COVID-19: GOVERNMENT ENFORCEMENT IN THE TIME OF A PANDEMIC

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U.S. Investigations, Enforcement and White Collar and Health Care Fraud & Abuse Alert

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In recent days, federal and state authorities have prioritized enforcement related activities aimed at combatting fraud schemes arising out of the public uncertainty and desperation caused by the COVID-19 pandemic. These enforcement efforts are being specifically spearheaded by the U.S. Department of Justice ("DOJ"), U.S. Attorneys' Offices, and State Attorneys General. From the appointment of Coronavirus Fraud Coordinators at each U.S. Attorney's Office to intensifying focus on those seeking to financially profit from the pandemic, federal and state authorities are beginning to make clear that they will aggressively pursue individuals and companies who seek to capitalize from the public crisis.

On Saturday, March 21, 2020, federal authorities brought charges in what is likely the first of many enforcement actions from DOJ for fraud arising out of the COVID-19 pandemic. [1] This action, as well as comments from DOJ officials, signal a shift in enforcement priorities, and companies and individual stakeholders in industries touched by the COVID-19 crisis—including healthcare, consumer goods, personal protective equipment, and internet domain providers—should take notice.

1. PRIORITIZATION BY FEDERAL AUTHORITIES

On March 16, 2020, Attorney General William P. Barr released a memorandum entitled "COVID-19 – Department of Justice Priorities," directing U.S. Attorneys to prioritize detection, investigation, and prosecution of all criminal conduct related to the pandemic. [2] Barr cited phishing schemes, marketing fake cures for COVID-19, and installing malware in supposed COVID-19 tracking apps as examples of individuals and businesses "seeking to profit from public panic." [3]

In a follow-up memorandum issued on March 19th, Deputy Attorney General Jeffrey A. Rosen further directed each U.S. Attorney to appoint a "Coronavirus Fraud Coordinator" to serve as the legal counsel on matters relating to COVID-19, direct the prosecution of COVID-19-related crimes, and increase outreach and awareness. [4] In its announcement of the memoranda, DOJ identified potential schemes ripe for prosecution by the Coronavirus Fraud Coordinators, including individuals and businesses fraudulently seeking donations for illegitimate or non-existent charitable organizations and medical providers obtaining patient information for COVID-19 testing and then using that information to fraudulently bill for other tests and procedures. [5]

The same day as Deputy Attorney General Rosen issued his memorandum, U.S. Attorney for the Western District of Pennsylvania Scott W. Brady appointed Shaun Sweeney, Senior Litigation Counsel, as the first Coronavirus Fraud Coordinator. U.S. Attorney Brady, along with Pennsylvania Attorney General Josh Shapiro, formed a task force comprised of various state and federal stakeholders, including representatives from the Pennsylvania Office of the Attorney General, Federal Bureau of Investigation, U.S. Secret Service, U.S. Postal Inspection Service,

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Immigration and Customs Enforcement/Homeland Security Investigations, Social Security Administration – Office of Inspector General, U.S. Department of Education – Office of Inspector General, and Pennsylvania State Police. [6] U.S. Attorney Brady's efforts thus far in response to the pandemic reflect the overall model that DOJ will be implementing throughout the United States. [7] Based on a recent conversation with U.S. Attorney Brady about his recent efforts, K&L Gates understands that the Western District of Pennsylvania task force also includes cooperation with fraud investigators at large medical institutions to help identify fraud related to the pandemic.

Beyond the potentially fraudulent activities that Attorney General Barr and Deputy Attorney General Rosen previously flagged, regional U.S. Attorneys' Offices have also identified other fact patterns that will be on the radar of enforcement authorities, including:

- False at-home COVID-19 test kits sold online or door-to-door;
- Fake shops, websites, social media accounts, and email addresses claiming to sell medical supplies currently in high demand, such as surgical masks and ventilators;
- "Provider scams" whereby fraudsters claim to be healthcare professionals and demand payment for "providing treatment" for COVID-19; and
- The issuance of "research reports" supporting investment in certain publicly-traded companies by falsely claiming that the products or services of such companies can prevent, detect, or cure COVID-19. [8]

Industries that may be most susceptible to fraudulent activity include pharmaceutical manufacturers, personal protective equipment manufacturers, health care providers, telehealth, and domain name providers.

A particularly high priority area of government enforcement is consumer-related fraud, [9] including price gouging related to cleaning supplies and hand sanitizer. [10] In a separate memorandum, Attorney General Barr announced the formation of a task force to address market manipulation, hoarding, and price gouging related to the COVID-19 pandemic, which will be led by Craig Carpenito, the U.S. Attorney for the District of New Jersey. [11] Based on discussions with U.S. Attorney Brady, K&L Gates understands that DOJ is also prioritizing shutting down scam websites related to COVID-19 through the immediate use of civil remedies and may later consider—on a case-by-case basis—whether a criminal enforcement response is required. [12] This approach is reflected in DOJ's first action in federal court to combat COVID-19 related fraud, where the government filed for a temporary restraining order ("TRO") and preliminary and permanent injunctions against a website fraudulently purporting to ship World Health Organization ("WHO") COVID-19 vaccine kits. [13] We understand that U.S. Attorney Brady's office will focus on individual and corporate "opportunists," and specifically highlighted as an enforcement priority any medical providers billing Medicare and Medicaid for standard upper respiratory issues in a manner that seeks to inappropriately capture higher reimbursements. U.S. Attorney Brady, however, has underscored that his Office would be less focused on well-meaning individuals and companies making genuine efforts to operate legally and compliantly, while navigating uncharted waters during the pandemic.

2. ENFORCEMENT EFFORTS LED BY STATE ACTORS

In addition to their work alongside federal authorities on cross-agency pandemic coordination task forces, state authorities are also utilizing their own tools to prosecute fraud. For example, Pennsylvania Attorney General Josh

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Shapiro's office appears especially focused on enforcement of anti-price gouging laws and on rooting out fraud in the Commonwealth. [14] Pennsylvania law prohibits "any party within the chain of distribution of consumer goods or services or both to sell or offer to sell the goods or services . . . for an amount which represents an unconscionably excessive price." [15] It is *prima facie* evidence that a price is unconscionably excessive if a company or vendor charges a price for consumer goods that exceeds 20% of the average price at which the same or similar consumer goods were sold even days preceding the date of a declared state of emergency. [16] Following Pennsylvania Governor Tom Wolf's disaster declaration on March 6th, [17] the Pennsylvania Office of the Attorney General requested consumers and businesses to send tips, complaints, and information about price gouging occurring in their communities. [18] As of March 24th, the office had received approximately 2,778 total complaints and had sent 69 cease and desist letters to businesses across the Commonwealth related to price gouging. [19]

Other states have also taken action in response to alleged COVID-19 related price gouging and scams. For example, on March 24th, Florida Attorney General Ashley Moody announced that she has issued subpoenas to 43 third-party sellers in the state accused of price gouging of essential goods, including face masks, hand sanitizers, and disinfectants, on Amazon. [20] Attorneys General offices in New York and Missouri have also taken action against television personalities selling and marketing products as a cure or treatment for COVID-19, even though no WHO- or FDA-approved vaccines or drugs to treat or prevent COVID-19 currently exist. [21] The coming weeks and months will likely be defined from an enforcement perspective by various states taking similar direct actions against individuals and companies seeking to profit by advertising and selling unproven cures and treatments to the public.

3. GOING FORWARD

As the COVID-19 crisis continues to envelope the nation, K&L Gates anticipates the following issues to arise:

- How medical institutions will balance meeting their own needs and demands in a time of unprecedented strain on the health system with the interests of the government in cooperating with investigative efforts;
- How enforcement efforts related to the COVID-19 crisis will affect previously-articulated priorities of U.S. Attorneys' Offices;
- How other task forces may be utilized to adapt to these newly-articulated COVID-19 related enforcement priorities (*e.g.*, will healthcare task forces be repurposed to investigate conduct arising out of COVID-19); and
- How the investigative burden (and the related enforcement recoveries) will be shared between state and federal agencies.

Certain courts have postponed jury and grand jury trials until at least June 2020, [22] and U.S. Attorney's Offices appear to be stepping back from in-person interviews due to travel risks associated with COVID-19. As prosecutors are confined to the office or work remotely, there have been strong indications that their focus may shift to the issuance of subpoenas and associated document productions. However, based on a conversation with U.S. Attorney Brady, prosecutors are aware that certain priority enforcement targets, like healthcare providers,

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are consumed with providing a direct response to COVID-19 and intend to work with such providers to ensure that they are not overly burdened by subpoena compliance at this time.

Additionally, K&L Gates expects to see continued use of TROs under 18 U.S.C. § 1345 as a stopgap measure to immediately prevent allegedly fraudulent conduct from victimizing members of the public without requiring the time or resources associated with a full-scale governmental investigation. Due to the rapidly moving crisis and ubiquity of certain fraud schemes, the government will likely use TROs as a tool to more quickly combat easily-identifiable forms of fraud, such as internet sales of medical masks, hand sanitizer, and fake COVID-19 tests and cures. Although Section 1345 directs courts to hold hearings on TROs "as soon as practicable," the timeline for "practicable" may be much longer with certain courts shuttered and litigants practicing social distancing.

K&L Gates' Health Care Fraud and Abuse and Investigations, Enforcement, and White Collar practice groups are continuing to monitor government enforcement priorities in light of the COVID-19 pandemic and will continue to provide period updates on developments.

NOTES:

[1] Press Release, U.S. Dep't of Just., Justice Department Files Its First Enforcement Action Against COVID-19 Fraud (Mar. 22, 2020) (announcing temporary restraining order issued against website offering fraudulent coronavirus vaccine), https://www.justice.gov/opa/pr/justice-department-files-its-first-enforcement-action-against-covid-19-fraud.
[2] *See* Attorney General of the United States, Memorandum re COVID-19 – Department of Justice Priorities (Mar. 16, 2020), https://www.justice.gov/ag/page/file/1258676/download.
[3] *Id.* at 2.
[4] Press Release, U.S. Dep't of Just., Attorney General William P. Barr Urges American Public to Report COVID-19 Fraud (Mar. 20, 2020), https://www.justice.gov/opa/pr/attorney-general-william-p-barr-urges-american-public-report-covid-19-fraud. A public version of the memorandum is not currently available.
[5] *Id.*
[6] Press Release, U.S. Dep't of Just., U.S. Attorney Scott Brady and Pennsylvania Attorney General Josh Shapiro Announce Formation of Joint Western Pennsylvania COVID-19 Task Force (Mar. 19, 2020), https://www.justice.gov/usao-wdpa/pr/us-attorney-scott-brady-and-pennsylvania-attorney-general-josh-shapiro-announce.
[7] *See e.g.,* Press Release, U.S. Dep't of Just., Federal and State Officials Launch Virginia Coronavirus Fraud Task Force (Mar. 20, 2020), https://www.justice.gov/usao-edva/pr/federal-and-state-officials-launch-virginia-coronavirus-fraud-task-force.
[8] *See, e.g.,* Press Release, U.S. Dep't of Just., U.S. Attorney Scott Brady and Pennsylvania Attorney General Josh Shapiro Announce Formation of Joint Western Pennsylvania COVID-19 Task Force (Mar. 19, 2020), https://www.justice.gov/usao-wdpa/pr/us-attorney-scott-brady-and-pennsylvania-attorney-general-josh-shapiro-announce.
[9] *Id.*

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[10] For further discussion of practical guidance and mitigation strategies related to the increased risk of antitrust and price gouging violations, see our Antitrust, Competition & Trade Regulation practice group's alert here.
[11] Sarah N. Lynch, U.S. task force to tackle coronavirus market manipulation, hoarding, Reuters (Mar. 25, 2020), https://www.reuters.com/article/us-health-coronavirus-fraud/u-s-task-force-to-tackle-coronavirus-market-manipulation-hoarding-idUSKBN21C0FW.
[12] State actors are also asking for cooperation from private companies to stop the registration and use of internet domain names by individuals trying to unlawfully and fraudulently profit off consumers' fears around COVID-19. *See* Press Release, N.Y. Att'y Gen., Attorney General James Asks GoDaddy and Other Online Registrars to Halt and De-list Domain Names Used for Coronavirus-Related Scams and Fake Remedies (Mar. 20, 2020), https://ag.ny.gov/press-release/2020/attorney-general-james-asks-godaddy-and-other-online-registrars-halt-and-de-list.
[13] *See* Complaint, United States v. John Doe, a/k/a "coronavirusmedicalkit.com", No. A-20-CV-306 (W.D. Tex. Mar. 21, 2020). The court granted the TRO and ordered the domain hosting service for the website to prevent the public from accessing the website. See Temporary Restraining Order and Order to Show Cause Why A Preliminary Injunction Should Not Issue, United States v. John Doe, a/k/a "coronavirusmedicalkit.com", No. A-20-CV-306 (W.D. Tex. Mar. 22, 2020).
[14] *See* Office of Attorney General Commonwealth of Pennsylvania, Coronavirus Updates, https://www.attorneygeneral.gov/covid19/ (last visited Mar. 24, 2020).
[15] 73 Pa. Stat. Ann. § 232.4.
[16] *Id.*
[17] Press Release, Penn. Gov., Gov. Wolf Signs COVID-19 Disaster Declaration to Provide Increased Support for State Response (Mar. 6, 2020), https://www.governor.pa.gov/newsroom/gov-wolf-signs-covid-19-disaster-declaration-to-provide-increased-support-for-state-response/.
[18] *See* Office of Attorney General Commonwealth of Pennsylvania, Coronavirus Updates, https://www.attorneygeneral.gov/covid19/ (last visited Mar. 25, 2020).
[19] *Id.*
[20] Press Release, Fla. Off. of the Att'y Gen., Attorney General Moody Issues More Than 40 Subpoenas Over Allegations of Price Gouging by Third-Party Sellers on Amazon (Mar. 24, 2020), http://www.myfloridalegal.com/newsrel.nsf/newsreleases/9D854B0F3345DC9085258535006C3BEC.
[21] *See* Letter from Lisa Landau, Chief, Health Care Bureau, State of N.Y. Off. of the Att'y Gen., to James Orsen Bakker (Mar. 3, 2020), https://ag.ny.gov/sites/default/files/bakker_cease_and_desist_letter_notification.pdf; Letter, Lisa Landau, Chief, Health Care Bureau, State of N.Y. Off. of the Att'y Gen., to Alex Jones, Managing Member, Free Speech Sys., LLC (Mar. 12, 2020), https://ag.ny.gov/sites/default/files/jones_cease_and_desist_3.12.2020.pdf. *See also* Application for Temporary Restraining Order, Missouri *ex rel.* Schmitt v. Bakker *et al.,* No. 20SN-CC00084 (Mo. Cir. Ct. Mar. 10, 2020). The court granted the TRO and scheduled the preliminary injunction hearing for June 11, 2020.
[22] *See* General Order No. 02-20, In Re: Court Operations Under the Exigent Circumstances Created by COVID-19 and Related Coronavirus (W.D. Wash. Mar. 17, 2020).

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