WARNING FROM THE U.S. ANTITRUST AGENCIES: REMAIN COMPLIANT WITH ANTITRUST LAWS DURING POST-HURRICANE HARVEY AND IRMA RELIEF EFFORTS

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U.S. Antitrust, Competition & Trade Regulation Alert

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On September 12, 2017, the Department of Justice Antitrust Division and the Federal Trade Commission (collectively, the "Agencies") released antitrust guidance for post-hurricane relief efforts in the aftermath of Hurricanes Harvey and Irma. [1] The purpose of the Antitrust Guidance is to remind individuals and businesses that while cooperation among competitors will likely be necessary to rebuild the communities and economies affected by the hurricanes, such efforts must remain compliant with the antitrust laws, and a failure to do so could lead to criminal prosecution and/or civil enforcement actions.

The Agencies warned that they "will hold accountable those who seek to illegally subvert competition and prey on those affected by Hurricanes Harvey and Irma." [2] In particular, the Agencies cautioned that they will "criminally prosecute businesses involved in naked price-fixing, bid-rigging, or market-allocation agreements," and will "investigate and take action against civil violations of the antitrust laws…[and] the consumer protection laws." [3]

AVOIDING LIABILITY

There are a few important steps businesses and individuals can take to avoid liability under the antitrust laws.

First, refrain from engaging in agreements—or potentially problematic communications—with competitors regarding price-fixing, bid-rigging, and market allocation. Such agreements among competitors are considered "*per se*" illegal under the antitrust laws (meaning that the agreement need not result in actual adverse competitive effects to be deemed illegal) and are subject to criminal prosecution.

Second, abstain from sharing with competitors competitively sensitive information regarding prices, sales, margins, and customers absent a reasonable and legitimate purpose for doing so. Competitors that share this type of information absent a reasonable, legitimate purpose for doing so risk violating antitrust laws since such information sharing can be used as evidence of an implicit illegal agreement.

COLLABORATIONS AMONG COMPETITORS

While the antitrust laws are designed to protect consumers from illegal activity among competitors, they also recognize that there are many types of beneficial collaborations that produce net procompetitive benefits for consumers and that these procompetitive collaborations should be accommodated and encouraged under the antitrust laws. Within the Antitrust Guidance, the Agencies acknowledged that Hurricanes Harvey and Irma

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"disrupted or destroyed many vital production facilities as well as numerous other business sectors," and that recovery will likely "require a range of collaborative efforts among competing firms." [4] In particular, the Agencies understand that hospitals or other health care facilities might need to combine resources or services to meet the health care needs of affected communities. [5] While such collaborative efforts are subject to review under the antitrust laws, the Agencies indicated that "joint efforts of limited duration by businesses to restore these services more effectively and to assist the affected communities in recovering from the devastation may be beneficial and should not generally raise antitrust concerns." [6] The Agencies also indicated that they will take into account changes in the market conditions as a result of the hurricanes when scrutinizing these types of collaborative arrangements. [7]

VIOLATIONS OF THE ANTITRUST LAWS CAN RESULT IN SEVERE PENALTIES

The purpose of the federal antitrust laws is to promote a competitive marketplace and protect consumers. Violations of the antitrust laws can result in serious consequences for employers and any individuals directly or indirectly involved in an illegal agreement. Such consequences include:

- Criminal prosecution under felony charges for both the corporation and culpable individuals (e.g., internal management, employees, or third parties). Corporations found guilty of criminal violations of the antitrust laws face significant fines (up to $100 million), while individuals may be subject to imprisonment (up to 10 years) and significant fines (up to $1 million).
- Civil enforcement actions by the Agencies that can result in broad-ranging injunctions governing future conduct.
- Private civil actions by employees or third parties injured by the violation. Such lawsuits can be extremely costly to defend, both in terms of monetary costs and lost time of officers and employees, and can result in treble damages (three times the losses suffered by the complaining party).

PRACTICAL GUIDANCE

Companies and individuals should consider the Antitrust Guidance as a warning that the Agencies will closely analyze, investigate, and prosecute any post-hurricane recovery efforts that potentially violate the antitrust laws or consumer protection laws. All companies and individuals involved in collaborative post-hurricane recovery efforts with their competitors should consider the following:

- Ensure that management and personnel involved in collaborative post-hurricane recovery efforts understand the types of conduct that are permissible and impermissible under the antitrust and consumer protection laws. Effective training and education should include practical examples on the do's and don'ts, especially as it relates to your company's particular business or industry.
- Prior to engaging in joint recovery efforts with competitors, review the Department of Justice Antitrust Division and Federal Trade Commission's *Antitrust Guidelines for Collaborations Among Competitors*. [8] These guidelines explain how the Agencies analyze certain antitrust issues raised by competitor collaborations and can assist companies in creating a framework for joint post-hurricane recovery efforts that do not run afoul of the antitrust laws.

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- Involve antitrust counsel in high-risk collaborations or exchanges of competitively sensitive information with competitors. As evidenced above, in certain circumstances, competing companies might have a legitimate, procompetitive purpose for engaging in such collaborations or sharing competitively sensitive information with each other in the aftermath of Hurricanes Harvey and Irma. If you believe you might fall into this category, first document the legitimate business justification for your policy or practice and then seek the opinion and guidance of antitrust counsel.

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[1] Department of Justice Antitrust Division & Federal Trade Commission, Antitrust Guidance – Hurricanes Harvey and Irma (Sept. 12, 2017), https://www.justice.gov/opa/press-release/file/995986/download ("Antitrust Guidance").

[2] Antitrust Guidance at 1.

[3] Antitrust Guidance at 1.

[4] Antitrust Guidance at 1.

[5] Antitrust Guidance at 2.

[6] Antitrust Guidance at 1–2.

[7] Antitrust Guidance at 2.

[8] Department of Justice Antitrust Division & Federal Trade Commission, Antitrust Guidelines for Collaborations Among Competitors (April 2000), https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf.

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