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How COVID-19 Will Affect DOJ's White Collar Enforcement

By **James Petkun** (April 2, 2020, 5:49 PM EDT)

With federal courts across the country closing their doors, grand juries shuttered, statutory deadlines for indictment and trial tolled, and prosecutors and agents stuck at home, what happens to the U.S. Department of Justice's white collar docket?

How is the DOJ stepping up enforcement related to the COVID-19 pandemic? And how will the passage of the Coronavirus Aid, Relief, and Economic Security, or CARES, Act impact white collar prosecutions?



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Immediate Impact on White Collar Prosecutions

As a practical matter, fraud prosecutions across DOJ components will be delayed as a result of COVID-19. With grand juries unable to meet for the foreseeable future, prosecutors cannot present evidence to grand juries or return indictments.

While cases may be charged by way of presenting criminal complaints with supporting affidavits to federal magistrate judges, and prosecutors thereafter may obtain continuances of the 30-day indictment deadline, the fact remains: Indictments will back up in federal districts across the country as the pandemic continues.

And for federal investigations in their early or middle stages, the pandemic's mass shutdown of the private sector also will significantly impact the DOJ's ability to move forward in investigating fraud cases.

The vast majority of federal fraud prosecutions are highly records-intensive — meaning that they rely on voluminous files and documents, obtained in paper or digital format, to be collected, reviewed and analyzed by agents and prosecutors. These records generally are obtained pursuant to the issuance of grand jury subpoenas, search warrants or court orders.

In most of my fraud cases as a federal prosecutor, numerous grand jury subpoenas duces tecum were issued — to banks, financial services providers, credit card companies, telecom companies, local and national business and retailers, airlines and travel companies, payment processors, online service providers, health care entities, civic venues, real estate companies, educational institutions, construction companies and various state and federal entities. Even during normal, nonpandemic times, prosecutors often must wait weeks or more for records to be returned.

Similarly, prosecutors often rely upon the issuance of search warrants to obtain records and evidence, including warrants served on electronic computing or remote service providers, such as Google Inc., Apple Inc., Microsoft Corp., Yahoo! Inc., Amazon.com Inc., Comcast Corp., Verizon Communications Inc. or Facebook Inc. /Instagram Inc.

These search warrants seek important user data, internet service provider information and history, user emails, user chats/instant messages, location and geotracking information, calendar entries, social media posts and private messages, and cloud-based photo, video, and audio files. Again, even during nonpandemic times, prosecutors generally must wait for weeks, at a minimum, for the return of these sorts of records.

The reason that companies are often delayed in responding to federal process is simple: They receive an

overwhelming number of subpoenas and warrants from law enforcement and prosecuting entities, and they simply do not have, and may not care to have, the staffing and resources necessary to timely obtain, review and produce all requested records to all requesting parties.

During the coronavirus pandemic, with corporate employees and in-house lawyers working from home, subpoena compliance and response teams will be even further delayed in their ability to procure requested records from across various business lines, review the records and make productions.

Equally as important, with businesses across the country facing severe economic danger, businesses are making difficult decisions regarding employee furloughs and/or layoffs. Smaller companies may lack the bandwidth to respond to legal process while dealing with other more pressing concerns. The reality is that responding to government-issued requests for records will be deprioritized across the private sector as companies triage to focus on critical and essential tasks. As a result, government investigations will be further delayed.

The pandemic likely will also delay the resolution or adjudication of fraud cases that are already indicted. Courts will be focusing on prioritizing the movement of criminal cases involving timing issues, prior delays and/or detained defendants — not generally the norm in white collar cases — such that fraud cases are likely to take a backseat on federal dockets.

And, as described below, while the use of audio and videoconferencing for motions hearings, guilty plea hearings and sentencing will enable some fraud cases to proceed through their respective life cycles from afar, criminal jury trials will remain at a standstill: juries cannot sit to hear trials, court administrators cannot call panels of prospective jurors, litigants and witnesses cannot travel, and courts will continue to toll speedy trial deadlines under the “interests of justice” exception.[1]

Delays will affect both foreign and domestic prosecutions. For instance, with the DOJ's Foreign Corrupt Practices Act prosecutors and subject matter expert agents currently unable to travel internationally to conduct interviews, take depositions and review hard-copy documents and records stored abroad or in other U.S. jurisdictions, certain FCPA investigations will be forced into holding patterns.

And with agents and prosecutors working from home, interviews and proffers with essential witnesses, subjects and targets may require rescheduling — especially where those interviews or proffers require reviewing voluminous records with the interviewee, where the interviewee wants to be physically present with counsel, or where the government must assess a witness's demeanor, behavior or credibility in person.

Logistical issues also abound for interviews and debriefs with detained cooperators or witnesses as the Federal Bureau of Prisons locks down facilities, and increases restrictions on visitation, to prevent the possible spread of infection across its facilities.

The DOJ Seeks Expanded Emergency Powers; The CARES Act Grants Some

News reports emerged last week describing the DOJ's rather stealthy request to Congress asking for a host of extraordinary emergency powers amid the pandemic — powers that, according to reports detailing the draft legislation submitted to Congress, would have:

- Enabled the DOJ to ask the chief judge of any federal district to pause any court proceeding, including freezing statutes or rules affecting (1) prearrest, post-arrest, pretrial, trial and post-trial procedures and deadlines in criminal and juvenile proceedings and (2) all civil process and proceedings;
- Given the chief judge of any federal district the power to detain people indefinitely, without trial; and
- Provided for modifications to current asylum rules.

Attorney General William Barr later called reports of the DOJ's proposed rule changes a “gross

mischaracterization” and explained that the DOJ was asked by lawmakers for suggestions about giving judges more flexibility to adjust their schedules amid the pandemic’s impact on court operations.[2]

Even still, the DOJ’s requests drew sharp criticism from both sides of the aisle — Sen. Mike Lee, R-Utah, tweeted “OVER MY DEAD BODY”[3] — as well as from defense lawyers and civil rights advocates across the country.

And for good reason: Granting the attorney general emergency powers that bypass Constitutional norms and principles, including powers that provide for extrastatutory abilities to slow and/or stop the movement of criminal cases, would be a drastic expansion of federal law enforcement power.

As an example, the DOJ’s requests — if passed into law — could have allowed law enforcement to make arrests and hold people indefinitely, without seeing a judge, for an unknown and undefined period of time.

Emergency situations may call for emergency measures, but this sort of large-scale power enhancement sought by the federal government should give all Americans pause and be granted only after thorough consideration and debate — not in a rush to pass an emergency spending bill.

Notably, the CARES Act, within Section 15002(b), included some aspects of the DOJ’s wish list, including (1) permitting federal courts to expand the use of audio and/or video conferencing for criminal cases during the pandemic for guilty plea and sentencing hearings, and (2) broadening the DOJ’s authority to release prisoners to home confinement. Importantly, the CARES Act did not include the DOJ’s initial request to be able to hold audio and videoconference hearings without the defendant’s consent.

The legislation, now being implemented by federal courts across the country,[4] is prudent. In a world where litigants cannot congregate in courtrooms, holding hearings by video or audio conferencing is the next best way to move cases forward and prevent undue delay.

While courts will have to grapple with issues that emerge from the use of technology in lieu of in-person hearings — for instance, courts are already taking steps to ensure that audio and video conferencing for hearings also entails permitting public access to the audio or video feed, consistent with the First Amendment — holding virtual court proceedings during the pandemic, with lawyers and parties appearing from remote locations, is a step in the direction of progress.

COVID-19-Related Fraud Prosecutions and the Post-Pandemic Future

The DOJ has made clear its desire to ramp up enforcement of COVID-19-related fraud. On March 16, Barr directed all U.S. attorney’s offices to prioritize prosecuting fraud cases relating to the COVID-19 pandemic.[5] Various federal and state fraud task forces have launched operations,[6] and, on March 22, the DOJ filed its first COVID-19-related fraud action in federal court in Austin, Texas, obtaining a civil restraining order against the operators of the website www.coronavirusmedicalkit.com, based on the alleged sale of fake World Health Organization vaccine kits.[7]

On March 30, the U.S. Attorney’s Office for the District of New Jersey brought the DOJ’s first criminal case relating to the pandemic, charging a Georgia man for allegedly taking kickbacks to gather Medicare patients for unnecessary COVID-19 testing — including the defendant telling a cooperator that “everybody has been chasing the COVID dollar bird.”[8]

Clearly, then, even if fraud enforcement slows during the pandemic, we should expect a significant surge in fraud prosecutions across the DOJ once we emerge from the pandemic. The CARES Act entails a \$2 trillion stimulus package that will pump hundreds of billions of dollars into the private sector.

History tells us that during and after disaster situations involving the distribution of significant federal and state funds, fraud always comes to the fore. Much as there was significant fraud enforcement in the wake of Hurricanes Katrina, Rita and Wilma, and again in the aftermath of the 2008 financial crisis’s Emergency Economic Stabilization Act’s Troubled Asset Relief Program, we can expect the same here. Whenever the government hands out massive amounts of cash, fraudulent actors come along for the ride.

Closing Thoughts

While the DOJ’s white collar prosecution and enforcement necessarily will slow during the pandemic, as a

result of a variety of logistical and practical hurdles, fraudulent conduct will continue unabated.

When the pandemic finally subsides, and life returns to normal — whatever that may mean, and whenever that may be — we should expect an explosion of white collar prosecution and enforcement activity related to the pandemic, as well as related to the CARES Act.

Paired with the emergence of white collar investigations and cases that were on ice across DOJ components and U.S. attorney's offices during the pandemic, the end of the pandemic may bring a busy season for fraud prosecutors, courts and defense lawyers alike. Let's hope we get there, sooner rather than later.

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[1] See, e.g., U.S. District Court for the Eastern District of Pennsylvania, Standing Order (Mar. 18, 2020), available at <https://www.paed.uscourts.gov/documents/standord/Standing%20Order%20-%20Additional%20Adjustments%20to%20Court%20Proceedings%20Due%20to%20the%20Exigent%20C19.pdf> (tolling indictment and speedy trial deadlines).

[2] Fox News, "Barr Calls Reports DOJ Sought Emergency Powers Amid Coronavirus Crisis 'Nonsense'" (Mar. 26, 2020), available at <https://www.foxnews.com/politics/barr-calls-reports-doj-sought-emergency-powers-amid-coronavirus-crisis-nonsense>.

[3] Twitter, Post by Utah Senator Mike Lee (posted Mar. 20, 2020), available at <https://twitter.com/SenMikeLee/status/1241507516980375555?s=20>.

[4] See, e.g., U.S. District Court for the Eastern District of Virginia, General Order No. 2020-09 (Mar. 30, 2020), , available at <http://www.vaed.uscourts.gov/notices/General%20Order%20No.%202020-09.pdf> (authorizing video and audio conferencing under the CARES Act for certain proceedings); see also U.S. District Court for the Eastern District of Pennsylvania, Standing Order (Mar. 30, 2020), available at <https://www.paed.uscourts.gov/documents/standord/Standing%20Order%20re%20Video%20Teleconfere> (same).

[5] U.S. Department of Justice, Memorandum for all United States Attorneys (Mar. 16, 2020), available at <https://www.justice.gov/ag/page/file/1258676/download>.

[6] See, e.g., U.S. Attorney's Office for the District of New Jersey, Press Release (Mar. 30, 2020), available at <https://www.justice.gov/usao-nj/pr/us-attorney-carpenito-ag-grewal-acting-comptroller-walsh-announce-federal-state-covid-19> (announcing task force partnership between DNJ, the NJ Attorney General, and various federal and state agencies); see also U.S. Attorney's Office for the Eastern District of Virginia, Press Release (Mar. 20, 2020), available at <https://www.justice.gov/usao-edva/pr/federal-and-state-officials-launch-virginia-coronavirus-fraud-task-force> (announcing task force partnership between EDVa, WDVa, FBI, and Virginia State Police).

[7] U.S. Department of Justice, Press Release (Mar. 22, 2020), available at <https://www.justice.gov/opa/pr/justice-department-files-its-first-enforcement-action-against-covid-19-fraud>.

[8] U.S. Attorney's Office for the District of New Jersey, Press Release (Mar. 30, 2020), available at <https://www.justice.gov/usao-nj/pr/georgia-man-arrested-orchestrating-scheme-defraud-health-care-benefit-programs-related> (Defendant allegedly stated on telephone call: "[W]hile there are people going through what they are going through, you can either go bankrupt or you can prosper," "[T]he good thing is we're opening a lot of doors through this coronavirus testing," and "everybody has been chasing the Covid dollar bird.").