Marketing, Promoting and Pricing Your Products During the Pandemic

April 23, 2020
Linda Goldstein, Ann O’Brien, and Randy Shaheen
Agenda

• Regulatory Hot Buttons/Enforcement
  – Price Gouging
  – Advertising and Marketing Practices
    ▪ FTC
    ▪ FDA
    ▪ State AG’s

• Heightened Areas of Risk
  – Implied Claims
  – Charitable CCV Efforts
  – Automatic Renewals
  – Made in USA
  – Shipping Delays

• Contractual Issues

• DOJ Restrictions on Competitor Collaborations
Price Gouging
Price Gouging

What is Price Gouging?

A seller increases prices on essential products to exorbitant amounts to capitalize on an emergency ("profiteering").

<table>
<thead>
<tr>
<th>Authority</th>
<th>Federal</th>
<th>State</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>No Current Statute,</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Executive Order triggering</td>
<td>Vary. Some have specific</td>
</tr>
<tr>
<td></td>
<td>Defense Production Act (DPA)</td>
<td>price increase caps</td>
</tr>
<tr>
<td></td>
<td>(DPA, 50 U.S. Code § 4512)</td>
<td>(e.g., NJ, CA and others</td>
</tr>
<tr>
<td></td>
<td>(March 23 Executive Order)</td>
<td>prohibit 10+% price</td>
</tr>
<tr>
<td>Substance</td>
<td>Prohibits hoarding and selling</td>
<td>excessive” or “unreasonable”</td>
</tr>
<tr>
<td></td>
<td>in excess of “prevailing</td>
<td>prices</td>
</tr>
<tr>
<td></td>
<td>market prices”</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(AG Barr March 24 Memo)</td>
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<tr>
<td>Products</td>
<td>Scarce health products</td>
<td>Vary. Some are narrowly-</td>
</tr>
<tr>
<td></td>
<td>designated by HHS (e.g. PPE,</td>
<td>tailored to emergency-</td>
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<tr>
<td></td>
<td>ventilators, disinfectants)</td>
<td>related products, but</td>
</tr>
<tr>
<td></td>
<td>(HHS Notice of Designation</td>
<td>many are broad, capturing</td>
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<tr>
<td></td>
<td>of Scarc Materials)</td>
<td>a wide-range of consumer,</td>
</tr>
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<td></td>
<td>(HHS Press Release)</td>
<td>housing, transportation,</td>
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<tr>
<td>Trigger</td>
<td>March 23 Executive Order</td>
<td>and medical products</td>
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<tr>
<td></td>
<td>triggering Defense Production</td>
<td>Nearly all are triggered</td>
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<td></td>
<td>Act (DPA, 50 U.S. Code § 4512)</td>
<td>by declaration of a</td>
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<tr>
<td></td>
<td>(March 23 Executive Order)</td>
<td>state of emergency</td>
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</tbody>
</table>
State Government Activity: COVID-19
Enforcement and Price Gouging Examples

**Missouri** AG issued a TRO against “The Jim Bakker Show” to stop their sale of “Silver Solution” as a treatment for COVID-19.

In **Maine**, investigators looked into a convenience store selling $10 rolls of toilet paper (normal retail price ~ $1.50/) roll (570% increase).

The **California** AG received complaints of retailers selling two 1-liter containers of hand sanitizer for $140 (normal retail price ~ $11) and eight half-gallons of bleach for $100 (normal retail price ~ $6) (1,500% increase).

In **Maine**, investigators looked into a convenience store selling $10 rolls of toilet paper (normal retail price ~ $1.50/) roll (570% increase) (normal retail price ~ $1.50/) roll (570% increase).

**Florida** AG issued more than 40 subpoenas to third-party accused of price gouging on essential commodities through accounts on Amazon.

In **Tennessee**, state officials forced individuals to stop selling more than 17,000 bottles of hand sanitizer they had hoarded. Investigators had received a tip that a store was charging $1 for a squirt of sanitizer (normal travel size bottle priced ~ $2).

The **New York** AG sent cease and desist letters to hardware store in Manhattan and grocery store in Queens for excessive prices on hand sanitizer and disinfectant for charging $79.99 hand sanitizer (300% increase), and $14.99 for disinfectant spray (150% increase).
Additional State Price Gouging Actions

Joint Statements to Online Retailers

“...We write in our capacity as the top law enforcement officers for our respective states...we appreciate report of the efforts made by platforms and online retailers to crack down on price gouging as the American community faces an unprecedented public health crisis, we are calling on you to do more at a time that requires national unity...”

33 State AGs sent online retailers letters asking them to crack down on online price gouging violations

| States Sending Cease and Desist Letters to Retailers for Price Gouging Violations |
|---------------------------------|-------------------------------|
| ✓ California                     | ✓ Michigan                    |
| ✓ New York                      | ✓ Oregon                     |
| ✓ New Jersey                    | ✓ Wisconsin                  |
| ✓ Missouri                      | ✓ Washington                 |
| ✓ Pennsylvania                  |                             |
| ✓ DC                             |                             |
| ✓ Arizona                       |                              |
Federal Government Activity: COVID-19
Enforcement and Price Gouging Examples

**Nationwide:** US Attorney Offices across the country are partnering with local hospitals to create Joint Tasks Force that focus on instances of Price Gouging on PPE, as well as shortages of equipment caused by hoarding. USAOs are encouraging hospitals and individuals to report all instances of price gouging and fraud.

**New York:** A Brooklyn man was arrested for agreeing to sell to approximately 1,000 N95 masks and other assorted materials for $12,000, an approximately 700 percent markup from the normal price.

**Georgia:** Man arrested for trying to secure order of $750 million of PPE from Department of Veterans Affairs even though he actually had no access to N95 masks or other needed supplies.

**California:** Man arrested for alleging to have the cure for COVID-19; was trying to solicit over $300,000 from investors in order to market his vaccine.
Price Gouging v. Price Fixing

Price Gouging

- **A seller** raises prices on a product or service for the purpose of taking advantage of a sharp increase in demand and short supply
- Typically takes place after a triggering event such as a natural disaster or pandemic (**profiteering**)
- Federal Penalties (Criminal): up to one year in prison and a fine of up to $10,000 per 50 U.S. Code § 4513
- State Penalties (Criminal and Civil): Vary, often $1,000 per violation and up to one year in prison

Price Fixing

- **Two or more horizontal competitors** agree to set the price of products or services instead of competing with each other
- Illegal even in non-emergency; crisis cartels may form
- Federal Criminal Penalties
  - $1 million fine and/or up to 10 years’ imprisonment for individuals
  - $100+ million fines for corporations
- State Penalties (Criminal and Civil)
- Private Civil Penalties: Treble (Triple) Damages
## Avoiding Price Fixing and Price Gouging

<table>
<thead>
<tr>
<th>Price Fixing</th>
<th>Price Gouging</th>
</tr>
</thead>
<tbody>
<tr>
<td>✓ <strong>Determine prices independently.</strong> Decide on and set prices independently. Do not discuss future prices or price setting process with competitors.</td>
<td>✓ <strong>Avoid opportunistic pricing.</strong> Tie pricing decisions to market factors, including actual costs. Avoid charging prices that are completely out of line with those charged in ordinary course; consistent with previous pricing history helpful.</td>
</tr>
<tr>
<td>✓ <strong>Know the law.</strong> Price gouging laws vary in terms of price increase thresholds and products covered. Know whether your products are covered essential products and the “gouging” thresholds.</td>
<td>✓ <strong>Document reasons for price increases.</strong> Most states have exceptions when tied to price increase of inputs/costs; maintaining good documentation is key.</td>
</tr>
<tr>
<td>✓ <strong>Monitor resellers.</strong> Even if your company isn’t charging exorbitant prices, resellers or distributors might, which could hurt your reputation.</td>
<td></td>
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</tbody>
</table>
Avoiding Bid Rigging and Market Allocation

<table>
<thead>
<tr>
<th>Bid Rigging</th>
<th>Market Allocation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Competitors agree in advance as to who will win a public or private contract.</td>
<td>Competitors agree to sell or not to sell certain products, sell in certain geographic areas, or sell to certain customers.</td>
</tr>
</tbody>
</table>

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Even in crisis situations, always:</strong></td>
<td></td>
</tr>
<tr>
<td>✓ Decide independently which contracts to bid on</td>
<td>✓ Decide independently what customers and markets to serve</td>
</tr>
<tr>
<td>✓ Avoid discussing intentions to bid or not bid with competitors</td>
<td>✓ Avoid discussions of territories, areas or specific customers with competitors</td>
</tr>
<tr>
<td>✓ Bid to win - Determine bid prices independently; avoid providing high or low numbers not intended to win a bid</td>
<td>✓ Do not agree with competitors to limit areas of service or customers served, or agree on amount of supply or output</td>
</tr>
</tbody>
</table>
Advertising and Marketing Practices
Regulatory Enforcement

• Rigorous Scrutiny by the FTC, State AG’s and the FDA

• Key Areas of Focus:
  – Bogus COVID-19 defense products
  – Misleading health and safety claims
  – Products targeted at seniors
  – CARE-related marketing scams
  – DNC violations
  – Privacy/data security/identity theft
FTC COVID-19 Complaints

January 1, 2020 - April 21, 2020

<table>
<thead>
<tr>
<th>Category</th>
<th>Reports</th>
<th>Loss</th>
</tr>
</thead>
<tbody>
<tr>
<td>Overall</td>
<td>23,581</td>
<td>$17.97M</td>
</tr>
<tr>
<td>Fraud</td>
<td>12,731</td>
<td>$553</td>
</tr>
<tr>
<td>Other</td>
<td>7,706</td>
<td></td>
</tr>
<tr>
<td>Identity Theft</td>
<td>1,813</td>
<td></td>
</tr>
<tr>
<td>Do Not Call</td>
<td>1,501</td>
<td></td>
</tr>
</tbody>
</table>

Top Fraud Products or Services (Top 5 by # of Reports and $ Loss)

<table>
<thead>
<tr>
<th>Category</th>
<th># of Reports</th>
<th>$ Loss</th>
</tr>
</thead>
<tbody>
<tr>
<td>Travel/Vacations</td>
<td>3,705</td>
<td>$6,197K</td>
</tr>
<tr>
<td>Online Shopping</td>
<td>2,307</td>
<td>$1,736K</td>
</tr>
<tr>
<td>Mobile: Text Messages</td>
<td>1,212</td>
<td>$154K</td>
</tr>
<tr>
<td>Internet Information Services</td>
<td>521</td>
<td>$201K</td>
</tr>
<tr>
<td>Impostor: Business</td>
<td>493</td>
<td>$1,424K</td>
</tr>
</tbody>
</table>

Top Do Not Call Reports

1. Other & No Subject Provided  623
2. Calls pretending to be government, businesses, or family and friends  330
3. Medical & prescriptions  198
4. Reducing your debt (credit cards, mortgage, student loans)  91
5. Warranties & protection plans  78

DNC Reports by Call Type

- Live Caller 399 (27.9%)
- Robocall 1,033 (72.1%)

Top Other Reports

1. Credit Cards  805
2. Lending: Mortgage  749
3. Lending: Student Loans  498
4. Banks, Savings & Loans, and Credit Unions  493
5. Credit Bureaus  427

*While the travel/vacation category typically relates to the sale or advertising of these services, the Coronavirus-related complaints in this category are primarily about refunds and cancellations.*
Where is FTC on Price Gouging?

- FTC has never brought a price gouging case
- Chairman Simons:
  - FTC lacks authority to prohibit/prevent excessive prices
  - Senate bills introduced to grant FTC express authority to regulate – with civil penalty authority
    - OMINOUS PRECEDENT?????????
**FTC Activity**

- **Joint FTC/FDA Warning Letters**
  - Sent to over 25 marketers of products claiming to treat or prevent COVID-19
  - FTC deems any such claims to be false per se
    - “currently are no vaccines, pills, potions, lotions, lozenges or other prescription or over-the-counter products to treat or cure” COVID-19
  - FDA deems such products to be “misbranded”
Joint Warning Letter

Date: March 31, 2020

TO: support@neuroxf.com – Neuro XPF
3900 South Hualapai Way, Suite 128
Las Vegas, NV 89147

RE: Unapproved and Misbranded Products Related to Coronavirus Disease 2019 (COVID-19)

“Crush Corona . . . While scientists around the world are working 24/7 to develop a COVID-19 vaccine, it will take many more months of testing before it’s approved and available. However, there’s something you can do right now to strengthen your immune system. Take CBD . . . CBD can help keep your immune system at the stop of its game. . . . We want everyone to take CBD and take advantage of its potential to help prepare your body to fight a coronavirus infection. So, we’re making all of our products more affordable.” [from your website https://neuroxf.com]

“Crush Corona! Your best defense against the COVID-19 blitz starts with a strong immune system. It’s what protects your body from the everyday attacks of bacteria, viruses, parasites and a host of other nasties. Learn more here: https://neuroxf.com/crush-corona/” [from March 19 posts on your social media websites https://www.facebook.com/NeuroXPF/ and https://twitter.com/NeuroXPF]
FTC Activity

- FTC Warning Letters
  - Letters sent to 10 companies selling products claiming to treat or prevent COVID-19
  - Letters sent to companies outside dietary supplement industry
    - Health/beauty/vitamins
  - Some claims based on established benefits/practices
    - Vitamin C – immune system
    - Hand cleanser – washing hands – bump up your “cleaning regimen”
  - Key message: Cannot draw any connection to COVID-19
“Face Vital Sonic Silicone Facial Brush, Fight off Coronavirus.”
[https://www.amazon.com/Face-Vital-Coronavirus-Micro-current-Rechargeable/dp/B081GKF8XH/]

“RAMP UP YOUR BEAUTY AND CLEANSING REGIMEN, FIGHT OFF CORONA: ... Take this lightweight brush with you, keep your hands and face clean everywhere you go – protect yourself from the coronavirus.” [https://www.amazon.com/Face-Vital-Coronavirus-Micro-current-Rechargeable/dp/B081GKF8XH/]

FTC Warning Letter to Face Vital LLC

In March 13 Instagram and Facebook posts, you marketed a “High Dose Vitamin C Plus Immune Booster IV nutrition infusion” and stated that, “Research is showing that high doses of Vitamin C both help prevent COVID-19 and effectively reduce the symptoms.”

In March 17 Instagram and Facebook posts, you claimed that “Vitamin C is proving to be one of the most effective agents out there right now against COVID-19. We have created a special High Dose Vitamin C Plus Immune Booster IV nutrition infusion for just $99.”

FTC Warning Letter to Resurgence Medical Spa, LLC
FTC Activity

- Warning letters sent to 13 Voice over Internet Protocol (VoIP) service providers and other companies making coronavirus-related telemarketing calls
- Enforcement action brought against company claiming to be an approved lender for coronavirus federal relief
  - Used SBA as a dba
State AG Responses

**Arizona** AG Mark Brnovich has partnered with Sen. Kyrsten Sinema, D-Ariz., to increase awareness among seniors of the stimulus check scams. Many state AGs have similarly issued warnings related to CARES Act scams.

**New York** AG Letitia James sent letters to website domain name registrars requesting that they halt new registrations of – and de-list current – domain names associated with coronavirus and COVID-19, alleging many of these sites perpetuate scams.

**Texas** AG Ken Paxton, with the FTC, sent a warning letter to a medical spa to cease claims its vitamin C intravenous infusions can prevent and cure COVID-19.

**California** AG Xavier Becerra issued consumer alerts (a) warning the public about deceptive advertising, and (b) cautioning the public about fraudulent charities. The AG warned, “Do not be hustled by opportunistic tricksters claiming to have a miracle cure. There is not a cure for COVID-19.”

Two companies settled with **Michigan** AG Dana Nessel to stop marketing and selling phony “Coronavirus Defender” patches.
NAD

- Hearings conducted over Microsoft Teams
- Fast-Track SWIFT filings via online portal
- Standard filings via e-mail
- Logistical challenges
  - Large file sizes
  - Product samples
Heightened Risks/Pitfalls
Heightened Areas of Risk

- Implied Claims
- Charitable CCV Efforts
- Automatic Renewals
- Made in USA
- Shipping Delays
Implied Health Claims
Implied Claims

Advertisers quickly responding to COVID-19
Implied Claims

• Literally true, but has tendency to deceive a substantial portion of target audience
• Often difficult to determine
• Can represent interpretation of only a small subset of consumers (15% or so)
Implied Claims

- Should claims be interpreted in light of COVID-19?
- Case involving press reports that aluminum caused Alzheimer’s
  - Rival antacid company advertised that its product contained no aluminum; Lanham Act suit followed
  - Court held not responsible for claim based on “pre-existing belief”
  - Would other courts or regulators follow this precedent?
Implied Claims

• May be a good time to review certain implied claims
• Certain claims may have been low or moderate risk before but may now be high risk
• Is your substantiation adequate for that new reality?
EXAMPLES: Implied Claim

- “Contactless” claims
- What part of the process is “contactless”
- “Contactless Delivery” seems clear
- What about claim that the product is not “touched” when it is sent out
  - Does this also imply that the packaging is not touched?
EXAMPLES: Implied Claim

- Immunity Claims
- “Supports the immune system”
- Be careful not to imply stronger claim of disease prevention
EXAMPLES: Implied Claim

- Immunity Claims
- “Boosts the immune system”
- Does this imply that there must be a benefit in terms of disease prevention/reduction
- FTC case against Nestle’s Boost drink involved strengthening immunity claims but company also made express claims about diarrhea and fever
Cause-Related Marketing
Cause-Related Marketing

- Will trigger charitable solicitation or commercial co-venture laws
- CCV:
  - An arrangement between a charity and a commercial entity under which the commercial entity engages in a sales or marketing campaign where the purchase or use of its goods or services will benefit a charity or charitable purpose
Cause Marketing Examples

During the month of April, when you buy our cereal, 10% of the purchase price will go to X Charity.

- **Company benefits economically from the boost in sales from the promotion. This is the TRADITIONAL model of a CCV.**

For every “Like” on our Facebook page during the month of April, we will donate $.10 to X Charity.

- **Company benefits only by getting a boost of “goodwill” from the promotion. This is also considered a CCV in most states. This a Goodwill CCV.**

Please click the link below to donate to X Charity.

- **This is a direct donation from the consumer and is NOT A CCV.**
Cause-Related Marketing

- Regulated in over half the states
- Requirements vary but typically include:
  - Written contract with the charity
  - Disclosures in advertising
    - Name of charity and advertiser
    - Amount of donation
    - Promotion dates
    - Min or maximum amount CCV will donate
  - Recordkeeping and accounting
  - Registration and bonding
Cause-Related Marketing

- Registration and Bonding
  - Six states require registration for a traditional CCV
    - Alabama, Hawaii, Illinois, Massachusetts, Mississippi, South Carolina
  - Four states require registration for a goodwill CCV
    - Alabama, Illinois, Massachusetts, Mississippi
  - Two states require a bond
    - Alabama, Massachusetts
Others
Risks/Pitfalls
Risks/Pitfalls

- **Automatic Renewals**
  - Are you able to fill your subscription/membership as promised
    - Six Flags class action

- **Made in USA Claims**
  - FTC and California requirements
    - Unqualified Made in USA claims – all or substantially all must be made in USA
    - Beware of implied claims
      - SHIPS FROM USA?

- **Shipping/Delivery Claims**
  - Mail/Internet Order Rule is alive and well
Risks/Pitfalls

- Shipping/Delivery Claims
  - FTC v. Fashion Nova
  - Record $9.3 million judgment
  - Shipping Promises:
    - 2 Day Shipping/Fast Shipping/Get it Quick
  - Refunds given with gift cards
Contractual Implications
Negative impact on budgets now extends even further than previously predicted – Pessimism on spending has moved out another quarter

Source: Advertiser Perceptions, “Coronavirus Effect on Advertising Report” (Wave 2 Results, April 2020)
### Ad Spending

More U.S. advertisers look to cancel or hold back ad budgets

<table>
<thead>
<tr>
<th>How has Coronavirus impacted advertising efforts?</th>
<th>Wave 1 Fielded Mar 17-20</th>
<th>Wave 2 Fielded Apr 1-4</th>
<th>Change in %-pts</th>
</tr>
</thead>
<tbody>
<tr>
<td>Held back a campaign from launching until later in the year</td>
<td>49%</td>
<td>64%</td>
<td>+15</td>
</tr>
<tr>
<td>Stopped or pulled a campaign mid-flight</td>
<td>45%</td>
<td>50%</td>
<td>+5</td>
</tr>
<tr>
<td>Adjusted media type usage or shifted budget among media types</td>
<td>48%</td>
<td>49%</td>
<td>+1</td>
</tr>
<tr>
<td>Cancelled a campaign completely (pre-launch)</td>
<td>34%</td>
<td>44%</td>
<td>+10</td>
</tr>
<tr>
<td>Paused all new advertising efforts until later in the year</td>
<td>38%</td>
<td>35%</td>
<td>-3</td>
</tr>
<tr>
<td>Launched a new campaign that we hadn’t previously scheduled</td>
<td>NEW</td>
<td>24%</td>
<td>n/a</td>
</tr>
</tbody>
</table>

Source: Advertiser Perceptions, “Coronavirus Effect on Advertising Report” (Wave 2 Results, April 2020)
Contractual force majeure clauses can protect parties from unforeseeable or uncontrollable events that prevent or delay performance.

Language and jurisdiction are key to enforceability.
Example Clauses

Non-specific:

“Any delay or failure of either party to perform its obligations under this Agreement shall be excused if, and to the extent that the delay or failure is caused or materially contributed to by force majeure or other acts or events beyond the reasonable control of a party hereto.”

Example Clauses

Identifying more situations, but still general:

“The Company shall not be liable for any failure in the performance of its obligations under this agreement which may result from strikes or acts of Labor Union, fires, floods, earthquakes, or acts of God, War or other conditions or contingencies beyond its control.”

Example Clauses

Specifically referencing epidemic and quarantine:

“Neither Buyer nor Seller shall be liable for delays or failures in performance . . . that arise out of or result from causes beyond such party's control, including without limitation: acts of God; acts of the Government or the public enemy; natural disasters; fire; flood; epidemics; quarantine restrictions; strikes; freight embargoes; war; acts of terrorism; equipment breakage

Many courts read force majeure clauses narrowly.

But even where clauses do not expressly list specific situations, they can be read to encompass impossibility of performance triggered by those events.

Parties with all three types of clauses discussed above will have arguments that they apply to COVID-19-related performance issues.
Triggering Event v. Impact

• Identifying a covered force majeure event is only one part of the defense to non-performance.

• Contracts also will set forth the type of performance challenges that are covered. For example:
  - Performance is impossible;
  - Performance is impracticable (?);
  - Performance is inadvisable (?)

• Think globally and locally
Overlap with Common Law

- Other common law theories;
  - Frustration of purpose;
  - Impossibility;
  - Act of God;
  - Against public policy.
New Contracts

- Don’t assume it automatically applies to COVID-19.
- The event and its impact may no longer be unforeseeable.
- Consider a separate contractual provision for COVID-19 issues.
DOJ Restrictions on Competitor Collaborations

Joint Antitrust Statement Regarding COVID-19

- On March 24, the DOJ and FTC issued a **joint statement** highlighting the important role of collaboration in fighting the pandemic.
- To promote such collaboration, the agencies committed to respond to requests for guidance within 7 days of receiving all necessary information.

**Collaborations Unlikely to Be Problematic**
- R&D collaborations typically procompetitive
- Sharing know-how may be necessary (and OK) for certain collaborations
- Standards for patient management developed to assist clinical decision making
- Most joint purchasing agreements among healthcare
- Healthcare facilities working together to provide resources and services
- Businesses combining production or distribution to distribute medical supplies
- Joint lobbying of federal emergency authorities (Noerr-Pennington Doctrine)

**Other Guidance Resources**
- Antitrust Guidelines for Collaboration among Competitors
- Statement of Antitrust Enforcement Policy in Healthcare
- The FTC’s Information Exchange: Be Reasonable.
Recent Expedited COVID-19 Business Review Letters Antitrust

Antitrust Letter 1
Filed: 3/30/20
Response: 4/4/20

- **Subject Matter**
  - U.S. distributors of PPE and medications sought review of joint efforts to identify global supply opportunities, ensure product quality, and facilitate manufacturing, sourcing, and product distribution necessary to treat COVID-19

Antitrust Letter 2
Filed: 4/14/20
Response: 4/20/20

- **Subject Matter**
  - Distributor of pharmaceuticals and other healthcare products also sought review of proposed collaboration with PPE producers named in Letter 1 in coordination with the government to identify global supply opportunities, ensure product quality, and facilitate manufacturing, sourcing, and product distribution necessary to treat COVID-19

Government Response

- Addressing potential disruptions to global PPE supply is central to the U.S. Government’s effort to save American lives and livelihoods from the destructive effects of COVID-19
- The nature of the Proposed Conduct, which is “necessary” and in “support [of] the mission of FEMA and other agencies to improve and enhance the supply chain for PPE and other healthcare products,” indicates that the likelihood of anticompetitive harm, if any, is low
- Full Letter Request [here](#)
- Full Government Response [here](#)

Government Response

- An important component of the effort to ensure an adequate supply of medical resources is the Strategic National Stockpile (the “Stockpile”)
- In conclusion, AmerisourceBergen represents that its efforts to expedite and increase distribution of medications and healthcare supplies to combat… the COVID-19 pandemic
- Full Letter Request [here](#)
- Full Government Response [here](#)
Recent Business Review Letters Advertising Law and Antitrust Response

Advertising Antitrust Letter
Filed: 11/22/19
Response: 4/16/20

• Subject Matter
  • Association of Independent Commercial Producers, Inc. (“AICP”) sought review of proposal to develop an online platform for advertisers to solicit, submit, and review bids from independent production and post-production companies.

Government Response

• The aggregation and exchange of price and other competitive information can facilitate anticompetitive coordination among competitors. In this case, however, there does not appear to be a substantial risk of that result because the proposed platform would not be used to compile, communicate, or disseminate pricing, transactional, bid, or other competitive information among subscribers, bidders, or third parties.
• Based on your representations and the documents and information submitted in support of your request, the Department has no present intention to challenge the operation of the AICP’s online bidding platform.
• Full Letter Request here
• Full Government Response here
Compliance for Collaborations

Guidelines for Meetings With Competitors During COVID19

**Do’s**

- Have a legitimate COVID19 Business reason for meeting
- Prepare a written agenda with topics to be covered
- Stick to the written agenda
- Limit attendance to personnel directly involved with the collaboration
- Report any troublesome discussions to executive level/Compliance team immediately
- Include counsel to monitor discussions and provide guidance

**Don’ts**

- Exchange competitively sensitive information (e.g., prices, margins, costs)
- COVID-19 DOES NOT provide authorization to conduct or agree to illegal activity (e.g., agreements on price, market allocation)
- Do not attend one-on-one meetings without prior senior level approval
- If improper discussions take place:
  - Immediately Terminate the Meeting
  - Make your disapproval and exit known to other participants
  - Leave meeting immediately
Coronavirus (COVID-19): Legal Considerations Resource Center

To provide guidance and to help address questions about legal concerns arising from the rapidly developing Coronavirus (COVID-19), BakerHostetler has established an online resource center to help address and answer legal questions about COVID-19.

https://www.bakerlaw.com/Coronavirus-COVID-19