivalent to members.

For more information about Hogan Lovells, the partners and their qualifications, see www.hoganlovells.com.

Where case studies are included, results achieved do not guarantee similar outcomes for other clients. Attorney advertising. Images of people may feature current or former lawyers and employees at Hogan Lovells or models not connected with the firm.

© Hogan Lovells 2020. All rights reserved.