

# THE U.S. DEPARTMENT OF JUSTICE ANTITRUST DIVISION AND STATE ATTORNEYS GENERAL



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## I. INTRODUCTION

The United States Department of Justice Antitrust Division (“DOJ”) frequently collaborates with state attorneys general in enforcing federal antitrust laws. While DOJ is the federal executive branch agency responsible for enforcing the antitrust laws, Congress gave the state attorneys general the authority to bring federal civil antitrust suits in both their proprietary and *parens patriae* capacities through the Clayton Act.<sup>2</sup> As a result, DOJ looks for opportunities to work with state attorneys general when doing so would protect competition more effectively and efficiently.

DOJ typically works with state attorneys general through the National Association of Attorneys General Antitrust Task Force.<sup>3</sup> While DOJ most often collaborates with state attorneys general in merger investigations, it also works with state attorneys general in other civil, non-merger matters. DOJ will also occasionally refer criminal matters to state attorneys general. This paper outlines DOJ’s approach to collaborating with state attorneys general and highlights some recent successful collaborations.

## II. CONFIDENTIALITY

DOJ takes confidentiality seriously. Outside of the national security context, non-public information related to antitrust enforcement, especially merger enforcement, is some of the most sensitive information within the government. The information DOJ obtains in the course of an investigation is almost invariably competitively sensitive; in the wrong hands, it could distort the competitive process. Moreover, information related to the status of an antitrust investigation itself can be highly sensitive, even market-moving. Accordingly, before DOJ collaborates on an investigation with a state attorney general, there are two prerequisites related to confidentiality that must be met.

The first is that the state attorney general must obtain confidentiality waivers from the parties under investigation and, if necessary, from any relevant third parties. Non-public information that DOJ obtains in the course of an investigation is typically subject to statutory confidentiality protections, and DOJ generally has no authority to share, or even discuss, such information with a state attorney general.<sup>4</sup> The party that produces the information, however, can waive those confidentiality protections. Parties are typically motivated to grant waivers because they have an incentive to avoid responding to overlapping and uncoordinated federal and state investigations. Parties under investigation also have an interest in both DOJ and any investigating state attorney general coming to the same conclusion and, if appropriate, remedy in any matter which they both investigate.

<sup>2</sup> 15 U.S.C. § 15c(a)(1); 15 U.S.C. §26.

<sup>3</sup> NATIONAL ASSOCIATION OF ATTORNEYS GENERAL: ANTITRUST COMMITTEE, [https://www.naag.org/naag/committees/naag\\_standing\\_committees/antitrust-committee.php](https://www.naag.org/naag/committees/naag_standing_committees/antitrust-committee.php) (last visited June 17, 2019).

<sup>4</sup> 15 U.S.C. § 18a(h) (2018).



The second prerequisite is that the state attorney general must sign a confidentiality agreement with DOJ. This agreement helps ensure the integrity of the investigation, including protecting the existence and status of the investigation. DOJ takes these confidentiality agreements seriously.

### III. INVESTIGATIONS AND ENFORCEMENT ACTIONS

#### *A. Initial Pathways to Collaboration*

There are two main paths by which state attorneys general participate in DOJ investigations. First, state attorneys general often approach DOJ about known investigations and express an interest in collaborating with DOJ. The state attorney general may know about the investigation because of news coverage or simply because it affects a market with which the state attorney general is familiar. Barring a major breach of trust with a particular state attorney general, DOJ usually accommodates a request to collaborate in a civil investigation.

Second, if the relevant geographic markets are concentrated in specific states, or if state or local entities are significant customers, then DOJ will often approach the relevant state attorneys general and solicit their involvement. State attorneys general often possess comparative advantages through their familiarity with local markets and relationships with state entities.<sup>5</sup> DOJ often seeks to use this expertise to enforce the law more effectively and efficiently.

Additionally, from time to time, a state attorney general will discover a potential antitrust violation and bring it to DOJ's attention. Depending on the nature of the violation and the state attorney general's preference, DOJ may consult with the state attorney general or, in certain circumstances, take an active role in the investigation.

#### *B. Collaboration in Practice*

There are two distinct phases to any collaboration with a state attorney general. The first is the investigative phase. During an investigation, it is common for many state attorneys general to be involved. When an investigation involves a large group of state attorneys general, the state attorneys general typically select an executive committee to organize their efforts and serve as a single point of contact for DOJ staff. Throughout the investigation, DOJ staff will often have weekly or biweekly calls with the state attorneys general to discuss the substance and status of the investigation. While the level of participation varies depending on the particular investigation, state attorneys general often play an important role. They may participate in interviews, issue follow-along subpoenas to gain access to the same documents produced to DOJ staff, and assist DOJ staff in document review. Additionally, state attorneys general often assist DOJ in preparing for depositions by consulting with DOJ staff and attending the depositions.

At the end of an investigation, if warranted, DOJ will bring an enforcement action or negotiate a settlement embodied in a consent decree. This second phase — the enforcement phase — raises special challenges in the DOJ-state attorney general relationship. During the time surrounding the final decision of an investigation, DOJ requires a heightened level of confidentiality. Any disclosure, even if inadvertent, could undermine an enforcement action or derail a settlement necessary to preserve competition. At the same time, however, state attorneys general require adequate information to make their own, independent enforcement decisions. Successful collaborations balance these competing needs with trust, communication, and forbearance.

The enforcement phase is typically when DOJ and state attorneys general enter into a common interest agreement and begin exchanging written work product in anticipation of litigation, including draft pleadings.

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<sup>5</sup> Stephen Calkins, *Perspectives on State and Federal Antitrust Enforcement*, 53 DUKE L.J. 673, 680–84 (2003).

## IV. RECENT COLLABORATIONS

DOJ has a long history of collaborating with state attorneys general. Over twenty years ago, the United States went to trial with state attorneys general for the first time in *United States v. Microsoft*.<sup>6</sup> More recently, numerous state attorneys general participated in the 2016 Aetna/Humana and Anthem/Cigna health insurance investigations and trials.<sup>7</sup>

In the past year, DOJ has worked, in one form or another, with over thirty state attorneys general on various investigations. Some recent highlights include:

- ***United States and the States of California, Florida, Hawaii, Mississippi, and Washington v. CVS Health Corp.***, 1:18-cv-02340 (D.D.C.): In October 2018, the attorneys general from California, Florida, Hawaii, Mississippi, and Washington State joined DOJ in requiring CVS Health Corporation and Aetna Inc. to divest Aetna's Medicare Part D prescription drug plan business for individuals in order to allow the parties to proceed with their \$69 billion merger.<sup>8</sup> The merger would have combined two of the leading sellers of individual prescription drug plans, eliminating valuable competition. The proposed merger would have resulted in increased premiums and increased out-of-pocket expenses paid by Medicare beneficiaries, higher subsidies paid by the federal government, and a lessening of service quality and innovation. The divestiture preserved competition in the market for individual prescription drug plans. DOJ worked closely with the state attorneys general throughout the investigation and settlement, and this cooperation continues to this day. The state attorneys general recently filed papers in support of the consent decree in ongoing Tunney Act proceedings.<sup>9</sup>
- ***United States and the State of North Carolina v. Charlotte-Mecklenburg Hospital Authority d/b/a Carolinas HealthCare System***, 3:16-cv-00311-RJC-DCK (W.D.N.C.): In November 2018, DOJ and the North Carolina Attorney General settled a lawsuit with Atrium Health (formerly known as Carolinas HealthCare System) prohibiting it from using anticompetitive steering restrictions in contracts between commercial health insurers and its providers in the Charlotte, North Carolina metropolitan area.<sup>10</sup> The settlement resolved over two years of civil antitrust litigation challenging Atrium's use of steering restrictions that prevented health insurers from promoting innovative health benefit plans and more cost-effective healthcare services to consumers. DOJ worked closely with the North Carolina Attorney General throughout the litigation.<sup>11</sup>
- ***Securus/ICS***: In April 2019, Securus Technologies Inc. abandoned its plans to acquire Inmate Calling Solutions LLC ("ICS"). DOJ had informed the parties that it had serious concerns that the merger would eliminate important competition in the market for inmate telecommunications services. Competition between the parties has yielded significant benefits for correctional facility customers, many of which are the state departments of correction and individual counties that operate these facilities. DOJ worked closely with the attorneys general from Colorado, Illinois, Massachusetts, Minnesota, Nevada, and Ohio on the matter.<sup>12</sup>
- ***Stromberg v. Qualcomm Inc.***, No. 19-15159 (9<sup>th</sup> Cir.): In June 2019, for possibly the first time ever, state attorneys general joined the United States on an amicus brief.<sup>13</sup> *Stromberg* raises questions over the interaction of federal and state antitrust law. The Supreme Court in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), held that only direct purchasers could seek damages under the federal antitrust laws. Several states, including California, passed so-called *Illinois Brick* repealers, allowing indirect purchasers to seek

6 Jay L. Himes, *Exploring the Antitrust Operating System: State Enforcement of Federal Antitrust Law in the Remedies Phase of the Microsoft Case*, 11 GEO MASON L. REV. 37, 51 (2002).

7 Complaint, *United States v. Anthem, Inc.*, 855 F.3d 345 (D.C. Cir. 2017) (No. 17-5024); Complaint, *United States v. Aetna, Inc.*, 240 F. Supp. 3d 1 (D.D.C. 2017) (No. 16-1494).

8 Complaint, *United States v. CVS Health Corp.*, No. 1:18-cv-02340 (D.D.C. Oct. 10, 2018).

9 Plaintiff States' Statement of Support and Request to Address the Court, *United States v. CVS Health Corp.*, No. 1:18-cv-02340 (D.D.C. May 15, 2019).

10 Final Judgment, *United States v. Charlotte-Mecklenburg Hosp. Auth.*, 248 F. Supp. 3d 720 (W.D.N.C. 2017) (No. 3:16-cv-00311-RJC-DCK).

11 See Press Release, Department of Justice, Antitrust Division, Atrium Health Agrees to Settle Antitrust Lawsuit and Eliminate Anticompetitive Steering Restrictions (Nov. 15, 2018).

12 See Press Release, Securus Technologies Abandons Proposed Acquisition of Inmate Calling Solutions After Justice Department and the Federal Communications Commission Informed Parties of Concerns (Apr. 3, 2019).

13 Brief of the United States of America and the States of Louisiana, Ohio, and Texas as Amici Curiae in Support of Appellant, *Stromberg v. Qualcomm, Inc.*, No. 19-15159 (9<sup>th</sup> Cir. June 10, 2019)

damages under relevant state antitrust laws. Other states have chosen to take a variety of differing policy positions. In *Stromberg*, the federal district court certified a nationwide class of indirect purchasers under California law. In an appeal by the defendant, DOJ and the attorneys general for Louisiana, Ohio, and Texas filed an amicus brief urging the Ninth Circuit to reject the certification. Both the United States and the state attorneys general have an interest in the correct application of the federal antitrust laws. Moreover, the attorneys general for Louisiana, Ohio, and Texas have an interest in the proper application of their state antitrust law. Accordingly, in the brief, the United States, Louisiana, Ohio, and Texas argued that states have an interest in applying their law to class members who reside in their state. Doing so vitiates policy choices made at both the federal and state levels to disallow recovery from indirect purchasers.

- ***United States and the States of Kansas, Nebraska, Ohio, Oklahoma, and South Dakota v. Deutsche Telekom AG, T-Mobile US Inc., SoftBank Group Corp., and Sprint Corporation***, No. 1:19-cv-02232 (D.D.C.): In July 2019, DOJ and the Attorneys General of Kansas, Nebraska, Ohio, Oklahoma, and South Dakota reached a settlement with T-Mobile and Sprint regarding their proposed merger. The settlement requires a substantial divestiture package in order to enable a viable facilities-based competitor to enter the market. Further, the settlement will facilitate the expeditious deployment of multiple high-quality 5G networks for the benefit of American consumers and entrepreneurs. Under the terms of the proposed settlement, T-Mobile and Sprint must divest Sprint's pre-paid business, including Boost Mobile, Virgin Mobile, and Sprint prepaid, to Dish Network Corp., a Colorado-based satellite television provider. The proposed settlement also provides for the divestiture of certain spectrum assets to Dish. Additionally, T-Mobile and Sprint must make available to Dish at least 20,000 cell sites and hundreds of retail locations. T-Mobile must also provide Dish with robust access to the T-Mobile network for a period of seven years while Dish builds out its own 5G network. DOJ worked closely with state attorneys general throughout the investigation.

## V. CONCLUSION

Both DOJ and state attorneys general play a role in enforcing federal antitrust laws. DOJ is committed to collaborating with the state attorneys general where doing so is necessary to protect competition for the benefit of the American consumer.



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