

New FTC Complaint Merits Attention of Group Purchasing Organization Suppliers and Participants

The Federal Trade Commission announced on February 12, 2018, that it has filed an administrative complaint seeking injunctive relief against three large dental supply companies, alleging that they violated the antitrust laws by conspiring to refuse to provide discounts, and sometimes refusing to serve, buying groups representing dental practitioners. [*In the Matter of Benco Dental Supply Company; Henry Schein, Inc.; and Patterson Companies, Inc.*](#)

Benco, Henry Schein and Patterson are national, full-service distributors and offer gloves, cements, sterilization products and other consumable supplies, as well as equipment, such as dental chairs and lights. The three companies collectively control more than 85 percent of all distributor sales of dental products and services in the United States, a market which is valued at \$10 billion, according to the FTC's complaint.

It is critical for companies to monitor any communications with competitors to ensure that they are complying with federal and state antitrust laws. As we explain below, group purchasing organizations are common in many industries. Although suppliers may not like dealing with them at discounted prices, it is vital that those decisions be made unilaterally, and not in combination with competitors. At the same time, buying groups have the right to expect free and fair competition for their business and should be on the lookout for suspicious activity that might suggest collusion.

Group Purchasing Organizations Are Relatively Common

The U.S. Supreme Court has recognized that buying groups are designed to increase economic efficiency by reducing transaction costs and input prices and, as a result, make markets more, not less, competitive. These groups typically aggregate the purchases of their members and attempt to leverage their collective buying power and bargaining skills in order to obtain lower prices on behalf of large numbers of small businesses. In the case charged by the FTC, the buyer groups were seeking discounts for solo and small-group dental practices that need dental supplies and equipment. Independent groceries, hospitals, local governments and franchised fast-food restaurants are just some of the many examples of members of purchasing cooperatives.

Formation, Monitoring and Enforcement of Alleged Conspiracy

The FTC alleges that Benco and Henry Schein agreed to refuse to provide discounts to, or compete for, the business of buying groups and that Patterson later joined their unlawful agreement. Benco alone is charged with a separate violation for attempting to recruit Burkhart Dental Supply, the fourth largest full-service distributor, to agree to refuse to provide discounts to buying groups.

The [complaint](#), which has been redacted for public release, includes details of communications among Benco, Henry Schein and Patterson that allegedly show the formation of the conspiracy and attempts to monitor and ensure each company's compliance with an agreement not to offer discounts to group purchasing organizations representing small, independent dentists. For example, the FTC alleges that:

- In October 2013, a Henry Schein employee informed his superior about a recent communication from his counterpart at Benco: "Next time we talk remind me to tell you about my conversation with [redacted] at

SM Benco. They're anti Buying Group and [redacted] recently reached out to them. I'm being careful not to cross any boundaries, like collusion." (Complaint ¶ 58).

- In May 2015, a Benco employee wrote in an internal email, "The best part about calling these [buying groups] is I already KNOW that Patterson and Schein have said NO." (Complaint ¶ 63).

The FTC alleges that the scheme harmed competition for dental products by: undermining the ability of independent dentists to obtain lower prices and discounts for dental products; depriving independent dentists of the benefits of price and service competition among full-service, national distributors; eliminating or reducing the output of dental products to dental buying groups; and eliminating or reducing the competitive bidding process for sales to these groups.

Henry Schein Vigorously Denies FTC's Allegations

The day following the FTC's announcement, Henry Schein issued its own statement denying the allegations in the complaint: "Contrary to the FTC's allegations, the Company was a leader in supplying buying groups, has consistently done business with buying groups, has a dedicated team to serve buying groups, and never entered into an agreement with others to refuse to do business with buying groups." Henry Schein contends that the FTC's allegations are meritless and commits to defend itself vigorously.

Group Buyer and Suppliers Alike Should Examine Their Practices

The reporting of the FTC's complaint is a reminder that suppliers risk being accused of antitrust violations when they actively communicate with competitors, and customers are allegedly harmed by reduced competition. Effective compliance programs should include education and training for senior executives and employees with responsibilities for sales and marketing, or others who may routinely come into contact with their counterparts at rival firms, including those employees who attend trade association meetings or industry trade shows. And it is advisable to refresh that training from time to time.

On the buy side, group purchasing organizations should review their own policies and procedures and also look for signs of reduced upstream competition, such as unreasonably hardline negotiation positions or parallel conduct that could indicate their suppliers may be engaged in improper collusion. If they entered into agreements with one another, the suppliers may have violated the antitrust laws, and purchasing groups that paid overcharges might be able to recover damages, which are automatically tripled by law.

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