



U.S. DEPARTMENT OF JUSTICE
Antitrust Division

MAKAN DELRAHIM
Assistant Attorney General

Main Justice Building
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001
(202) 514-2401 / (202) 616-2645 (Fax)

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 Pursuant to
COVID-19 Expedited Procedure

Dear Mr. Toto:

This letter responds to your request, on behalf of the National Pork Producers Council (“NPPC”), for the issuance of a business review letter under the Department of Justice’s Business Review Procedure, 28 C.F.R. § 50.6. Specifically, the Department understands that NPPC’s request is made under the expedited, temporary review procedure as detailed in the Joint Antitrust Statement Regarding COVID-19 dated March 2020 (“Joint Statement”).¹ As indicated in the Joint Statement, the Department’s statement of its current enforcement intentions as set out in this letter will be in effect for one year from the date of this letter.

In the Joint Statement, the Department indicated its aim to address COVID-19 related requests “addressing public health and safety” within seven days of receiving all necessary information. In a request on May 8, 2020, you sought a statement of the Department’s current antitrust enforcement intentions with respect to (i) NPPC and its members assisting the United States Department of Agriculture (“USDA”) in humanely and efficiently depopulating unmarketable hogs and (ii) NPPC sharing information with its members about best practices for depopulating unmarketable hogs (“Proposed Conduct”).²

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

¹ Dep’t of Justice & Fed. Trade Comm., Joint Antitrust Statement Regarding COVID-19 (Mar. 2020), <https://www.justice.gov/atr/joint-antitrust-statement-regarding-covid-19> [hereinafter “Joint Statement”].

² Letter from Martin M. Toto, National Pork Producers Council, to the Honorable Makan Delrahim, Assistant Attorney General for Antitrust, U.S. Dep’t of Justice (May 3, 2020) [hereinafter “Request Letter”] at 5.

of processing facilities has led to a “reduction in some of those facilities’ processing capacity.”³ The Executive Order addresses bringing those facilities back online, but in the meantime, processing capacity reductions have had impacts up and down the supply chain. Your request explains that those impacts have included some hogs becoming unmarketable due to the inability to process them in a timely manner. As a result, some farmers may need to humanely euthanize unmarketable hogs—a “tragic choice [they] are being forced to make because of COVID-19 closures of pork packing facilities.”⁴

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. At the same time, it is also important to provide antitrust guidance to hog farmers and others that have been adversely impacted by the current pandemic, especially where they seek to cooperate with the government in beneficial and procompetitive ways. 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.

While for the reasons explained below your Proposed Conduct appears procompetitive, the Department would have serious concerns if industry participants, such as meat processors, engaged in coordination that facilitated price fixing, output restrictions, market allocation, anticompetitive exchanges of information, or other anticompetitive conduct.⁵ As always, the Department would welcome the NPPC’s assistance, its members, or that of any other industry participant in preventing and identifying violations of the antitrust laws in this critical industry.

I. Background

The spread of COVID-19 has created unprecedented challenges for industries across America. Major disasters have been declared in all 50 states, more than 1,250,000 Americans have been infected with the virus, and more than 75,000 have died from it.⁶

³ Exec. Order No. 13,917, 85 Fed. Reg. 26 (April 28, 2020).

⁴ Request Letter at 4.

⁵ See Joint Statement.

⁶ Fed. Emergency Mgmt. Agency, *Disasters*, <https://www.fema.gov/disasters> (last visited May 8, 2020); Johns Hopkins University, *Coronavirus COVID-19 Global Cases by the Center for Systems Science and Engineering*, <https://coronavirus.jhu.edu/map.html> (last visited May 8, 2020); see also Letter from the Honorable Makan Delrahim, Assistant Attorney General for Antitrust, U.S. Dep’t of Justice to Lori A. Schechter, McKesson Corp., Jessica L. Mayer, Cardinal Health, Inc., Michael S. Ettinger, Henry Schein, Inc., Alex Liberman, Medline Indus., Inc., & Nicholas J. Pace, Owens & Minor, Inc. (Apr. 4, 2020),

Measures to mitigate the spread of COVID-19, moreover, “have taken a dramatic toll on the United States economy and critical infrastructure.”⁷

The meat and poultry industries are among the industries affected. For example, facilities processing meat, *e.g.*, pork, have been forced to reduce capacity or close entirely, affecting the entire supply chain.⁸ As a result of these closures, hog farmers and others who supply Americans with pork are facing unprecedented hardships. In response, President Donald J. Trump issued an Executive Order recognizing that “the continued functioning of the national meat and poultry supply chain” is “critical” to the health and security of Americans.⁹ The President therefore directed the Secretary of the USDA, pursuant to the Defense Production Act, to “take all appropriate action . . . to ensure that meat and poultry processors continue operations” and “determine the proper nationwide priorities and allocation of all the materials, services, and facilities necessary to ensure the continued supply of meat and poultry.”¹⁰

The USDA’s Animal and Plant Health Inspection Service (“APHIS”) has also recognized that “American livestock and poultry producers are facing an unprecedented emergency due to COVID-19, particularly with the closing of meat processing plants in several states.”¹¹ USDA’s Under Secretary for Marketing and Regulatory Programs is initiating a program to facilitate the depopulation of unmarketable hogs. The Under Secretary has directed APHIS’s National Incident Coordination Center (“NICC”) to carry out activities under the program. APHIS’s NICC will help hog producers “whose animals cannot move to market as a result of processing plant closures” by identifying alternative markets or, “if necessary,” advising “on depopulation and disposal.”¹²

The NPPC is a national association representing pork producers, *i.e.*, hog farmers. Its business review request arises based on the exigent circumstances described above.

II. NPPC’s Efforts to Maintain Pork Supply and Facilitate Depopulation

The facts set forth in this section regarding NPPC’s Proposed Conduct are based on your representations to the Department, the Department’s discussions with the USDA, and publicly available information.

<https://www.justice.gov/atr/page/file/1266511/download> [hereinafter “PPE Distributor BRL”] and Letter from the Honorable Makan Delrahim, Assistant Attorney General for Antitrust, U.S. Dep’t of Justice to John G. Chou, AmerisourceBergen (Apr. 20, 2020), <https://www.justice.gov/atr/page/file/1269911/download> [hereinafter “AmerisourceBergen BRL”].

⁷ Exec. Order. No. 13,917, 85 Fed. Reg. 26, 313 (April 28, 2020).

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ U.S. Dep’t of Agric., Animal & Plant Health Inspection Serv., *USDA APHIS Establishing Coordination Center to Assist Producers Affected by Meat Processing Plant Closures* (Apr. 25, 2020), https://www.aphis.usda.gov/aphis/newsroom/stakeholder-info/sa_by_date/sa-2020/sa-04/meat-processing-coordination-center.

¹² *Id.*

In a normally functioning market, hog producers deliver their hogs to pork packers, *i.e.*, companies that process hogs into pork. Producers sell to packers based on preexisting contracts or on the spot market.¹³ As a result of the pandemic and reduced packing capacity, however, hog producers are unable to sell all of their hogs previously raised “just-in-time” for slaughter to packers. Producers also cannot keep these hogs until packing capacity rebounds because when hogs “exceed a certain weight . . . they are no longer marketable—no one will buy them as they do not fit on the production line equipment at the packing plants.”¹⁴ This has created “an overwhelming oversupply of live hogs in the United States.”¹⁵ Maintaining unmarketable hogs is expensive and limits farmers’ ability to make space in barns to raise hogs for future supply.¹⁶

Unable to sell or keep these unmarketable hogs, many farmers plan to “humanely euthanize” them.¹⁷ Hog farmers, however, “generally lack the knowledge, equipment, and facilities needed to humanely euthanize large numbers of animals.”¹⁸ By contrast, pork packers have the ability to do so. Several packers have even volunteered to help producers with whom they have contracts depopulate their unmarketable hogs.¹⁹ In some areas, though, these services may not be available or packers might be unable to depopulate enough hogs. Producers who sell on the spot market and lack existing contractual relationships with packers may also struggle to depopulate their unmarketable hogs at scale.

In response to these circumstances, NPPC explains that it and its members propose to engage in two categories of conduct.

First, NPPC proposes to work “in conjunction with officials from the USDA” or “relevant state and local governments” to “implement an orderly euthanization and disposal process” and “communicat[e] with farmers who may need assistance humanely euthanizing and disposing of unmarketable hogs.”²⁰ As noted above, one initiative in this area involves APHIS’s NICC. The Department understands from NPPC and USDA that APHIS’s NICC will work with farmers and packers to facilitate hog depopulation and that any coordination among farmers to implement USDA’s policies will happen at the direction and under the supervision of the USDA or state governmental authorities.

¹³ Some packers are also vertically integrated, meaning they process their own hogs as well.

¹⁴ Request Letter at 4.

¹⁵ *Id.*

¹⁶ Int’l Trade Comm’n, *Pork and Swine Industry & Trade Summary* (Oct. 2014) at 18, https://www.usitc.gov/publications/332/pork_and_swine_summary_its_11.pdf (noting that hogs are typically marketable “at 5–6 months of age”).

¹⁷ Request Letter at 4 (“It is a tragic choice, but one that thousands of hog farmers are being forced to make because of COVID-19 closures of pork packing facilities.”).

¹⁸ *Id.* at 4-5 (noting the difficulty that individual producers would have depopulating in a humanely and “environmentally responsible manner”).

¹⁹ *Id.* at 5.

²⁰ *Id.*

Ultimately, though, each producer will unilaterally decide how many of their hogs to depopulate.

Second, NPPC proposes to help federal and state agencies develop other initiatives “to address the logistical, economic, ethical, and environmental challenges pork-processing facility closures and capacity constraints caused by the COVID-19 outbreak have caused for hog farmers.”²¹ The Department’s understanding is that, to the extent NPPC helps implement these initiatives, it would do so at the direction and under the supervision of federal or state agencies, *e.g.*, APHIS’s NICC or State Veterinarians, or that NPPC’s conduct would involve relaying best practices for supply chain management and depopulation, rather than competitively sensitive information, to its members, based on publicly available information or information from federal or state agencies.²²

III. Legal Framework and Analysis

a. Collaboration and Cooperation with Federal and State Agencies

The Department has indicated that it will not challenge conduct aimed at addressing COVID-19 if it is (i) “compelled by an agreement with a federal agency or a clearly defined federal government policy” and (ii) “supervised by a federal agency.”²³

NPPC and its members, *i.e.*, hog producers, working with APHIS’s NICC fits within this two-part framework.²⁴ First, while producers may not have a formal agreement with APHIS’s NICC, they “will be acting at [its] direction in the context of a clearly defined federal program” and in furtherance of that program.²⁵ Second, their actions will be “at the direction and supervision of the USDA.”²⁶ In particular, while producers will unilaterally decide whether to depopulate their hogs and in what quantities, APHIS’s NICC will tell those producers where they should take those hogs to be depopulated. The Department understands that this conduct is necessary as a result of the situation created by the current pandemic. The Department further understands that the conduct will not be used as a mechanism to depopulate more hogs than necessary, *i.e.*, the conduct is limited to the depopulation of hogs that become unmarketable due to a reduction in processing plant

²¹ *Id.*

²² *See id.* at 7.

²³ AmerisourceBergen BRL at 8 (internal brackets omitted); *see also* PPE Distributors BRL at 7 n.30 (“[T]he Department stands ready to work with federal agencies to ensure their efforts promote competition”).

²⁴ The Department expresses no view on packers sharing of information with APHIS or state governments. The Department does note, however, that “bilateral communication with [a federal agency], as opposed to communication [among competitors], should not raise antitrust concern.” PPE Distributors BRL at 8.

²⁵ AmerisourceBergen BRL at 8; *see also* Exec. Order. No. 13,917, 85 Fed. Reg. 26, 313 (April 28, 2020) (directing USDA “to determine the proper . . . allocation of all the materials, services, and facilities necessary to ensure the continued supply of meat”).

²⁶ Request Letter at 7.

capacity. Given the above caveats, the Department is satisfied that this and similar conduct should not raise concerns under the antitrust laws.²⁷

b. Collaboration and Cooperation Among Competitors

Although NPPC represents that much of the Proposed Conduct will be under the direction and supervision of USDA or other government officials, NPPC's request also covers collaborations independent of government involvement.

NPPC also intends to provide its members with "clear and consistent guidance with regard to how producers should dispose of [their hogs]."²⁸ For example, producers who elect to depopulate their unmarketable hogs without the help of packers must navigate a patchwork of local, state, and federal laws along with other safety and environmental considerations. To the extent NPPC communicates with its members to help USDA, APHIS's NICC, and other agencies, under their direction and supervision, the Department is satisfied that this conduct should not raise concerns under the antitrust laws.²⁹ Likewise, NPPC sharing information about euthanization methods, protocols, equipment, or processors with its members – even if not at the direction of USDA or another governmental entity – is unlikely to raise concerns under the antitrust laws.³⁰

By contrast, the Department would have concerns if industry participants shared competitively sensitive information or otherwise engaged in coordination that facilitated price fixing, output restrictions, market allocation, anticompetitive exchanges of information, or other anticompetitive conduct. While your request does not address the communication of competitively sensitive information, we note that further guidance is available in the Antitrust Guidelines for Collaborations Among Competitors issued jointly by the Antitrust Division and the Federal Trade Commission.³¹

IV. Conclusion

This letter expresses the Department's current enforcement intention and is predicated on the accuracy of the information and assertions you have provided, as well as the additional qualifications set forth in the letter. It expresses the Department's current enforcement intention in the exercise of its prosecutorial discretion in the context of the

²⁷ In some circumstances, state authorities, *e.g.*, a state veterinarian or animal health authority, may direct producers to specific facilities for depopulating their unmarketable hogs (based on information from USDA or otherwise). The Department would analyze this conduct using the same two-part framework discussed above.

²⁸ Request Letter at 5.

²⁹ AmerisourceBergen BRL at 9 (quoting PPE Distributors BRL at 9).

³⁰ The same is true for NPPC seeking to "help USDA/APHIS, and state and local government representatives develop policies and initiatives" to addressing the effects of COVID-19. Request Letter at 5. See AmerisourceBergen BRL at 11–12 (discussing *Noerr–Pennington* immunity).

³¹ Fed. Trade Comm'n and U.S. Dep't Of Justice, Antitrust Guidelines for Collaborations Among Competitors at § 2.1 (2000), <https://www.justice.gov/atr/page/file/1098461/download>.

antitrust laws.³² The letter also reflects the outcome of an expedited, temporary review procedure that is necessarily less thorough than ordinary business review procedures and should not be interpreted as applying to any matter other than the Proposed Conduct as it relates strictly to, or arises directly out of, the COVID-19 pandemic. In accordance with our normal practices, the Department reserves the right to bring an enforcement action in the future if the actual operation of the proposed conduct proves to be anticompetitive in purpose or effect.

This statement is made in accordance with the Department's Business Review Procedure, 28 U.S.C. § 50.6, and subject to the limitations and reservations of rights therein. Pursuant to its terms, your business review request and this letter will be made publicly available immediately, and any supporting data you have submitted will be made publicly available within thirty days of the date of this letter, unless you request that part of the material be withheld in accordance with paragraph 10(c) of the Business Review Procedure.

Sincerely,

/s/

Makan Delrahim

³² The Department therefore expresses no opinion on whether the Proposed Conduct or other actions by NPPC or its members implicates the Packers and Stockyards Act.