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To Our Clients and Friends

Memorandum

March 20, 2020

Department of Justice and State Attorneys General Crack Down on Unscrupulous Business Practices During COVID-19 Pandemic

In the wake of the current global coronavirus crisis, law enforcement agencies around the country are stepping up efforts to prevent and punish those who would try to take advantage of the pandemic, in particular with respect to goods and services which are in high demand. This Memorandum will highlight some of these recently-announced initiatives.

Department of Justice and U.S. Attorney's Offices Antitrust Enforcement

The Department of Justice, in coordination with U.S. Attorney's Offices nationwide, is cracking down on price gouging related to essential healthcare-related goods and other business practices seeking to capitalize on consumer demand in the wake of the COVID-19 pandemic.

On March 9, 2020, U.S. Attorney General William P. Barr issued a statement that DOJ "stands ready to make sure that bad actors do not take advantage of emergency response efforts, healthcare providers, or the American people during this crucial time[.]"[1] To that end, DOJ announced that it would "hold accountable anyone who violates the antitrust laws of the United States in connection with the manufacturing, distribution, or sale of public health products such as face masks, respirators, and diagnostics."

Specifically, DOJ warned that "[i]ndividuals or companies that fix prices or rig bids for personal health protection equipment such as sterile gloves and face masks could face criminal prosecution," and that "[c]ompetitors who agree to allocate among themselves consumers of public health products could also be prosecuted."

Last November, DOJ launched the Procurement Collusion Strike Force tasked with "deterring, detecting, investigating and prosecuting antitrust crimes."[2] However, in response to the COVID-19 pandemic, the

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1 Press Release, *Justice Department Cautions Business Community Against Violating Antitrust Laws in the Manufacturing, Distribution, and Sale of Public Health Products*, U.S. Dep't of Justice (Mar. 9, 2020), https://www.justice.gov/opa/pr/justice-department-cautions-business-community-against-violating-antitrust-laws-manufacturing.

2 Press Release, *Justice Department Announces Procurement Collusion Strike Force: a Coordinated National Response to Combat Antitrust Crimes and Related Schemes in Government Procurement, Grant and Program Funding*, U.S. Dep't of Justice (Nov. 5 2019), https://www.justice.gov/opa/pr/justice-department-announces-procurement-collusion-strike-force-coordinated-national-response.

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DOJ announced that the Strike Force would now "be on high alert for collusive practices in the sale of [public health] products to federal, state, and local agencies."[3]

On March 16, 2020, Attorney General Barr also directed U.S. Attorney's Offices nationwide to, "prioritize the detection, investigation, and prosecution of all criminal conduct related to the current pandemic."[4] The Attorney General explained that "[t]he pandemic is dangerous enough without wrongdoers seeking to profit from public panic," and mentioned that his office had received "reports of individuals and businesses selling fake cures for COVID-19 online and engaging in other forms of fraud[,]" including phishing emails and malware.

In response to this directive, U.S. Attorney's Offices in Pennsylvania, Washington, D.C., and Virginia, among others, announced heightened tactics to track down fraudulent business practices or scams related to COVID-19. The U.S. Attorney's Office for the Western District of Pennsylvania announced the appointment of a COVID-19 fraud coordinator and issued guidance for avoiding "Coronavirus scams."[5] The U.S. Attorney's Office for the District of Columbia in coordination with the D.C. Attorney General launched a "Pandemic Fraud Hotline," along with a "Pandemic Fraud Coordinator" to help citizens more easily report scams for further investigation.[6] And, the U.S. Attorney's Office for the Eastern District of Virginia provided public guidance on common "COVID-19 scam[s]," along with best practices for avoidance.[7]

State Attorneys General Enforce Local Consumer Protection Laws

In addition to these federal measures, attorneys general in states including but not limited to New York, California, Connecticut and Washington have announced that they will leverage state law to crack down on "price gouging" and other business practices attempting to exploit pandemic-induced consumerism.

On March 4, 2020, after California Governor Gavin Newsom issued a "Proclamation of a State of Emergency" regarding COVID-19, California Attorney General Xavier Becerra issued a "price gouging alert" to "remind[] all Californians that, under Penal Code Section 396, price gouging is illegal in all California communities during the declared state of emergency."[8] That same day, Washington Attorney General Bob Ferguson announced that his "office is investigating price gouging in the wake of the COVID-19 public health emergency," and encouraged consumers who "see price gouging" to "file a complaint with [his] office."[9]

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3 Press Release, *Justice Department Cautions Business Community Against Violating Antitrust Laws in the Manufacturing, Distribution, and Sale of Public Health Products*, U.S. Dep't of Justice (Mar. 9, 2020).

4 Memorandum, *COVID-19 – Department of Justice Priorities*, U.S. Dep't of Justice (Mar. 16, 2020).

5 Webpage, *COVID-19 Fraud*, U.S.A.O. W.D. Pa. (updated Mar. 19, 2020), https://www.justice.gov/usao-wdpa/covid-19-fraud-page.

6 Press Release, *Statement from the U.S. Attorney for the District of Columbia on COVID-19 Scam Prevention Measures*, U.S.A.O. D.C. (Mar. 18, 2020), https://www.justice.gov/usao-dc/pr/statement-us-attorney-district-columbia-covid-19-scam-prevention-measures.

7 Press Release, U.S. Attorney Warns of Coronavirus Scams Targeting Vulnerable Victims, U.S.A.O. E.D. Va. (Mar. 18, 2020), https://www.justice.gov/usao-edva/pr/us-attorney-warns-coronavirus-scams-targeting-vulnerable-victims.

8 Press Release, *Attorney General Becerra Issues Consumer Alert on Price Gouging Following Statewide Declaration of Emergency for Novel Coronavirus Cases in California Communities*, Cal. Att'y Gen. (Mar. 4, 2020), https://oag.ca.gov/news/press-releases/attorney-general-becerra-issues-consumer-alert-price-gouging-following-statewide.

9 Press Release, *AG Ferguson Statement on Price Gouging in Public-Health Emergency*, Wash. Att'y Gen. (Mar. 4, 2020), https://www.atg.wa.gov/news/news-releases/ag-ferguson-statement-price-gouging-public-health-emergency.

On March 5, 2020, New York Attorney General Letitia James warned the public of several "potential consumer scams" related to COVID-19 and encouraged consumers to "[r]eport retailers that appear to take unfair advantage of consumers by selling goods or services that are vital to the health, safety, or welfare of consumers for an unconscionably excessive price."[10] Notably, under New York law, where there is an "abnormal disruption of the market for consumer goods and services vital and necessary for the health, safety and welfare of consumers, no party within the chain of distribution" may sell or offer such goods or services for an "unconscionably excessive price."[11]

On March 17, 2020, Connecticut Attorney General William Tong issued a press release reminding residents that price gouging "[d]uring civil preparedness and public health emergencies" violates Connecticut law and announced that his office had recently "received 71 complaints regarding large price hikes on basic supplies like hand sanitizer, disinfectant wipes and toilet paper."[12]

Two days later, in response to a consumer complaint, Attorney General Tong sent a letter to Amazon "seeking information from the retailer regarding efforts to detect and combat price gouging during the COVID-19 pandemic."[13] The consumer's complaint alleged he was charged "nearly $400 in shipment fees for two small boxes of face masks with a retail value of under $100."

Conclusion

In light of the above, companies that sell public health-related products or consumer goods will likely experience heightened scrutiny under federal and state antitrust laws and under state consumer protection and unfair competition laws. In anticipation of this increased enforcement, companies should conduct internal reviews to insure that their business practices are in compliance with the applicable local and federal laws.

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This Memorandum in not intended to provide legal advice and no legal or business decision should be based on its contents.

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[10] Press Release, *Attorney General James Takes Action Against Coronavirus Health Scams, Issues Guidance to New Yorkers*, N.Y. Att'y Gen. (Mar. 5, 2020), https://ag.ny.gov/press-release/2020/attorney-general-james-takes-action-against-coronavirus-health-scams-issues.

[11] New York General Business Law § 396-r(2).

[12] Press Release, *Attorney General Tong Provides Update on Coronavirus Price Gouging Complaints*, Conn. Att'y Gen. (Mar. 17, 2020), https://portal.ct.gov/AG/Press-Releases/2020-Press-Releases/Attorney-General-Tong-Provides-Update-on-Coronavirus-Price-Gouging-Complaints.

[13] Press Release, *Attorney General Tong Seeks Information from Amazon Following Price Gouging Complaint*, Conn. Att'y Gen. (Mar. 19, 2020), https://portal.ct.gov/AG/Press-Releases/2020-Press-Releases/Attorney-General-Tong-Seeks-Information-from-Amazon-Following-Price-Gouging-Complaint.

If you have any questions about this Memorandum, please call your regular Fried Frank contact or an attorney listed below. We have a breadth of experience representing clients facing challenges on the antitrust, transactional, regulatory, and litigation fronts.

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