

U.S. Department of Justice's Pandemic-Related Enforcement Priorities Warrant Caution by Businesses

By **Eric W. Moran** and **Jeffrey P. Mongiello**

July 2020

Since the onset of the COVID-19 pandemic in the United States, the U.S. Department of Justice ("Department") has prioritized COVID-19-related enforcement actions in a very public way. In a series of March 2020 memos, Department officials have warned of a range of pandemic-related schemes, dedicated experienced Department staff to pandemic-related prosecutions, shored up public reporting hotlines, and constituted within the Department a "COVID-19 Hoarding and Price Gouging Task Force" ("Task Force"). The Department also promoted the use of the anti-price gouging provisions of the Defense Production Act¹ ("DPA") to target the stockpiling and price gouging of designated items that are important to slowing the spread of the virus. Attorney General William P. Barr directed federal prosecutors "to prioritize the detection, investigation, and prosecution of all criminal conduct related to the current pandemic."

What followed has been a range of enforcement actions for price gouging, program fraud, health care fraud, anti-kickback violations, and consumer protection, proving the Department's willingness to vigorously pursue pandemic-related cases, even as federal criminal prosecutions overall have dropped some 80 percent from February to April 2020.² And such enforcement actions are expected to continue. These new cases teach important lessons for businesses operating in the health care space, and for any business that has accepted some of the \$2.7 trillion in economic relief under the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act") that the government dispensed in the wake of the COVID-19 pandemic. These cases also offer a glimpse of prosecutions to come.

Price Gouging and PPE Fraud Enforcement

In conjunction with the establishment of the Task Force to enforce the DPA's anti-hoarding and price gouging provisions, President Trump issued a March 23, 2020, executive order (EO 13910) authorizing the Secretary of Health and Human Services

¹ 50 U.S.C. §§ 4512, 4513.

² TRAC Reports, Inc., *Federal Criminal Prosecutions Plummet in Wake of COVID-19*, <https://trac.syr.edu/tracreports/crim/609> (last visited 6/9/2020).

(“HHS”) to designate “scarce healthcare and medical items” under the DPA. The HHS Secretary, in turn, promptly designated 16 categories of personal protective equipment (“PPE”) and other medical equipment as “scarce,” including N-95 and other filtering masks, portable ventilators, sterilizers and disinfecting devices, medical gowns, and such PPE as coveralls, face masks and shields, and gloves. After their designation, it became a misdemeanor to accumulate those “scarce healthcare and medical” items in excess of his or her reasonable needs for business, personal, or home consumption, or for the purpose of selling it in excess of “prevailing market prices.”³

The Task Force has prioritized the investigation of hoarding “vital medical supplies,” such as PPE, for resale at excessive prices but has offered little guidance as to what is “excessive.” Neither the DPA nor federal law defines “price gouging” or what constitutes an “excessive” markup, and state law provides a patchwork of guidance. New Jersey law, for example, states that a price of more than 10 percent above “the price at which the good or service was sold . . . by the seller in the usual course of business immediately prior to the state of emergency” is presumed to be an “[e]xcessive price increase.”⁴ The Pennsylvania Price Gouging Act considers a price that “exceeds an amount equal to or in excess of 20% of the average price” to be *prima facie* evidence of an unconscionably excessive price.⁵ Florida prohibits “gross disparity” between the sale price and the “average price” of sale within 30 days immediately prior.⁶ New York simply bars the sale of certain goods at an “unconscionably excessive price.”⁷

In June 9, 2020, comments to the Senate Judiciary Committee, Associate Deputy Attorney General William Hughes and New Jersey U.S. Attorney Craig Carpenito, who heads the Task Force, addressed the Task Force’s efforts to date. They explained that when evaluating resale price for designated materials, it is important that the reseller is not “profiteering” from the transaction. They said that “[i]t is likewise important if the reseller’s costs are not particularly higher than the costs a traditional distributor incurs, but the reseller nevertheless demands a resale price substantially higher than the traditional price for the same goods.” Predictably, the Department offered no bright line rule; instead, it promoted a know-it-when-you-see-it analysis of reseller profit margins.

Despite uncertain pricing standards, the Department has already invoked the DPA in multiple cases to address pandemic-related stockpiling.

In a pair of April 2020 cases, the U.S. Attorney’s Office for the Eastern District of New York (“EDNY”) targeted alleged price-gougers for stockpiling PPE, such as protective face masks, for resale at excessive prices. In its first prosecution under the DPA, the government charged Amardeep Singh with stockpiling more than five tons of medical equipment, including masks and gloves, and with selling those goods in the “COVID-19

³ 50 U.S.C. § 4512.

⁴ N.J. Stat. Ann. § 56:8-108.

⁵ 73 Pa. Cons. Stat. § 232.4(b).

⁶ Fla. Stat. § 501.160(b)(1).

⁷ N.Y. Gen. Bus. Law § 396-R.

Essentials” section in his Long Island store at a more than a 1,000 percent markup.⁸ In the criminal complaint, the government detailed Singh’s business pre-COVID-19 as a traditional retail store (e.g., selling sneakers and clothes), and noted that he only started selling medical materials after the COVID-19 outbreak.

EDNY also brought federal price-gouging charges against Kent Bulloch and William Young.⁹ Prosecutors alleged that these defendants sought to resell one million KN95 face masks, an item deemed scarce and threatened under the DPA, at a 50 percent markup in New York City, solicited “investors” to sell the masks for double or triple the regular price, and brandished false documents certifying mask quality. Bulloch also created fraudulent documents for an undercover agent posing as an investor, purportedly limiting the resale markup to 10 percent, according to filed documents.

According to U.S. Attorney Carpenito, the Task Force has opened “hundreds” of investigations involving hoarding and price gouging, counterfeiting or misbranding of medical devices, fraud, and other violations.¹⁰ Sellers of “scarce” materials should therefore expect continued scrutiny from both federal and state regulators. Detailed records establishing costs associated with designated materials will be critical in fending off price-gouging allegations. This is particularly true for businesses with no sustained track record of selling such goods, as was emphasized in the *Singh* case. As with *Singh*, retailers that have only recently pivoted to selling “scarce” materials should expect scrutiny from the federal government.

PPP Fraud

Price gouging is hardly the only area of enforcement in the wake of COVID-19. The Department also has prioritized the detection and prosecution of waste and abuse relative to the some \$2.7 trillion in relief programs rolled out to address the economic impact of the COVID-19 pandemic. Even at this early stage, federal prosecutors have brought numerous cases charging fraud in connection with applications for, and misuse of, Paycheck Protection Program (“PPP”) loans.

Prosecutors across the country have pursued allegations of fraudulent PPP loan applications. Such was the case with Baoke Zhang, a software engineer who, according to prosecutors in the Western District of Washington, committed bank fraud by seeking \$1.5 million in forgivable, Small Business Administration (“SBA”)-backed loans from multiple banks, claiming fictitious payroll expenses associated to fictitious information technology companies that he created.¹¹ Zhang allegedly provided lenders with fraudulent Internal Revenue Service (“IRS”) documentation for a purported sole proprietorship with 25 employees. Zhang allegedly submitted documentation purporting to show that the IRS had assigned his entities’ Employer Identification Numbers (or

⁸ *United States v. Singh*, 20-mj-00326 (E.D.N.Y. Apr. 24, 2020).

⁹ *United States v. Bulloch and Young*, 20-mj-00327 (E.D.N.Y. Apr. 27, 2020).

¹⁰ Craig Carpenito and Nicholas Grippo, *An Inside Look at DOJ Fight Against COVID-19 Price-Gauging*, Law360 (June 24, 2020).

¹¹ *United States v. Zhang*, 20-mj-00269 (MAT) (W.D. Wash. May 21, 2020).

“EIN”) in 2017 and 2018, when, in fact, those EINs were assigned just days before the applications.

PPP application fraud cases often concern misstatements about the existence of the corporate applicant and the number of workers it employs (thus falsely inflating the existence and size of its payroll budget).¹² According to filed charging documents, investigations of these cases often involve a simple comparison of payroll lists set forth in the PPP application to state labor and IRS records.

Prosecutors also have focused on how applicants spend PPP proceeds. The U.S. Attorney in the Northern District of Georgia alleged that reality TV personality Maurice Fayne frittered away \$1.5 million in PPP loan proceeds on personal expenses, such as a Rolex Presidential watch, diamond jewelry, child support payments, and a Rolls-Royce Wraith (found in his garage, temporary tags still affixed).¹³ While that case does allege certain misstatements in Mr. Fayne’s application, there is no allegation that his trucking company was a fiction, and the allegations emphasize his use of the program funds for impermissible personal uses.

Unfortunately, guidance on the use of PPP funds has been in flux. Recent guidance, for example, permits the use of program funds for certain health care benefits and interest payments on non-mortgage debt, both of which were not previously allowed.¹⁴ This uncertainty may well impact the Department’s ability to bring criminal charges in more subtle cases of alleged misuse. The CARES Act vests program oversight in the Special Inspector General for Pandemic Recovery (“SIGPR”) and the Pandemic Response Accountability Committee’s Council of the Inspectors General on Integrity and Efficiency (“CIGIE”). Audits by SIGPR and the CIGIE will likely result in criminal referrals to the Department that are sure to test the boundaries of what is considered “fraud” in this context. What is certain is that the Department is willing to vigorously pursue allegations

¹² See, e.g., *United States v. Staveley*, 20-mj-00034-LDA (D. R.I. May 4, 2020) (alleging false statements in a PPP application concerning the operation of two restaurants, their employment of dozens of workers, and defendant’s ownership interest in those establishments); *United States v. Butziger*, 20-mj-00033-LDA (D. R.I. May 4, 2020) (alleging false statements in a PPP application concerning the applicant’s employment of seven full-time employees); *United States v. Rai*, 20-mj-00095 (KFG) (E.D. Tex. May 12, 2020) (alleging false statements in an application for \$10 million in PPP funds, claiming to have 250 employees with an average monthly payroll of \$4 million when state labor records showed no employees or revenues for the applicant companies); *United States v. Yates*, (E.D. Tex. May 19, 2020) (alleging false statements in an application for \$5 million in PPP funds, claiming to have over 400 employees at applicant company when in fact it had none); *United States v. Hayford*, 20-mj-00140-FHM (N.D. Ok. June 2, 2020) (alleging false statements in an application for \$8 million in PPP loans, claiming the submission of false documents to substantiate payroll expenses that did not exist and misrepresenting the incorporation date of the applicant entity); *United States v. Shah*, No. 1:20-cr-00293 (N.D. Ill. June 16, 2020) (alleging fraud in an application for \$400,000 in PPP funds, including overstating the number of employees and submitting fraudulent IRS documents).

¹³ *United States v. Fayne*, 20-mj-00370 (N.D. Ga. May 12, 2020).

¹⁴ 85 FR 36311 (June 16, 2020).

of program funds spent on anything short of expressly allowable uses, such as personal expenses.¹⁵

Health Care Fraud and Anti-Kickback Statutes

Certain pandemic-related schemes fit squarely into the Department's already active health care enforcement agenda. The Department's March 2020 memos redoubled enforcement priorities in the areas of health care fraud and anti-kickback violations, and U.S. Attorneys already have responded by bringing COVID-19-related cases. Initial cases have involved the alleged bundling of COVID-19 tests with other, more expensive respiratory pathogen panel ("RPP") tests that prosecutors claim were unnecessary because these RPP tests could not screen for COVID-19.

"[W]hile there are people going through what they are going through, you can either go bankrupt or you can prosper"—so read the unfortunate quote attributed to Erik Santos in a criminal complaint filed against him in the District of New Jersey.¹⁶ U.S. Attorney Carpenito charged Santos, a marketing company proprietor, with soliciting and receiving bribes and kickbacks on a per-test basis for COVID-19 tests, and bundling those tests with more expensive and medically unnecessary RPP tests. This variation on a classic bundling fraud was made all the more attractive to the Department against the backdrop of the COVID-19 pandemic and Attorney General Barr's priorities aimed at just that kind of fraud.¹⁷

Other recent pandemic-related fraud cases run the gamut from submitting reimbursement claims for medically unnecessary services to allegations against the head of a medical technology company for submitting fraudulent reimbursement claims for COVID-19 and other tests, then allegedly lying to shareholders about the scheme.¹⁸ These cases sound a warning to health care market participants that the Department will use every tool in its arsenal to address alleged pandemic-related misconduct.

Consumer Protection

The public fear spawned by COVID-19's effects on the U.S. population brings opportunities for the "snake oil" salesman. Opportunists have peddled bogus cures and dubious treatments, according to the March 2020 memos, and Department lawyers have again responded by using an array of statutes to criminally prosecute and civilly enjoin them. In one recent case, a Georgia woman has pleaded guilty to violating the

¹⁵ See, e.g., *United States v. Sadleir*, 20-mj-02326 (C.D. Cal. May 22, 2020) (alleged misuse by a Hollywood executive of \$1.7 million in PPP loan proceeds for personal expenses, such as personal credit card debt and a car loan).

¹⁶ *United States v. Santos*, 20-mj-09096 (D.N.J. March 26, 2020).

¹⁷ See also *United States v. Parris*, 20-mj-01475-T-SPF (M.D. Fl. May 14, 2020) (charging a Georgia woman with conspiracy to commit health care fraud and to defraud the United States, and to pay and receive illegal kickbacks on a per-test basis for COVID-19 tests, provided that those tests were bundled with more expensive and allegedly unnecessary RPP tests).

¹⁸ *United States v. Schena*, 20-mj-70721 (N.D. Cal. June 8, 2020).

Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”) for selling an unregistered pesticide that she claimed protected against viruses, such as COVID-19.¹⁹

The Department’s Civil Division, too, has actively responded to allegations of companies making false pandemic-related statements to the public. In April, the Department permanently enjoined Purity Health and Wellness Centers, Inc., from falsely claiming that its “Ozone Therapy” steam treatment was effective to prevent COVID-19.²⁰ That same month, the Department obtained temporary restraints against Genesis II Church of Health and Healing and its proprietors from marketing a powerful bleach product as a COVID-19 treatment.²¹ In *Genesis II*, the government invoked the Food, Drug, and Cosmetic Act (“FDCA”) to successfully argue that Genesis was distributing an unapproved new drug and misbranded drugs in interstate commerce.

Department Priorities Going Forward

These cases are likely just a glimpse of pandemic-related enforcement actions to come. With a robust reporting apparatus in place, experienced professionals assigned to COVID-19 cases, and the newly constituted Task Force, the Department is expected to bring more investigations and charges across all areas of focus. In this environment, companies should consider concentrating their compliance efforts on addressing the Department’s attention to these areas. For example:

- Businesses operating in markets for PPE and other goods designated as “scarce” by HHS should scrupulously document purchase and sales data and be prepared to substantiate resale prices that comport state and federal anti-price gouging laws. This is particularly true for companies that have changed business models, or that have recently entered the PPE market, to take advantage of perceived market opportunities.
- Businesses taking advantage of PPP, CARES Act Provider Relief Fund, or other program relief must ensure accurate applications and spending in accordance with the rules of the particular program involved. This involves following closely the updated guidance from the U.S. Department of the Treasury and the SBA and coordinating with legal and accounting professionals.
- Health care providers and businesses operating in the chain of commerce for COVID-19 laboratory testing should expect continued scrutiny of reimbursement claims, particularly those tests submitted to federal payors, such as Medicare, and should regard the government’s position on medical necessity for tests related to COVID-19 so as to avoid the appearance of improper bundling.

¹⁹ *United States v. Sun*, 1:20-MJ-00289 (N.D. Ga. April 8, 2020).

²⁰ *United States v. Purity Health and Wellness Centers, Inc.*, 20-cv-00985-L (N.D. Tex. April 22, 2020).

²¹ *United States v. Genesis II Church of Health and Healing*, 20-cv-21601 (S.D. Fl. April 16, 2020).

- Sellers of foods, drugs, and supplements, too, should expect increased scrutiny of advertisements under the FDCA. Reference to COVID-19 in marketing materials should be carefully vetted in view of recent cases.

The costs associated with these “ounce of prevention” compliance measures comes at an inconvenient time for businesses, many of which have been dealt a devastating economic blow by the COVID-19 pandemic. However, given the Department’s scrutiny of COVID-19-related business practices and dedicated resources to enforcement actions, these and other compliance investments may be well advised. With \$2.7 trillion in relief distributed so rapidly, and the fertile ground for fraudulent schemes brought on by the COVID-19 pandemic, federal prosecutors will continue to review reports of alleged improprieties, investigate, and bring enforcement actions where they deem appropriate.

* * *

*This Client Alert was authored by **Eric W. Moran** and **Jeffrey P. Mongiello**. For additional information about the issues discussed in this Client Alert, please contact one of the authors or the Epstein Becker Green attorney who regularly handles your legal matters.*

This document has been provided for informational purposes only and is not intended and should not be construed to constitute legal advice. Please consult your attorneys in connection with any fact-specific situation under federal law and the applicable state or local laws that may impose additional obligations on you and your company.

About Epstein Becker Green

Epstein Becker & Green, P.C., is a national law firm with a primary focus on health care and life sciences; employment, labor, and workforce management; and litigation and business disputes. Founded in 1973 as an industry-focused firm, Epstein Becker Green has decades of experience serving clients in health care, financial services, retail, hospitality, and technology, among other industries, representing entities from startups to Fortune 100 companies. Operating in locations throughout the United States and supporting domestic and multinational clients, the firm’s attorneys are committed to uncompromising client service and legal excellence. For more information, visit www.ebglaw.com.

If you would like to be added to our mailing list or need to update your contact information, please contact Kristen Vetula at kvetula@ebglaw.com or 202-861-1845.