

Considerations For Competitors Collaborating Post-Hurricane

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Hurricanes Harvey and Irma — which battered Texas and Florida and many coastal communities in other southeastern U.S. states — left millions without power; forced oil refineries offline; flooded homes, businesses and health centers; and damaged railroad tracks, roads and other parts of the regions' transportation infrastructure. Recovery efforts likely will require businesses, including competitors, to work together to rebuild the communities impacted by the storms.

In a statement issued by the Antitrust Division of the U.S. Department of Justice and the Federal Trade Commission on Sept. 12, 2017, the two agencies acknowledged that “joint efforts of limited duration by businesses to restore [] services more effectively and to assist the affected communities in recovering from the devastation may be beneficial and should not generally raise antitrust concerns.”[1] For example, businesses may need to enter into supply agreements with their closest competitors to gain access to key resources that are temporarily unavailable due to the storms. In addition, health care facilities temporarily may need to combine resources to meet the needs of impacted residents.

However, despite the unique and critical need for collaboration among competitors following hurricanes and other natural disasters, these events are not an invitation for businesses to ignore antitrust laws, and businesses must remain mindful of the rules that govern interaction and coordination among competitors. As a practical matter, the federal government is extremely unlikely to challenge short-term collaborative conduct by competitors that are good faith efforts aimed at efficiently addressing the devastation wrought by major natural disasters such as Hurricanes Harvey and Irma. But, in recent years, the government has issued these kinds of statements after natural disasters to remind firms that it has an eye out for unscrupulous anti-competitive collaborations not motivated by helping disaster victims.

The Relevant Antitrust Law

Antitrust laws recognize that competitors can work together in some ways, such as in joint ventures or joint licensing agreements, that can be good for consumers. Following extraordinary devastation resulting from natural disasters, competitors working together may allow businesses to continue



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operating despite damage to, or complete destruction of, their manufacturing facilities, distribution centers and supply chain.

However, agreements between competitors also may make it easier and tempting for them to engage in illegal antitrust activity, such as price-fixing and market allocation, to take advantage of people who are in desperate need of help. The agencies' joint statement makes clear that antitrust laws continue to apply to any agreements between competitors despite the critical need for collaboration during recovery. As the agencies emphasized in their statement, they intend to "hold accountable those who seek to illegally subvert competition and prey on those affected by Hurricanes Harvey and Irma." [2]

The central question regarding whether a competitor collaboration violates antitrust laws is "whether the relevant agreement likely harms competition by increasing the ability or incentive profitably to raise price above or reduce output, quality, service, or innovation below what likely would prevail in the absence of the relevant agreement." [3] To make this determination, the agencies typically engage in an extensive factual analysis of the agreement itself and of current market conditions. That is, they will ask whether this particular agreement is beneficial to consumers at this particular time. Changed conditions resulting from the hurricanes likely mean that some collaborations that would otherwise be deemed anti-competitive will be allowed by the agencies, at least until conditions improve. The bottom line is that competitors legally can share information if it is done with the intent to make, and the likely effect of making, the companies more effective competitors; quickly restoring essential services to victims of the hurricanes is very likely to clear this hurdle.

Tips for Avoiding Antitrust Liability in Competitor Collaborations

Businesses considering entering into post-hurricane competitor collaborations — whether long-term or short-term — should consider following the below guidelines to decrease the likelihood that their agreement will be subject to regulatory scrutiny.

1. Minimize the risk that improper discussions will occur between competitors. Obtain antitrust guidance from legal counsel prior to any meetings with competitors — including informal discussions. Prepare an agenda for the meeting with pre-approved topics and stick to it. Consider having counsel present at all meetings with competitors.
2. Limit information sharing to that which is necessary to achieve the stated business objective. Avoid sharing information relating to price, output, costs or strategic planning.
3. Have a legitimate business justification for the collaboration. Cooperate only if the cooperation will enhance competition, such as by helping a business get back on its feet or allowing a disrupted supply chain to operate again. Continue to compete fiercely in all other lines of business.
4. If the nature of the collaboration is such that it likely would raise the agencies' suspicion under "normal" circumstances, consider seeking a DOJ business review letter or FTC advisory opinion. In the aftermath of Hurricanes Katrina and Rita, the agencies recognized the "acute need for parties to receive a statement of the Agencies' antitrust enforcement intentions on an expedited basis" and accordingly established expedited procedures. [4] It is possible the agencies will enact similar procedures following Harvey and Irma.
5. Design the collaboration to last only the amount of time that is reasonably necessary to achieve the business goals. The agencies acknowledge that "[i]n general, the shorter the duration, the more likely

participants are to compete against each other and their collaboration.”

6. Use a proper confidentiality agreement that limits the use of any confidential information after the termination of the collaboration or joint venture.

Contractual arrangements between competitors — such as joint ventures, distribution and supply agreements, and joint licensing — likely are necessary while the Southeast and Texas coast recover from Hurricanes Harvey and Irma. With proper safeguards, these collaborative efforts will be both pro-competitive and beneficial to the devastated communities.

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[1] Antitrust Guidance—Hurricanes Harvey and Irma, (2017), <https://www.justice.gov/opa/press-release/file/995986/download> (last visited Sep. 14, 2017).

[2] See supra note 1.

[3] U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS, §3.31(b) (2002), https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf. The full text of the Agencies' press release and the Antitrust Guidelines for Collaborations Among Competitors can be found on the FTC's website.

[4] DOJ Business Reviews and FTC Staff Advisory Opinion Letters Related to Hurricane Katrina and Hurricane Harvey Aftermath, <https://www.justice.gov/atr/doj-business-reviews-and-ftc-staff-advisory-opinion-letters-related-hurricane-katrina-and> (last visited Sep. 14, 2017)