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April 14, 2020

VIA ELECTRONIC DELIVERY

The Honorable Makan Delrahim
Assistant Attorney General
U.S. Department of Justice
Main Justice Building
Room 3109
950 Pennsylvania Ave NW
Washington, DC 20530

Re: Urgent COVID-19-Related Request for a Business Review Letter

Dear Mr. Delrahim:

On behalf of AmerisourceBergen Corporation and its subsidiaries (“AmerisourceBergen”), I write to ask for expedited treatment of a Business Review Letter to confirm that AmerisourceBergen’s efforts to expedite and increase distribution of medications and healthcare supplies designed to combat and alleviate the health emergency caused by the Coronavirus Disease 2019 (“COVID-19”) do not in any way transgress the antitrust laws.¹ We ask for your urgent help to ensure we can engage in cooperative efforts that are essential to delivering critically-needed medications and healthcare supplies as quickly as possible to save American lives.

AmerisourceBergen is a leading distributor of pharmaceuticals and other healthcare products. Along with other distributors, such as McKesson Corporation (“McKesson”) and Cardinal Health, Inc. (“Cardinal”), we are working with various federal agencies to ensure that needed medications and healthcare supplies move quickly and efficiently to areas of greatest need during the COVID-19 crisis.

On March 30, 2020, McKesson, Cardinal and other companies (the “Requesting Parties”) wrote to you seeking a Business Review Letter pertaining to their efforts to increase manufacturing, sourcing, and distribution of personal-protective equipment (“PPE”) and

¹ AmerisourceBergen is seeking an expedited Business Review Letter under the expedited, temporary review procedure as detailed in the Joint Antitrust Statement Regarding COVID-19 dated March 2020. <https://www.justice.gov/atr/joint-antitrust-statement-regarding-covid-19>

medications related to the COVID-19 pandemic.² On April 4, 2020, you responded to that March 30, 2020 letter, stating that based on the information and representations made in the Requesting Parties' March 30, 2020 letter, the direct and continuing observations of personnel from the Antitrust Division of the Department of Justice (the "Division"), and after an expedited review, the Department of Justice presently does not intend to challenge those companies' efforts to expedite and increase manufacturing, sourcing, and distribution of PPE and medications.³

Although AmerisourceBergen is less involved in distributing PPE specifically, AmerisourceBergen, like McKesson, Cardinal and others, is responding cooperatively to requests from various agencies of the U.S. Government related to medications and other healthcare supplies, as part of a collaborative process with government personnel and industry representatives in which the Department's Antitrust Division is regularly involved. As a result, AmerisourceBergen similarly requests an expedited Business Review Letter⁴ regarding our collaborative efforts to identify global supply opportunities, ensure product quality, and facilitate product distribution to the most imperiled communities. Such a letter will give AmerisourceBergen the certainty it needs to move as swiftly as possible to protect the health of Americans.

Our collaborative efforts with McKesson, Cardinal and others are focused on facilitating the government's efforts to guide medications and other healthcare supplies to the places where they are needed most; in all other respects, AmerisourceBergen will continue to pursue its independent business strategies as before.⁵ The collaboration is limited only to Coronavirus-related efforts and will only last for as long as such efforts are necessary for the welfare of our country.

Like McKesson, Cardinal, and the other Requesting Parties in the March 30, 2020 letter to you, we also are grateful that the Antitrust Division of the Department of Justice ("the Division") has taken the lead in recognizing that the COVID-19 pandemic "will require unprecedented cooperation between federal, state, and local governments and among private businesses to protect Americans' health and safety."⁶ And we strongly share your belief as well as your commitment to the antitrust laws. We also pledge to work with you and currently are engaged with the Federal Emergency Management Agency ("FEMA"), the Defense Logistics

² Letter from Lori A. Schechter, et al., to the Hon. Makan Delrahim regarding Urgent COVID-19-Related Request for a Business Review Letter (March 30, 2020).

³ Letter from the Hon. Makan Delrahim to Lori A. Schechter, et al., regarding McKesson Corporation, et al. Business Review Request Pursuant to COVID-19 Expedited Procedure (April 4, 2020) at 2.

⁴ 28 C.F.R. § 50.6.

⁵ DOJ/FTC COVID-19 STATEMENT, *supra* note 1.

⁶ 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") JOINT STATEMENT REGARDING COVID-19 (March 24, 2020), <https://www.justice.gov/atr/joint-antitrust-statement-regarding-covid-19> (hereinafter, "DOJ/FTC COVID-19 STATEMENT").

Agency (“DLA”), the Department of Health and Human Services (“HHS”), the Centers for Disease Control (“CDC”) and other parts of the U.S. Government to ensure the fast, fair and pro-competitive distribution of necessary medications and other healthcare supplies to the most-needed places during the current health crisis.

1. Background

As you know, the COVID-19 pandemic has caused urgent need for medications and other related healthcare supplies to treat COVID-19 patients, while at the same time causing significant disruption to the supply chain. Recognizing this, U.S. Government agencies, including FEMA, DLA, CDC, HHS, and FDA have asked AmerisourceBergen and other distributors to use their industry expertise and contacts to direct medications and other healthcare products to the areas in greatest need, to address supply chain shortages, and to apply their expertise to evaluate potential medication supply issues. For example, AmerisourceBergen, McKesson, Cardinal, and other distributors are being asked by FEMA, DLA, CDC, and HHS to work to distribute hydroxychloroquine from the U.S. Government’s Strategic National Stockpile to health care providers in areas of greatest need. Similarly, AmerisourceBergen, McKesson, Cardinal, and other distributors are working with FEMA and the other government agencies to help identify medicines, and areas of the country, where other shortages may occur. We will be able to work together with those other distributors most effectively if we have the clear support of the Division for our critical and pro-competitive efforts.

2. The Proposed Conduct

At the direction of FEMA, HHS, and other government agencies, AmerisourceBergen and other distributors are collaborating to:

- Help FEMA, HHS, and foreign governments address bottlenecks with our existing foreign suppliers;
- Help FEMA and HHS identify and qualify new sources of supply;
- Help FEMA and HHS identify and monitor areas of increased demand for, and potential shortages of, medications and other healthcare supplies;
- Help expedite distribution of medications and other healthcare supplies, including medications from the Strategic National Stockpile, to FEMA-designated COVID-19 hotspots;
- Provide FEMA and HHS with data necessary to do the above;

- Provide FEMA and HHS with claims data and data otherwise requested by FEMA⁷;
- Engage in related activities to source and distribute medications and other healthcare supplies as directed by FEMA, HHS, or additional government agencies.

Due to the fast-moving nature of the COVID-19 crisis, AmerisourceBergen and other companies will engage in the Proposed Conduct directly with FEMA, HHS or other government agencies. But to be effective and responsive in furthering the objectives, policies and directions of the government, AmerisourceBergen—like the Requesting Parties in the March 30, 2020 letter to you—also will need to engage in the Proposed Conduct when agency representatives are not participating in the call or email chain.

To the limited extent that AmerisourceBergen needs to engage in the Proposed Conduct when U.S. Government representatives are not participating, AmerisourceBergen commits to follow several safeguards:

- a) Any collaboration between AmerisourceBergen and other distributors is specifically intended to further U.S. government policy and efforts;
- b) AmerisourceBergen is not using any collaboration to increase prices, reduce output, reduce quality, or otherwise engage in COVID-19 profiteering;
- c) If FEMA, HHS, other government entities, or their consultants and designees request any competitively sensitive information from AmerisourceBergen, AmerisourceBergen will make all reasonable efforts to share this information only with the requesting government agency, and not with any other distributor or competitor;
- d) AmerisourceBergen's collaborations are limited to the time period necessary to assist FEMA, HHS and other government agencies in responding to COVID-19 shortages;
- e) Upon resolution of the COVID-19-related disruptions and the disbanding of the related U.S. Government response initiatives, AmerisourceBergen and other distributors will formally dissolve their competitor collaboration and immediately notify the Department, in writing;
- f) AmerisourceBergen will commit to work with the Department to determine appropriate sequestration of competitively sensitive material that was produced during the collaboration period.

AmerisourceBergen commits to follow these safeguards at all times.

AmerisourceBergen's collaborative assistance is ongoing, and may have to change depending on the disruptions due to the COVID-19 pandemic. As a result, we recognize that the

⁷ AmerisourceBergen understands that the Division is counseling FEMA regarding antitrust issues to help mitigate any concerns with respect to data-sharing.

Division's review of AmerisourceBergen's behavior may require more flexibility than traditional Division business reviews.⁸ We will work with the Division to ensure necessary oversight. AmerisourceBergen welcomes the participation of Division attorneys in its engagements with FEMA or other government agencies to help assure conduct is consistent with the spirit and the letter of antitrust laws.

3. Analysis

Like McKesson, Cardinal and other Requesting Parties of the March 30, 2020 letter to you, AmerisourceBergen does not believe that coordinating with other distributors to support the mission of FEMA and other agencies to improve and enhance the supply chain for medication and other healthcare supplies violates any federal antitrust law enforced by the Division. As the Division recognizes, "a competitor collaboration may enable participants to offer goods . . . that are . . . brought to market faster than would be possible absent the collaboration."⁹ Further, "[a] collaboration may allow its participants to better use existing assets" than would be possible absent collaboration.¹⁰ AmerisourceBergen's collaboration with other distributors is necessary to allow us to offer medications and other healthcare supplies more quickly than otherwise would be possible and to address scarcity.

In addition, as you note in your April 4, 2020 response to McKesson, Cardinal and the other Requesting Parties in the March 30, 2020 letter to you, courts "have extended immunity to conduct by private parties acting individually or together when (i) the collaboration is compelled by an agreement with a federal agency or a clearly defined federal government policy and (ii) a federal agency supervises the conduct."¹¹ Like the Requesting Parties in the March 30, 2020 letter to you, AmerisourceBergen intends "to undertake various activities 'directed by FEMA, HHS, or additional government agencies.'"¹² And as with the Requesting Parties, federal government agents will be actively directing and supervising AmerisourceBergen's conduct. Similarly, "any determination of prices, wages, output, quality, bids, or allocations will only occur if at FEMA's [or another government agency's] direction."¹³ Moreover, any other collaboration with McKesson, Cardinal,

⁸ See, e.g., Letter from The Hon. Makan Delrahim to Victoria L. Smith, regarding The American Optometric Association and the AOAExcel GPO, LLC Business Review Request (Jan. 15, 2020) (reviewing the proposed expansion of a GPO to include optometric products), <https://www.justice.gov/atr/page/file/1235051/download>.

⁹ FED. TRADE COMM'N AND U.S. DEP'T OF JUSTICE, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS 6 (2000), <https://www.justice.gov/atr/page/file/1098461/download>.

¹⁰ Id.

¹¹ Letter from the Hon. Makan Delrahim to Lori A. Schechter, et al., regarding McKesson Corporation, et al. Business Review Request Pursuant to COVID-19 Expedited Procedure (April 4, 2020) at 7.

¹² Id.

¹³ Id. at 8.

and others would be done in necessary support of activities directed by the federal government, and consistent with the safeguards set forth above.

We recognize that the Division also must weigh any potential anticompetitive harms of collaboration.¹⁴ We do not believe that the Proposed Conduct will result in anticompetitive harms, and any speculative harms are in any case greatly outweighed by the pro-competitive health and public welfare benefits of the joint conduct. AmerisourceBergen and the March 30, 2020 Requesting Parties are not using the collaboration to increase prices, reduce output, reduce quality, or otherwise engage in COVID-19 profiteering against which the Division has warned.¹⁵ The collaboration also is limited to the time period necessary to assist FEMA, HHS and other government agencies in responding to COVID-19 shortages.

These “joint efforts” among distributors are “necessary to assist patients, consumers, and communities affected by COVID-19 and its aftermath,” which the DOJ noted as a “necessary response to exigent circumstances that provide Americans with products or services that might not be available otherwise.”¹⁶

4. The Defense Production Act and the Pandemic and All-Hazards Preparedness Act

In addition to this request for business review, AmerisourceBergen is exploring all options for enhancing the efficacy of our efforts to assist the federal government pursuant to the Defense Production Act and the Pandemic and All-Hazards Preparedness Act. We would appreciate the Division’s willingness to help us, and the other relevant government departments, work through these additional related protections, which are vital to ensuring supply to providers and patients.¹⁷

5. Conclusion

The Division recognizes that “there are many ways firms, including competitors, can engage in procompetitive collaboration that doesn’t violate the antitrust laws.”¹⁸ We agree. And we believe that there is no similar time in recent American history where such pro-competitive collaboration could be more critical. Healthcare distributors are working together to expand existing capacity and bring medications and other healthcare supplies to communities in need. The proposed conduct is limited in scope and duration, necessary to address COVID-19-related

¹⁴ See, e.g., *id.*

¹⁵ DOJ/FTC COVID-19 STATEMENT, *supra* note 1.

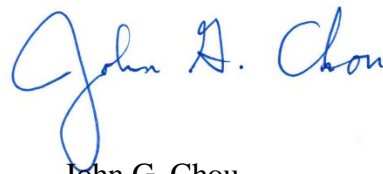
¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

medication needs, and will not extend beyond what is required to facilitate the availability of needed supplies. We therefore request an expedited Business Review Letter confirming that the Division views our efforts to address COVID-19-related medication and healthcare supply needs in conjunction with FEMA, HHS and other government agencies as consistent with the antitrust laws, and has no present intention to bring an enforcement action against AmerisourceBergen for the Proposed Conduct.

Very truly yours,



John G. Chou
Executive Vice President
Chief Legal Officer & Secretary

CC: The Honorable Alex M. Azar II, Secretary, U.S. Department of Health and Human Services
The Honorable Peter T. Gaynor, Administrator, Federal Emergency Management Agency
The Honorable Joseph J. Simons, Chairman, Federal Trade Commission