Antitrust Insights
Webinar Series

Avoiding Distribution Disasters:
Antitrust Assessment of Pandemic Pricing Practices

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Proskauer

A Proskauer Webinar Series

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Agenda

1. How the Pandemic is Changing Antitrust Risk
2. Impacts on Distribution Practices
3. Price Discrimination
4. Price Gouging
5. Competitors

Pandemic-Increased Antitrust Risk

- The current COVID-19 pandemic is forcing companies to change business strategies as they navigate the economic effects of this global crisis

- Businesses are changing and renegotiating their supply and distribution chains
  - Changes in demand may result in reduced output or increased price
  - Businesses may act more aggressively to try to secure position in marketplace
  - Customers and channels may be impacted
  - Increased costs may result in changes in suppliers

Beware: these business strategy changes can increase antitrust risk

What We are Seeing: This Year vs. Next Year

This Year

- The pandemic has forced many companies to breach agreements, make unilateral changes, lower prices, raise prices, change supply chains, and deal with competitors differently.
- Companies have had to juggle in real-time the antitrust legal risks from changing their distribution practices against business necessity.
- Involves identifying the risks, assessing and weighing the degree of risk, designing options to reduce or lessen the risk, and balancing against the business gain/loss.
- PLUS a new factor: how much does the COVID-19 pandemic justify these changes by a company and how is that assessed under antitrust law?

What We are Seeing: This Year vs. Next Year

For Next Year

- Companies are designing their strategic plans for 2021. Everything is changed by the pandemic.
- Provisions in agreements that were placeholders previously, now are critical.
- Based on the new problems seen in the pandemic marketplace, companies want to address them with new and stronger provisions in agreements, and new practices.
- What can companies do to protect their price and brand strategy?
- To protect their marketplace position?
- What can customers request as far as discounts, most favored treatment, working with other suppliers?
- How can a company safely enter into its 2021 contracts?
- How does the pandemic and the new business realties change the analysis under antitrust law of distribution practices?

How Does the Pandemic Impact Distribution the Legality of Practices?

Scenario 1: Customers are lowering prices due to the emergency, and this is harming the manufacturer's strategy for the product. It is okay to mandate a certain floor price as long as the terms are clear in your contract, you give the customer a sufficient margin and the price is fair.

A. **True.**

B. **False.**

<u>Scenario 2</u>: For products that are in high demand, we can suggest resale prices in advertising and can agree with customers to establish a maximum retail price as long as the agreement is not anticompetitive.

A. **True**.

B. **False.**

The Pandemic Impacts Many Distribution Strategies

Advertisements	Buyback Option on Termination	Channel Management	Coupons	Customer Minimums	Demonstrations	Display racks
Loyalty Discounts	Loyalty Programs	MAP	Marketing Support	Meet-or-Release Provisions	Minimum Purchase Requirements	MSRP Provisions
Non-Discrimination Rules	Pricing Escalators	Pricing Tied to Indices or Other Outside References	Promotional Support	Rebates	Retail Preference Programs	Shelf Space
Slotting Fees	Special Packaging	Termination With Cause	Termination Without Cause	Trade Credit	Trade Spending	Volume Discounts

Distribution Practices to Expand Access: What We are Seeing

- Standard provisions in distribution agreements may now receive greater scrutiny.
- Manufacturers are pushing for greater use of provisions to control the channel in 2021, in light of the problems in 2020.
- Certain contract terms and provisions can raise heightened concerns in the current marketplace.

Programs That Can Raise Antitrust Questions

Minimum Purchase Requirements	Exclusives	Loyalty Discounts	Volume Discounts
Requiring the distributor or dealer to purchase a specified amount of the company's products	Requires buyer to purchase all or almost all of a particular product or service from the supplier for a set period of time	Discounts to the distributor or dealer for purchasing certain amounts of the products or penalize it for purchasing from the company's competitors	

Minimum Purchase Requirements

- To incentive the distributor's sales volume of goods, the seller may negotiate a:
  - Minimum purchase commitment. Minimum purchase commitments require the distributor to buy a minimum amount of goods from the seller during a specified period of time
  - Minimum sales commitment. Minimum sales commitments require the distributor to sell a minimum volume of goods to customers within a specified time
    - Minimum sales commitments are more often found in exclusive distribution agreements
- What have we seen in 2020? How to address in 2021?
- When using minimum sales commitments avoid termination-related challenges by:
  - ensuring that the minimum sales commitment accurately reflects predicted sales; and
  - monitoring and enforcing the minimum sales commitment

Loyalty Programs

- Many companies employ a variety of tactics designed to encourage loyalty and motivate their customers to continue buying from them
- Price competition is a key mechanism to promote sales, and is precisely what the antitrust laws are intended to encourage
- Price competition can take different forms, including discounts for high-volume purchases
- Discount arrangements can also be structured in more elaborate ways to encourage customer loyalty, for example:
  - a company might offer discounts if a customer purchases a particular percentage of its requirements from the company, or
  - may condition discounts on the purchase of a package of products that the company sells
- What are the learnings from the pandemic?

Loyalty Programs: Risk Factors

Whether a company has a ***substantial or dominant share*** of the relevant market

Whether a loyalty program is ***conditioned on exclusivity*** or involves ***discounts or rebates for purchasing a range of products*** which single-product competitors cannot offer

Whether a company's loyalty program creates incentives that ***require customers to deal exclusively*** with the company and not its competitors

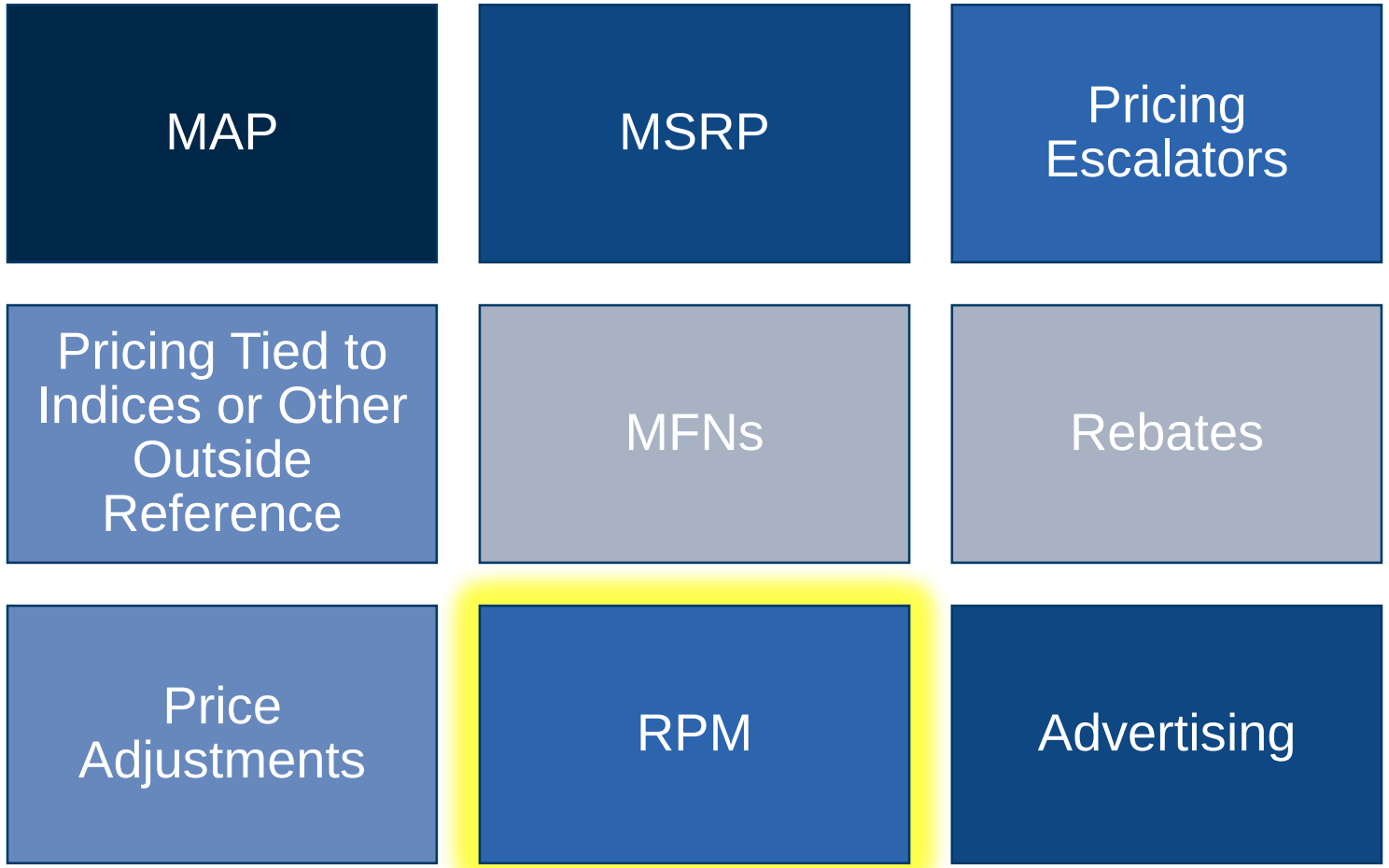
Whether a program ***ties up a necessary distribution channel*** in a particular market

Whether the ***price of a product bundle***, in whole or in part, could be alleged to be ***below-cost***

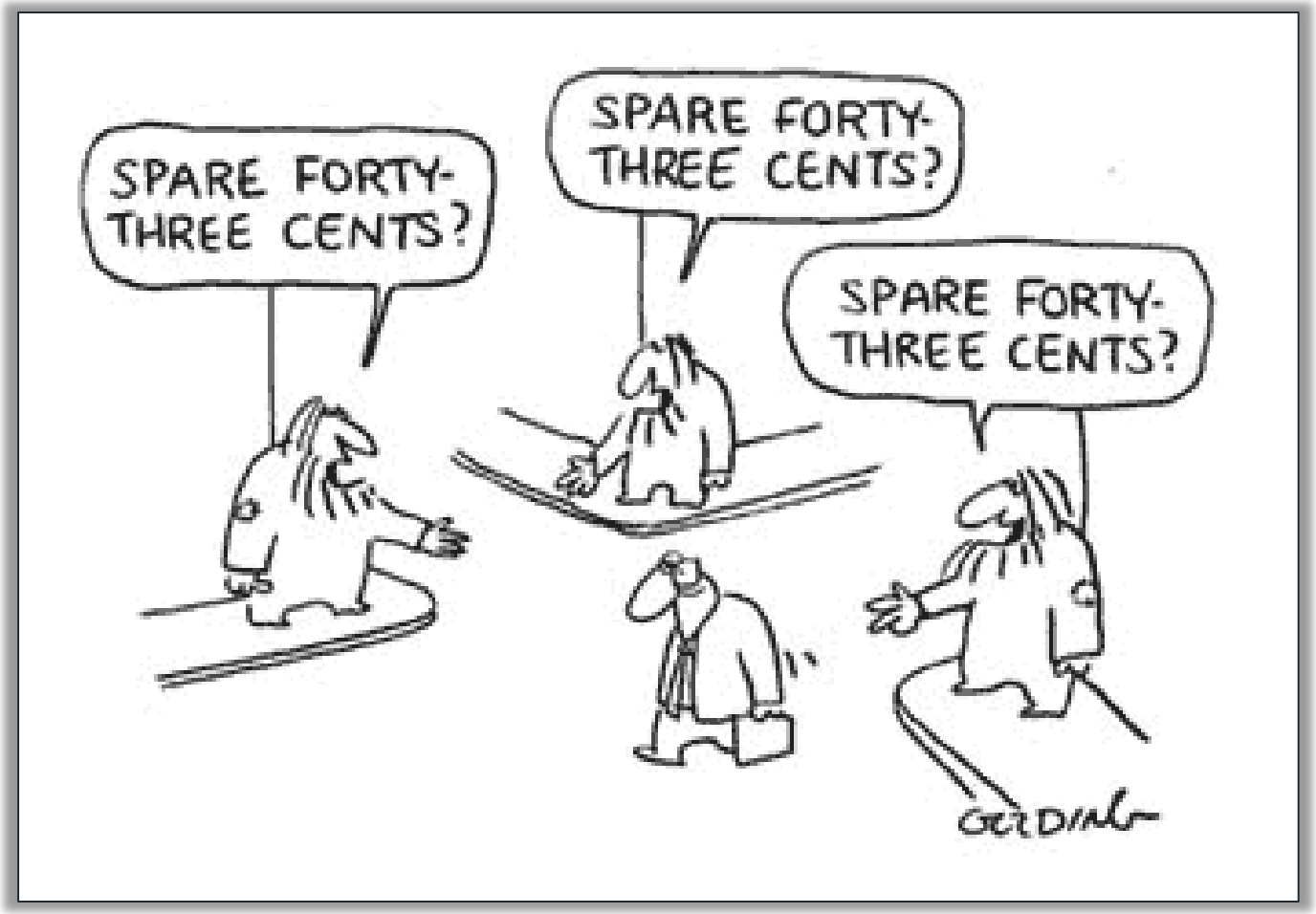
Slotting Fees/Shelf Space Payments

- Sellers may offer buyers discounts or allowances for displaying their product in a premium position, or slot
- A large manufacturer may harm competition if it elicits promises from retailers to not carry the manufacturer's competitor's products in exchange for a slotting allowance
- However, if a slotting allowance is a reasonable amount to cover the retailer's stocking and display costs, and if there is no exclusivity requirement, the slotting allowance is unlikely to be found to be anticompetitive
- Beware of price discrimination:
  - These payments may raise price discrimination claims especially if customers are not notified that such fees are available, or
  - The slotting fees and other promotional allowances were offered in an ad hoc manner or not according to objective criteria
- The pandemic changed the landscape for shelf space. How are companies addressing this for 2021 agreements, and what are the risks?

Protecting Price and Brand

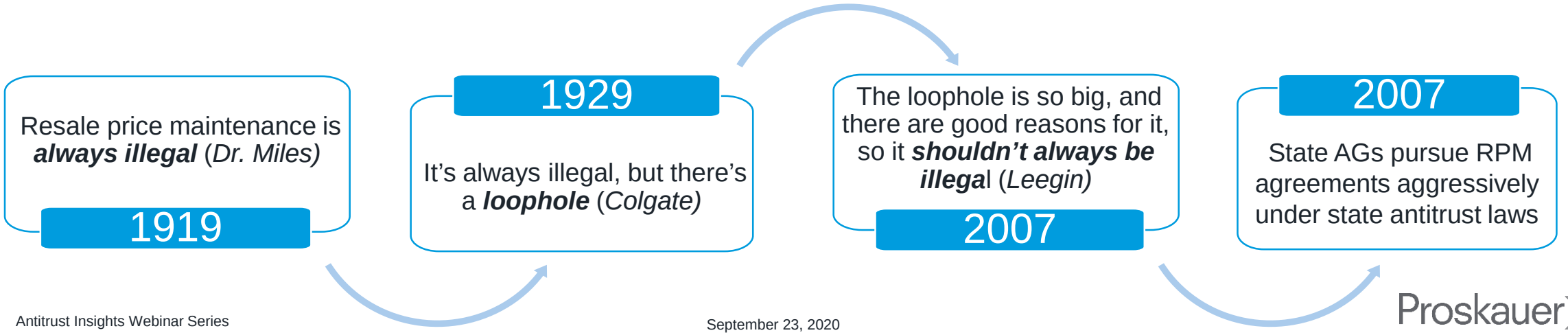


Resale Price Maintenance



What is Resale Price Maintenance?

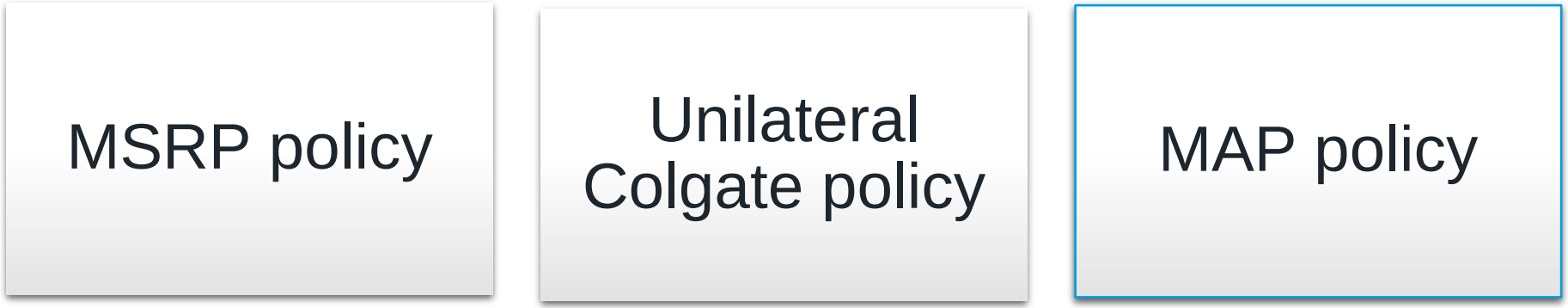
- An ***agreement*** between a manufacturer and a distributor/retailer
  - Can be oral or written
  - Can be implied based on retailer coercion
- Must be about the ***resale price***
  - Actual or suggested resale prices
  - Internet prices
  - Rebates, discounts and freebies
  - Advertised price
- The winding history of resale price maintenance



Resale Price Maintenance

- Complex issues for companies with products, companies, and product lines operating nationally and internationally
- RPM can be procompetitive:
  - can stimulate interbrand competition by reducing intrabrand competition
  - can protect inventory from being devalued/protect brand value
  - can prevent free riding
  - can incentivize retailers to invest in promotional/sales efforts
- RPM agreements can also facilitate retailer collusion, resulting in higher prices and reduced incentive to innovate
- When employing RPM policies, such as MAP policies, ***document the procompetitive benefits*** for doing so
- RPM policies must be carefully crafted and monitored by legal – they can be a trap for the unwary

Options to Protect Channel Pricing



- A “policy” – not an agreement – addresses antitrust risk
- Not risk free, hard to perfectly implement, but if done well, rarely successfully challenged

<u>Scenario 1</u>: Customers are lowering prices due to the emergency, and this is harming the manufacturer's strategy for the product. It is okay to mandate a certain floor price as long as the terms are clear in your contract, you give the customer a sufficient margin and the price is fair.

A. True.

B. False.

If not *per* se unlawful, RPM agreements are unlawful if there is a substantial adverse effect on competition. This can be established by direct proof of anti-competitiveness – higher prices or less availability without substantial justification. Anticompetitive effects can be inferred if players have market power or the business justifications are bogus. It is okay to use a MAP policy.

Scenario 2: For products that are in high demand, we can suggest resale prices in advertising and can agree with customers to establish a maximum retail price as long as the agreement is not anticompetitive.

A. **True.**

B. **False.**

MAP policies only apply to advertised prices. Because the antitrust laws are designed to protect consumers, it is likely that most maximum retail price agreements will not be deemed anticompetitive.

Price Discrimination–Robinson Patman Act

<u>Scenario 3</u>: BigBox retailer uses pricing algorithms to ensure it is has the lowest pricing. Prices are dropping in the pandemic, and Bigbox recently learned that it does not have the lowest price on a popular line of hair products and reaches out to you to request a 5% price reduction, is that OK?

A. Yes.

B. No.

Scenario 4: I have an internet site, and I want to offer lower prices online to drive sales in the current slump. Can I offer lower prices than I sell to retailers?

A. Yes.

B. No, if the retailers compete with the company-owned internet store.

Pricing Decisions In The Midst of A Crisis

- Economic consequences of a crisis force businesses throughout the supply chain to make tough choices
  - Customers will pursue extended or modified payment terms
  - Customers will seek credit offerings
  - Some customers will go out of business
- Firms making decisions about whom to extend credit to or whom to provide payment terms may be choosing which businesses will survive and which will fail
- As a result, suppliers could face a resurging risk of price discrimination claims under the Robinson-Patman Act
- The viability of such claims may be uncertain, but firms can take steps to protect themselves

Twin Antitrust Rules – RPA and RPM – Promote "*Intrabrand*" Competition

The Robinson-Patman Act

Must Charge the Same Price

Consumer

Resale Price Maintenance

Can't Control Resale Prices

Consumer

Proving Price Discrimination

> It shall be unlawful … to discriminate in price between different **purchasers** of **commodities** of **like grade and quality**, where either or any of the purchases… are in commerce… and where the effect of such discrimination may be substantially to lessen competition

Elements of a Claim:

- Commodity Requirement
  - Does not apply to things like real estate or securities
- Like Grade and Quality
  - Must be greater difference than just labeling, and must impact consumer use
- Two-Sales Requirement
  - An offer or a refusal to sell does not qualify

Primary “Defenses”

Seller can defend price differentials based on:

- **Meeting Competition** – seller can offer different prices to different customers if acting in “good faith” to meet (but not beat) the lower price of a competitor
- **Changing Conditions** – must be based on changes that actually decreased (or increased) the value of the goods
- **Cost Justification** – burden on the seller to prove that its prices are in fact lower when selling to the favored rather than disfavored customer and that the cost differential fully accounts for the price difference
- **Functional Availability** – sellers can create programs benefiting participating retailers if made known to all applicable buyers on a “proportionately equal” basis
- **Functional Discounts** – sellers can pay (in the form of discounts) for the services that only certain customers provide

What Can We Do To Protect Ourselves?

- Establish ***fair and consistent standards*** for determining whether and when to extend credit or payment terms
- Develop payment programs that are "***functionally available***" to all customers
- Require customers to establish ***ability to pay*** if credit is extended
- Be mindful of how decisions to grant or decline credit extensions are ***communicated***
- Those left without a business may view their only asset as a contingent claim against suppliers who discriminatorily refused to extend a lifeline
- ***Contact Legal*** and craft credit and payment terms policies that comport with the Robinson-Patman Act

<u>Scenario 3</u>: BigBox retailer uses pricing algorithms to ensure it is has the lowest pricing. Prices are dropping in the pandemic, and Bigbox recently learned that it does not have the lowest price on a popular line of hair products and reaches out to you to request a 5% price reduction, is that OK?

A. Yes.

B. No.

RPA prohibits sellers from charging different prices for products of like grade and quality to competing customers. The price reduction request is likely to violate RPA.

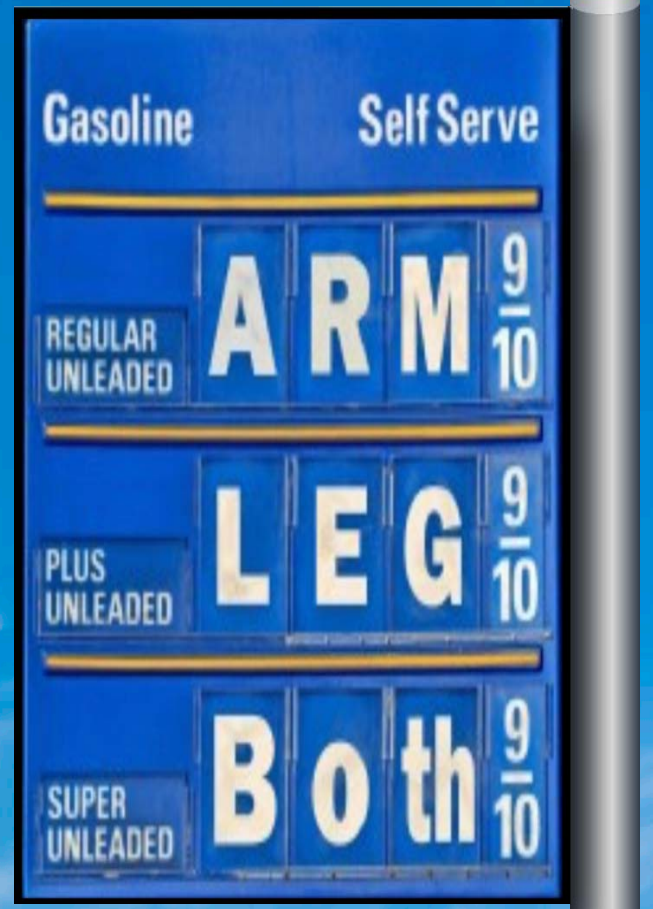
<u>Scenario 4</u>: I have an internet site, and I want to offer lower prices online to drive sales in the current slump. Can I offer lower prices than I sell to retailers?

A. **Yes.**

B. **No, if the retailers compete with the company-owned internet store.**

RPA requires at least “two sales” to resellers. An offer, refusal to sell, or direct to consumer sale does not qualify.

Price Gouging



Scenario 5: Average prices have gone up in many cases because of pulled promotions due to low supply levels. Is there a price gouging risk here?

A. Yes.

B. No.

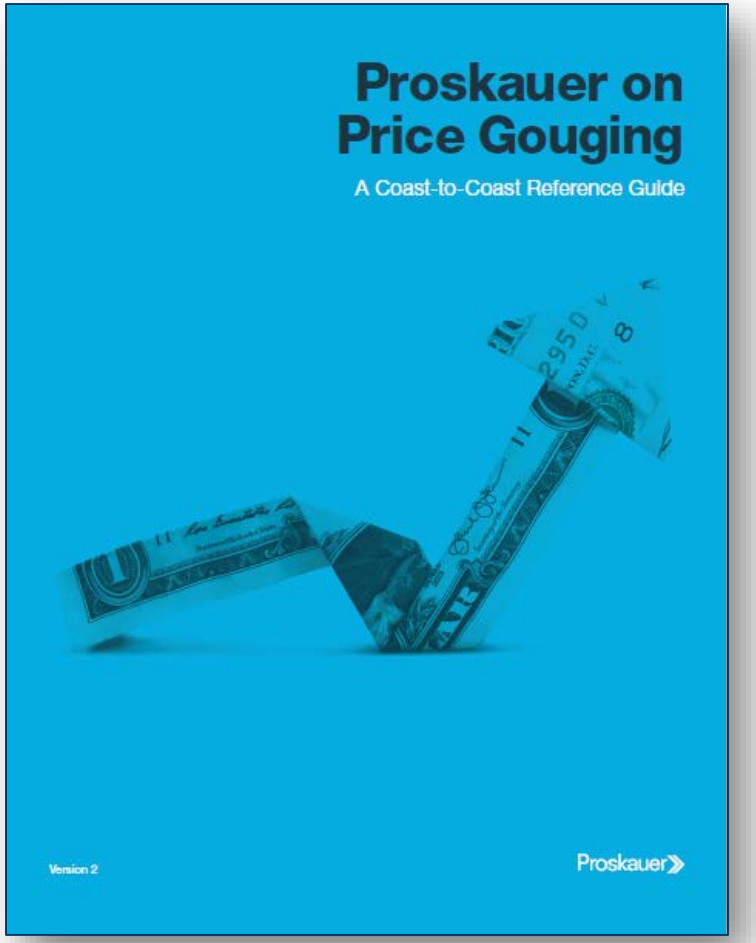
Scenario 6: Raising prices to meet a supplier's minimum advertised price ("MAP") during a state of emergency — even if more than 10% — is a valid defense under price gouging statutes.

A. True.

B. False.

Price Gouging Considerations for Supply Chain Businesses

- In response to the current pandemic, state attorneys general are actively pursuing price gouging cases across the supply chain
- Most states have price gouging laws and executive orders have added new requirements or changed existing laws
- Supply chain businesses should consider an assessment of the specific compliance required by state price gouging laws as applied to their own sales, products, and geography
    1. Where they sell (i.e., online, specific states, nationwide)
    2. What products or services they sell and whether those products or services are regulated by the state price gouging law
    3. What their prices were before the state of emergency
    4. How their costs are impacted by the state of emergency
    5. Whether their prices have changed and, if so, how and why



Strategies for Compliance

Compliance Tracking

- Set a Compliance Baseline
- Maintain Documentation

Documentation

- Maintain pricing records
- Track and document any price increases
- Document legitimate justification for price increases

Training

- Train employees and agents on price gouging risks, including sales people
  - Companies can be held liable for the actions of their sales people

Process and Best Practice

- Create a tracking system that lists the requirements, price caps, or other controls for your covered products and services in those states
- Monitor evolving requirements from state governments
- Take any inquiry from a state attorney general's office seriously
- Take public complaints and news coverage of price increases seriously

<u>Scenario 5</u>: Average prices have gone up in many cases because of pulled promotions due to low supply levels. Is there a price gouging risk here?

A. **Yes.**

B. **No.**

Not all states explicitly address whether promoted prices are factored into the baseline price for a good. In many states, consideration will be given to documentation that those promoted prices ***do not*** reflect "normal" pricing. Several states explicitly ***exclude*** factoring "temporar[y] discount[s]" (Mississippi), "discounted prices" (Rhode Island), or "limited discounts or rebates" (Rhode Island) into the average price calculation, and instead identify price gouging by comparing sales prices to the "normal average retail price" (DC) or the "average price at which the same or similar commodity was readily obtainable" (Florida) during the relevant baseline period.

Scenario 6: Raising prices to meet a supplier's minimum advertised price ("MAP") during a state of emergency — even if more than 10% — is a valid defense under price gouging statutes.

A. True.

B. False.

Most state statutes do not contemplate minimum advertised pricing as a defense. However, Tennessee does not prohibit price increases that are directly attributable to prices set forth in a pre-existing agreement. Kentucky's price gouging law also provides that a price does not violate the statute if it is "[a] contract price, or the result of a price formula, established prior to the order implementing" the statute. Further, this could potentially be taken into consideration in those states that apply an "excessive" or "unreasonable" standard.

Competitors

What We Are Seeing for Competitors: Three Buckets of Risk

Collaborating with competitors

Customers sharing information from a competitor

Competitive intelligence

All of these have been intensified by the pandemic

Scenario 7: A customer is facing a shortage, and wants to increase purchases from your company. They want to send you the reporting template another supplier uses, that provide significant efficiencies for the customer, so your company can on-board and use it as well. Is this safe?

A. Yes.

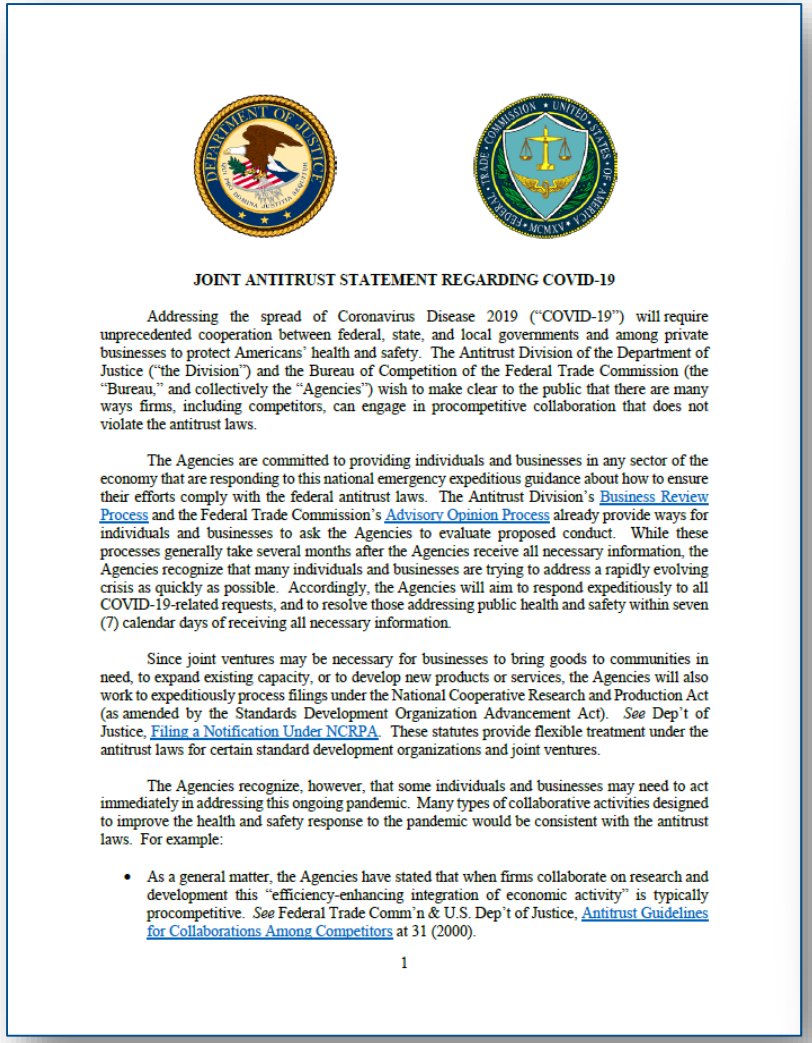
B. No.

Scenario 8: In addition, the customer wants your company to look at the other supplier's prices and discounts for this specific customer in the template, and have your company match or beat those prices. Is this safe?

A. Yes.

B. No.

Agency Guidance On Competitor Collaboration And Covid-19



JOINT ANTITRUST STATEMENT REGARDING COVID-19

Addressing the spread of Coronavirus Disease 2019 ("COVID-19") will require unprecedented cooperation between federal, state, and local governments and among private businesses to protect Americans' health and safety. 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") wish to make clear to the public that there are many ways firms, including competitors, can engage in procompetitive collaboration that does not violate the antitrust laws.

The Agencies are committed to providing individuals and businesses in any sector of the economy that are responding to this national emergency expeditious guidance about how to ensure their efforts comply with the federal antitrust laws. The Antitrust Division's Business Review Process and the Federal Trade Commission's Advisory Opinion Process already provide ways for individuals and businesses to ask the Agencies to evaluate proposed conduct. While these processes generally take several months after the Agencies receive all necessary information, the Agencies recognize that many individuals and businesses are trying to address a rapidly evolving crisis as quickly as possible. Accordingly, the Agencies 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.

Since joint ventures may be necessary for businesses to bring goods to communities in need, to expand existing capacity, or to develop new products or services, the Agencies will also work to expeditiously process filings under the National Cooperative Research and Production Act (as amended by the Standards Development Organization Advancement Act). *See* Dep't of Justice, Filing a Notification Under NCRPA. These statutes provide flexible treatment under the antitrust laws for certain standard development organizations and joint ventures.

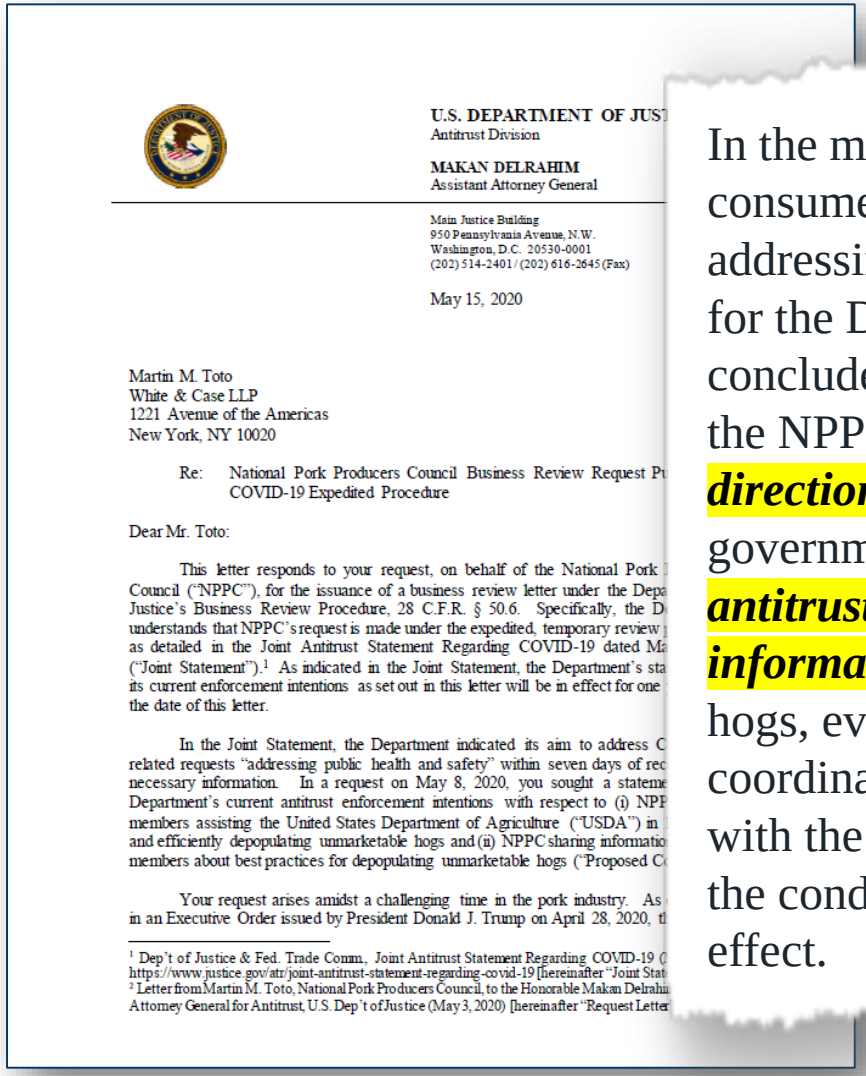
The Agencies recognize, however, that some individuals and businesses may need to act immediately in addressing this ongoing pandemic. Many types of collaborative activities designed to improve the health and safety response to the pandemic would be consistent with the antitrust laws. For example:

- As a general matter, the Agencies have stated that when firms collaborate on research and development this "efficiency-enhancing integration of economic activity" is typically procompetitive. *See* Federal Trade Comm'n & U.S. Dep't of Justice, Antitrust Guidelines for Collaborations Among Competitors at 31 (2000).

1

While many individuals and businesses have and will demonstrate extraordinary compassion and flexibility in responding to COVID-19, others may use it as an opportunity to subvert competition or prey on vulnerable Americans. The Division and the Bureau will not hesitate to seek to hold accountable those who do so. In particular, the Division and the Bureau stand ready to ***pursue civil violations of the antitrust laws, which include agreements between individuals and business to restrain competition through increased prices, lower wages, decreased output, or reduced quality*** as well as efforts by monopolists to use their market power to engage in exclusionary conduct. The Division will also prosecute any criminal violations of the antitrust laws, which typically involve agreements or conspiracies between individuals or businesses to fix prices or wages, rig bids, or allocate markets.

DOJ Permits Industry Collaboration for Pandemic Issues



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May 15, 2020

Martin M. Toto
White & Case LLP
1221 Avenue of the Americas
New York, NY 10020

Re: National Pork Producers Council Business Review Request Pu
COVID-19 Expedited Procedure

Dear Mr. Toto:

This letter responds to your request, on behalf of the National Pork
Council ("NPPC"), for the issuance of a business review letter under the Depa
Justice's Business Review Procedure, 28 C.F.R. § 50.6. Specifically, the D
understands that NPPC's request is made under the expedited, temporary review
as detailed in the Joint Antitrust Statement Regarding COVID-19 dated Ma
("Joint Statement").[1] As indicated in the Joint Statement, the Department's sta
its current enforcement intentions as set out in this letter will be in effect for one
the date of this letter.

In the Joint Statement, the Department indicated its aim to address C
related requests "addressing public health and safety" within seven days of rec
necessary information. In a request on May 8, 2020, you sought a stateme
Department's current antitrust enforcement intentions with respect to (i) NPP
members assisting the United States Department of Agriculture ("USDA") in
and efficiently depopulating unmarketable hogs and (ii) NPPC sharing informatio
members about best practices for depopulating unmarketable hogs ("Proposed C

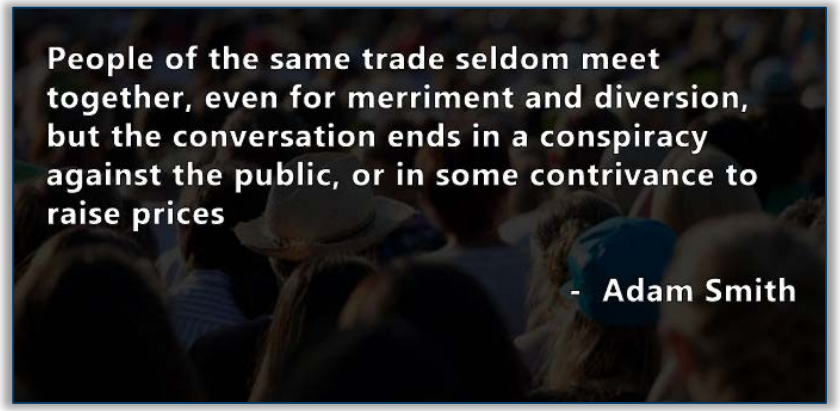
Your request arises amidst a challenging time in the pork industry. As
in an Executive Order issued by President Donald J. Trump on April 28, 2020, t

[1] Dep't of Justice & Fed. Trade Comm., Joint Antitrust Statement Regarding COVID-19 (
https://www.justice.gov/atr/joint-antitrust-statement-regarding-covid-19 [hereinafter "Joint Stat
[2] Letter from Martin M. Toto, National Pork Producers Council, to the Honorable Makan Delrahi
Attorney General for Antitrust, U.S. Dep't of Justice (May 3, 2020) [hereinafter "Request Letter

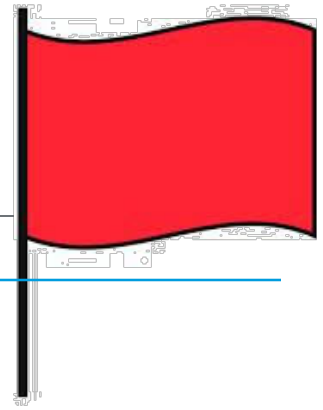
In the midst of these challenges, competition remains critically important to consumers and market participants in the pork and other meat industries, and addressing anticompetitive conduct in these industries is therefore a top priority for the Department . . . Following an expedited review, the Department can conclude that it does not presently intend to challenge the Proposed Conduct by the NPPC. Based on your representations, most of this ***conduct will occur at the direction and under the supervision and coordination of the USDA***—a government agency—and ***therefore should not raise concerns under the antitrust laws.*** Moreover, ***NPPC's communication of non-competitively sensitive information to its members***, *e.g.*, best practices for depopulating unmarketable hogs, even if not occurring at the direction of and under the supervision and coordination of the USDA, similarly ***is unlikely to raise concerns***. In accordance with the Department's usual practice, however, it reserves the right to challenge the conduct in the future if it is later revealed to be anticompetitive in purpose or effect.

Government “Encouragement” Will Not Shield Companies From Antitrust Challenges

- Companies may feel pressure from the government to pursue certain policies or initiatives to assist with the crisis
  - invite businesses to share sensitive information in connection with essential goods
  - encourage businesses to develop plans for joint development or distribution of products to ensure supply
- It is critical that companies stay vigilant of antitrust risks
  - Remind employees that they must continue to follow antitrust rules and guidelines
  - Avoid all communication with competitors concerning prices, costs, business plans, production, capacity, customers and channels
  - Take special care when writing documents to avoid making statements that may be taken out of context (documents can/will be used if litigation arises)
  - Avoid communications with competitors at trade association meetings elated to prices, costs, business plans, production, capacity, customers and channels, involve antitrust counsel, and take detailed notes of the meeting
  - Avoid text messages, emails, or phone calls with competitors that can be taken out of context



Red Flag Collaboration: Per Se Antitrust Violations



- Prices or bids
- Allocation of customers or territories
- Boycotts (also known as joint refusals to deal)
- Wages, salaries, or other benefits
- Not hiring or soliciting their employees (no-poaching agreements)

Evaluate Potential Exchanges of Information

- Information exchanges between competitors can occur in a variety of contexts, including as part of otherwise procompetitive business arrangements
- In a buy/sale relationship with a competitor, consider whether any terms in the contract contemplate the exchange of competitively sensitive information, such as current or future price or cost information
- Remember that these exchanges could harm competition if they:
  - Lead to a full-blown conspiracy
  - Facilitate coordination between the competitors, or
  - Reduce uncertainty about a competitor's activities

Do Not Discuss With Competitors

- Prices or pricing policies
- Terms that relate to prices
- Credit terms
- Allowances
- Costs or margins
- Capacity, output, or inventory
- Bids, including your intent to bid or not bid
- Markets or sales territories
- Customers or customer segments
- Market conditions or marketing plans
- Other competitors

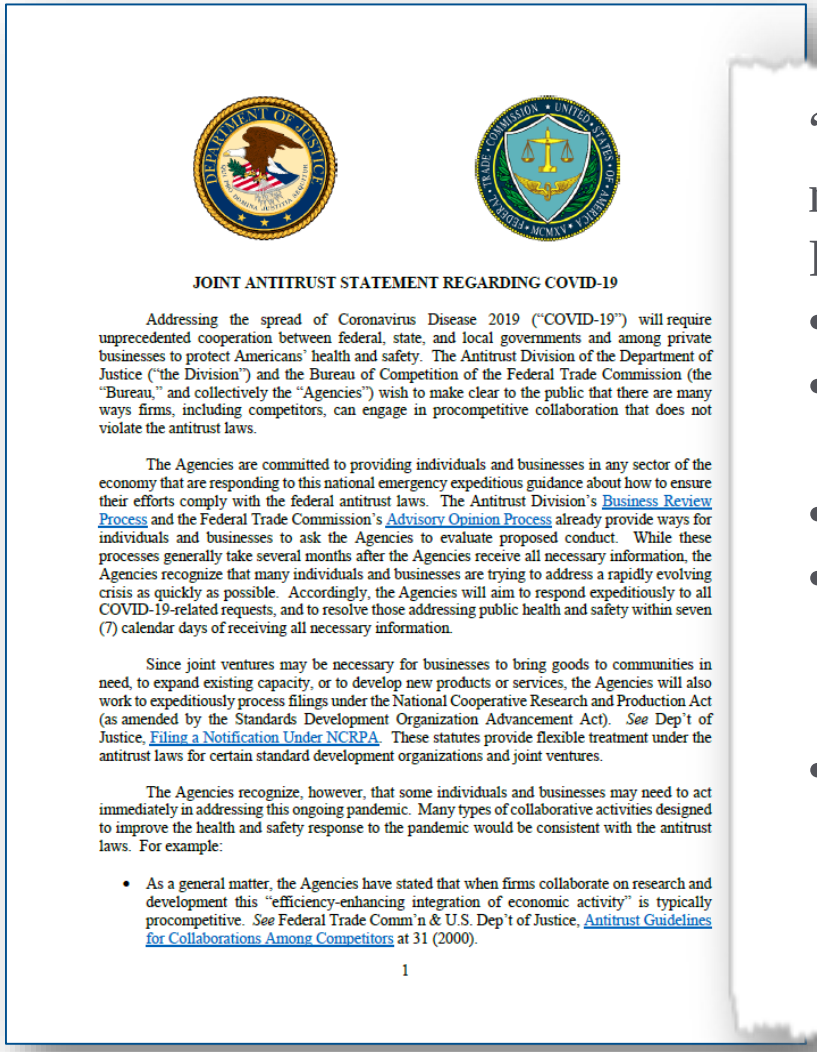
What If The Information Is Passed To The Company By A Customer?

- If a customer is passing information, ensure it is increasing competition, and not harming competition.
- Assess the sensitivity of the information.
- Would the information be appropriate to receive directly from the competitor? If not, is it appropriate here?
- Does the competitor know the information is being provided? Have they tacitly requested it be provided, or agreed it be provided?
- Is it a two-way exchange? Is the company's information going to be provided to the competitor?

Gathering Competitive Intelligence

- Monitoring competitors' pricing from public sources is generally okay
- Customers may provide information regarding competitors' pricing, but don't regularly solicit such information
- Documenting the source of competitive intelligence
- What is the information was provided by mistake? How should that be handled?

During The Pandemic It May Be OK to Share Technical Know-How



JOINT ANTITRUST STATEMENT REGARDING COVID-19

Addressing the spread of Coronavirus Disease 2019 ("COVID-19") will require unprecedented cooperation between federal, state, and local governments and among private businesses to protect Americans' health and safety. 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") wish to make clear to the public that there are many ways firms, including competitors, can engage in procompetitive collaboration that does not violate the antitrust laws.

The Agencies are committed to providing individuals and businesses in any sector of the economy that are responding to this national emergency expeditious guidance about how to ensure their efforts comply with the federal antitrust laws. The Antitrust Division's Business Review Process and the Federal Trade Commission's Advisory Opinion Process already provide ways for individuals and businesses to ask the Agencies to evaluate proposed conduct. While these processes generally take several months after the Agencies receive all necessary information, the Agencies recognize that many individuals and businesses are trying to address a rapidly evolving crisis as quickly as possible. Accordingly, the Agencies 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.

Since joint ventures may be necessary for businesses to bring goods to communities in need, to expand existing capacity, or to develop new products or services, the Agencies will also work to expeditiously process filings under the National Cooperative Research and Production Act (as amended by the Standards Development Organization Advancement Act). *See* Dep't of Justice, Filing a Notification Under NCRPA. These statutes provide flexible treatment under the antitrust laws for certain standard development organizations and joint ventures.

The Agencies recognize, however, that some individuals and businesses may need to act immediately in addressing this ongoing pandemic. Many types of collaborative activities designed to improve the health and safety response to the pandemic would be consistent with the antitrust laws. For example:

- As a general matter, the Agencies have stated that when firms collaborate on research and development this "efficiency-enhancing integration of economic activity" is typically procompetitive. *See* Federal Trade Comm'n & U.S. Dep't of Justice, Antitrust Guidelines for Collaborations Among Competitors at 31 (2000).

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"[C]ollaborative activities designed to improve the health and safety response to the pandemic would be consistent with the antitrust laws. For example:"

- collaborations on research and development
- ***sharing technical know-how, rather than company-specific data about prices, wages, outputs, or costs***
- providers' development of suggested practice parameterse
- most joint purchasing arrangements among healthcare providers, such as those designed to increase the efficiency of procurement and reduce transaction costs
- private lobbying addressed to the use of federal emergency authority, including private industry meetings with the federal government to discuss strategies on responding to COVID-19

Scenario 7: A customer is facing a shortage, and wants to increase purchases from your company. They want to send you the reporting template another supplier uses, that provide significant efficiencies for the customer, so your company can on-board and use it as well. Is this safe?

A. Yes.

B. No.

Yes, for the template, if safeguards are in place and there is a clear record that the customer initiated the request.

Scenario 8: In addition, the customer wants your company to look at the other supplier's prices and discounts for this specific customer in the template, and have your company match or beat those prices. Is this safe?

A. **Yes.**

B. **No.**

Yes, but care must be exercised. Because it is through a customer, and the customer is requesting and should benefit, the exchange can be justified. But, if the information can lead to less competition for any other customer, it should be avoided.

Competitors: Practical Guidance

- DO compete vigorously and fairly in ways that benefit your customers, including by offering superior products, services, and prices to the marketplace
- DO unilaterally make business decisions and document independent valid reasons for such changes
- DO use caution when participating in industry-wide activities such as trade associations, standard-setting organizations, industry conferences, and trade shows
- DO consider engaging with DOJ/FTC on crisis collaboration issues and keep detailed records
- DO consult counsel whenever you have concerns or if there is any doubt about whether specific conduct is appropriate

- DON'T discuss or share competitively sensitive information with competitors or other industry participants
- DON'T obtain or attempt to obtain competitively sensitive information from a competitor or from former employees of a competitor
- DON'T suggest inappropriate knowledge about what competitors may do in their pricing
- DON'T agree with another company to take common action of any kind
- DON'T assume that because the competitor's information came through a customers that there is no legal issue

Proskauer