

In Wake of COVID-19 Pandemic, U.S. Department of Justice Coronavirus-Related Prosecutions Heat Up

Alert

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By Habib Ilahi & Victoria Smith

What Proactive Steps Businesses Should Take to Ensure Robust Compliance Measures

A U.S. Department of Justice memo issued last week by Deputy Attorney General Jeffrey Rosen directed DOJ prosecutors to focus their attention on a variety of COVID-19-related categories of offenses.

The memo is a follow up to Attorney General William Barr's March 16 memo directing all DOJ prosecutors to prioritize the detection, investigation and prosecution of illegal conduct related to the pandemic. DOJ also set up a task force, named the COVID-19 Hoarding and Price Gouging Task Force, to work with the U.S. Department of Health and Human Services (HHS) to determine which medical supplies and devices were scarce or in need, and therefore covered by the Defense Production Act (DPA). This would allow federal prosecutors to pursue companies or individuals that hoard or price gouge items designated by HHS under the DPA.

Rosen's memo further directs DOJ prosecutors to focus their attention on the following categories of offenses related to COVID-19:

- Engaging in fraudulent schemes
- Selling fake drugs and cures
- Malicious hoaxes or threats regarding the purposeful exposure and infection of others with COVID-19
- Accumulating medical supplies or devices beyond what individuals or businesses reasonably need on a daily basis, or for the purpose of selling them in excess of prevailing market prices

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- Conspiracies between individuals or businesses to fix prices, rig bids, or allocate markets with respect to COVID-19 materials
- Monopolization or anticompetitive agreements related to critical materials needed to respond to COVID-19

The DOJ has not wasted any time in implementing the new guidance, and is sending a loud and clear message out to businesses and individuals that its enforcement guidance isn't just aspirational. Since Rosen's memo, the DOJ has already filed four federal criminal actions to combat fraud and other offenses related to the coronavirus pandemic. [Read more about the four criminal actions filed by the DOJ.](#)

STEPS BUSINESSES CAN TAKE

The DOJ's heightened COVID-19-related criminal and civil fraud and antitrust enforcement actions establish a new precedent for taking extra steps to ensure robust compliance measures are in place and communicate the importance of fraud prevention to front line personnel. Moreover, the supplemental DOJ guidance assures that businesses selling products or providing services in the COVID-19-related medical provider, laboratory testing, or pharmaceutical sectors as well as medical supplement and medical foundations will have increased scrutiny by DOJ and other federal and state law enforcement agencies as they are within the prioritized coronavirus-related enforcement.

Businesses should consider the following actions:

- Review ethics policies, procedures and processes to make sure that they are effective and being followed. Document communications that all claims should be truthful and not withhold critical information.
- Review supply chain policies/contracts to make sure your suppliers are not making improper claims about their products and that they indemnify you if they do.
- Review your whistleblower/employee complaint policies and be sure they reflect your position on when employees should report suspicious behavior and to whom.
- Prior to investing in a COVID-19-related company, treatment or product, thoroughly vet and research the sales personnel, company, and products by contacting the Food and Drug Administration and Federal Trade Commission.
- If a company is planning to increase its prices on essential goods used by consumers or companies, there are a myriad of state price gouging laws that should be taken into account. Counsel can assist you in navigating this space.
- There is no public health exception to the antitrust laws. If you believe sharing information or collaborating with any competitors or potential competitors will aid in your company in providing COVID-19-related products or services, seek the advice of antitrust counsel.

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- As always, although companies with market power can generally choose which firms they choose to deal with, such action must be unilateral and not coordinated with other firms. Firms with market power may receive additional attention in their actions when they are providing items needed for a COVID-19 response, and antitrust advice prior to any decisions about terminating business relationships can assist in avoiding risk.

Stinson's [Antitrust Group](#) and [White Collar Criminal Defense & Special Investigations team](#) will continue to monitor COVID-19-related antitrust and fraud enforcement and provide periodic updates. This team includes leaders who are alumni of many of the sections of the DOJ including the Antitrust Division, the Consumer Protection Branch, the Civil Division's Fraud Section, and various U.S. Attorneys' Offices.

Due to the dynamic nature and rapidly changing circumstances, we will continue to provide legal updates on fraud, and we welcome your questions.

CONTACT

Victoria L. Smith

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