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2020 White Collar Prosecution And Enforcement Trends

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As with so many other aspects of life, the biggest story in white collar criminal law this year was the effect of the COVID-19 pandemic. White collar criminal prosecutions were already trending down before the pandemic.[1]

But when COVID-19 exploded in March, new federal white collar prosecutions dropped precipitously.[2] Despite picking up over the summer, enforcement activity is still well below prepandemic levels.

Here is a look back at the pandemic's effect on white collar practice and the other significant cases and trends in 2020, as well as a look ahead to what to watch for in 2021.

COVID-19

2020 will long be remembered for the COVID-19 pandemic, the worst public health crisis in over a century. More than 16 million Americans have been infected, and more than 300,000 Americans have died.

As COVID-19 cases began to spike in March, federal courts suspended jury trials and grand jury proceedings, limited or suspended in-person appearances, issued orders mandating increased sanitation procedures and social distancing, and began conducting proceedings remotely. With cases spiking again this fall, most pandemic-related restrictions will likely persist well into 2021.

The virus's spread has been particularly acute in prisons and jails. As of Dec. 15, more than 22% of all federal prisoners either have or have had COVID-19 this year. At least 161 federal prisoners and two Federal Bureau of Prisons staff members have died.[3]

The dire situation in federal prisons has led to mounting calls for judges to reconsider sentences imposed before the pandemic. White collar defendants, in particular, have been able to postpone reporting to prison until the public health situation improves. In addition, there has been a more than a twentyfold increase in the number of successful motions for compassionate release under Title 18 of the U.S. Code, Section 3582(c).[4]

The pandemic has also already resulted in a number of prosecutions. In a March 16 memorandum, Attorney General William Barr directed the U.S. Department of Justice to "prioritize the detection, investigation, and prosecution of all criminal conduct related to the current pandemic."

Then, in April, federal prosecutors charged multiple individuals with conspiracy to violate the Defense Production Act for allegedly seeking to resell 1 million KN95 masks in New York City at a 50% markup.[5] In May, the DOJ charged several individuals with an alleged scheme to defraud the Paycheck Protection Program established by the Coronavirus Aid, Relief and Economic Security, or CARES, Act.

The government alleged that the defendants sought more than $500,000 in bank loans under the PPP to pay dozens of employees earning wages at four different businesses, even though three of the businesses were apparently not operating prior to the pandemic and had no salaried employees, and the fourth was not owned by the applicant.[6]

With the pandemic roiling markets, the DOJ and the U.S. Securities and Exchange Commission are also paying close attention to potential insider trading schemes.

President Donald Trump

President Donald Trump spent much of 2020 fighting subpoenas from the Manhattan District Attorney's Office and the U.S. House of Representatives for his financial records. In a pair of July decisions, the U.S. Supreme Court rejected the president's claim of categorical immunity from subpoena but returned both cases to the lower courts for further proceedings.

In the case of the New York subpoena, the Supreme Court ruled that a "President is neither absolutely immune from state criminal subpoenas seeking his private papers nor entitled to a heightened standard of need," but it remanded to allow the president to challenge the subpoena on other grounds.[7]

With regard to the House subpoena, the Supreme Court reaffirmed the House's "authority under the Constitution to issue subpoenas to assist it in carrying out its legislative responsibilities," but concluded that the lower courts had failed to "take adequate account of the significant separation of powers issues raised by congressional subpoenas for the President's information."[8]

This year was also marked by concerns of DOJ interference in prosecutions to benefit the president's allies. In February, four assistant U.S. attorneys prosecuting Trump adviser Roger Stone abruptly withdrew from the case after the DOJ scaled back its sentencing recommendation following Stone's conviction for witness tampering, obstruction and making false statements.[9] Although Stone was ultimately sentenced to 40 months, Trump commuted Stone's sentence days before he was set to report to prison.

In another controversial move, the DOJ moved to dismiss charges against former national security adviser Michael Flynn, after Flynn twice pleaded guilty to lying to the Federal Bureau of Investigation.

When U.S. District Judge Emmet Sullivan of the U.S. District Court for the District of Columbia appointed amicus curiae to oppose the government's motion, Flynn petitioned the U.S. Court of Appeals for the District of Columbia Circuit for an order forcing Judge Sullivan to immediately dismiss the case. The D.C. Circuit, sitting en banc, denied Flynn's request and allowed Judge Sullivan to rule on the DOJ's motion.[10] Trump ultimately pardoned Flynn with the dismissal motion still pending.

In the twilight of the Trump presidency, the focus has shifted to whether Trump will issue preemptive pardons to his allies, family or himself. But even the president's pardon power has not escaped criminal scrutiny. On Dec. 1, a D.C. federal judge unsealed a heavily redacted order indicating that the DOJ is investigating a possible bribe-for-pardons scheme.

Brady Disclosures

2020 saw a continued focus on the government's disclosure obligations under Brady v. Maryland,[11] culminating in the enactment of the Due Process Protections Act on Oct. 21. Two cases highlighted the dangers of courts simply relying on the government's assurances regarding its Brady obligations.

In June, prosecutors in New York were forced to drop their criminal case against Iranian businessman Ali Sadr Hashemi Nejad after evidence surfaced showing that the government had concealed exculpatory evidence and made misleading statements to the court before and during trial.[12]

Sadr was charged in 2018 in connection with an alleged scheme to evade U.S. sanctions against Iran and launder money in U.S. dollars through Swiss bank accounts. After his conviction in March, it was discovered that the government had failed to timely disclose exculpatory evidence that had been in its possession for over a year. Perhaps worse, when the government finally disclosed the evidence, it did so in a way that was designed to conceal the belated nature of its disclosure.

The government attempted to dismiss the charges against Sadr, but U.S. District Judge Allison Nathan of the U.S. District Court for the Southern District of New York demanded that the U.S. Attorney's Office respond to detailed written questions regarding its handling of the case. Judge Nathan ultimately issued a scathing critique of the government's conduct in September, finding that the government "both violated its disclosure obligations and subsequently made a misrepresentation to the court about its conduct."[13]

The U.S. attorney has admitted that it was "responsible for substantial failures in this case," which would be the "focus of significant executive leadership attention" moving forward.

In contrast, the government's failure to comply with Brady obligations in the long-running "Varsity Blues" college admissions investigation[14] was excused despite vigorous protests from the defense.

In March, the defendants moved to have all charges dismissed — or, in the alternative, to suppress phone conversations recorded by the government's primary cooperator and organizer of the scheme, William "Rick"

Singer — after the disclosure of notes from Singer suggesting that the government had coerced him into characterizing payments made by the defendants as bribes.

That distinction is material to the government's case: The defendants have long claimed they could not be guilty of honest services fraud because they believed they were making permissible donations to the universities.

Despite receiving these notes in October 2018, the government did not disclose them until February 2020 — even after telling the court repeatedly that it had fully complied with its Brady obligations.

U.S. District Judge Nathaniel Gorton of the U.S. District Court for the District of Massachusetts found that the government's failure to disclose the notes was "irresponsible and misguided" but declined to award any relief or hold an evidentiary hearing to address the defendants' contention that the government browbeat Singer into recharacterizing the nature of the payments on recorded calls. According to Judge Gorton, the prejudice to the defendants was mitigated by their ability to cross-examine Singer at trial on the meaning of his notes. [15]

On Oct. 21, Trump signed into law the Due Process Protections Act, which requires federal judges to issue an order at the outset of criminal proceedings that confirms the government's Brady disclosure obligations and the possible consequences of Brady violations. The statute also requires each judicial council to issue a model Brady order for district courts to implement as they deem appropriate.

Health Care

In 2020, the government continued its efforts to hold pharmaceutical companies accountable for their role in the opioid crisis, which has claimed over 230,000 lives since 1999. In the most significant development this year, Purdue Pharma LP pled guilty to one count of conspiring to defraud the U.S. and to violate the Food, Drug and Cosmetic Act, and two counts of conspiracy to violate the federal Anti-Kickback Statute.[16]

Among other admissions, Purdue admitted that it induced doctors to write more prescriptions for Purdue's opioid products and also made payments to a health records company in exchange for referring, recommending, and arranging for the ordering of Purdue's products.

Purdue agreed to a criminal fine of $3.5 billion and forfeiture of $2 billion. Purdue also separately agreed to a $2.8 billion civil settlement with the government for alleged violations of the False Claims Act. The plea agreement did not resolve potential criminal charges against members of the Sackler family.

However, as part of the plea agreement, the Sackler family agreed to surrender its ownership interests in Purdue, and the company agreed to submit a reorganization plan in its ongoing bankruptcy proceeding that calls for the company to cease operating in its current form and emerge as a public benefits company.

Fraud

In a trio of cases in 2020, appeals courts confirmed the federal wire fraud statute's broad reach over fraudulent schemes involving foreign actors and conduct. Notably, none of the courts held that the wire fraud statute applied extraterritorially. Instead, each court reasoned that the focus of the wire fraud statute is the use of wires to perpetrate a fraudulent scheme, and then found sufficient use of domestic wires to trigger a domestic application of the statute.

Left uncertain is just how much use of domestic wires is needed to trigger a domestic application of the wire fraud statute. In U.S. v. Napout, the U.S. Court of Appeals for the Second Circuit stressed that the use of domestic wires had to be essential, and not just incidental, to the scheme to defraud.[17]

In contrast, decisions by the U.S. Court of Appeals for the First Circuit in U.S. v. McLellan and the U.S. Court of Appeals for the Ninth Circuit in U.S. v. Hussain suggest that mere use of domestic wires in connection with the fraudulent scheme is generally enough.[18] Those courts distinguished the Second Circuit's "essential versus incidental" test as dealing with cases where both the perpetrators and victims of fraud were foreign and suggested that a less demanding test applied to cases with foreign perpetrators or victims.[19]

Public Corruption

This year, the Supreme Court again limited the reach of federal criminal statutes as applied to political actors in Kelly v. U.S.[20] The case arose out of the infamous "Bridgegate" affair, in which New Jersey officials reallocated traffic lanes on the George Washington Bridge to punish the mayor of Fort Lee for refusing to support then-Gov. Chris Christie's reelection bid. The issue in Kelly was whether the defendants had

committed property fraud under the statutes prohibiting wire fraud and fraud on a federally funded program or entity.[21]

The government argued that the defendants' scheme had the object of obtaining property because the defendants had sought to "commandeer part of the Bridge itself — to take control of its physical lanes."[22] The court explained, however, that "th[e] realignment was a quintessential regulatory power" and "a scheme to alter such a regulatory choice is not one to appropriate the government's property."[23]

The government also argued that the defendants' scheme had the object of obtaining property because the scheme "deprive[d] the Port Authority of the costs of compensating the traffic engineers and back-up toll collectors" who were forced to perform useless work related to the politically motivated lane realignment.[24]

The court acknowledged that "a scheme to usurp a public employee's paid time is one to take the government's property" but found that proposition inapplicable because the defendants' "plan never had that as an object."[25] Rather, the defendants "aimed to impede access from Fort Lee to the George Washington Bridge," and "[t]he cost of the employee hours spent on implementing that plan was its incidental byproduct."[26]

Foreign Corrupt Practices Act

Although the pace of Foreign Corrupt Practices Act enforcement slowed in 2020,[27] the year still produced a few notable headlines.

In February, the DOJ suffered a setback in its effort to extend the extraterritorial reach of the FCPA, when a Connecticut federal judge partially overturned a jury verdict convicting Lawrence Hoskins, a British national and former executive of French company Alstom SA, for allegedly bribing an Indonesian government official.[28] The court held that the DOJ had failed to present sufficient evidence that Hoskins was an agent of Alstom's U.S. subsidiary, and therefore Hoskins could not be convicted for acts taken overseas.

In October, The Goldman Sachs Group Inc. entered into a deferred prosecution agreement and agreed to pay $2.9 billion to resolve an FCPA enforcement action relating to the firm's involvement in the 1Malaysia Development Bhd., or 1MDB, scandal.[29] The bank's Malaysian subsidiary pleaded guilty to one count of conspiracy to violate the FCPA.[30]

The agreements resolved allegations that Goldman Sachs conspired to bribe Malaysian government officials to obtain underwriting and other business relating to 1MDB, netting the bank more than $600 million in fees. The DOJ has also filed charges against two former Goldman bankers involved in the scandal; one has pleaded guilty, while the other has a trial set for 2021.[31]

Looking Ahead

With 2020 nearly in the rearview mirror, here are three questions white collar practitioners are asking heading in to 2021.

When will the COVID-19 pandemic subside enough to allow the criminal justice system to reopen?

The reopening could lead to a wave of major COVID-19-related prosecutions.

What will the change in the White House mean for white collar criminal enforcement?

So far, President-elect Joe Biden has not named his pick to be attorney general, but regardless of who is appointed, most white collar defense lawyers expect an uptick in enforcement actions under the Biden administration.

How will Justice Amy Coney Barrett shape the Supreme Court's white collar criminal jurisprudence?

We may get our first indication when the court decides Van Buren v. U.S., which concerns the reach of the Computer Fraud and Abuse Act. The CFAA makes it a crime to "intentionally access ... a computer without authorization or exceed ... authorized access, and thereby obtain … information from any protected computer."[32]

In Van Buren, the court will decide whether one who is authorized to access information for certain legitimate purposes exceeds authorized access if he accesses the information for an improper purpose.[33] Based on the justices' questions at the Nov. 30 oral argument, it appears that the court will narrow the reach of the

CFAA.

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[1] Corporate and White-Collar Prosecutions At All-Time Lows, TRAC Reports (March 3, 2020).

[2] Federal Criminal Prosecutions Plummet in Wake of COVID-19, TRAC Reports (May 28, 2020).

[3] See BOP, COVID-19 Coronavirus, https://www.bop.gov/coronavirus/ (last visited Dec. 15, 2020).

[4] See Douglas A. Berman, Spotlighting Remarkable (But Still Cursory) Data on "Compassionate Release" After First Step Act, Sentencing Law & Policy (Sept. 3, 2020), https://sentencing.typepad.com/sentencing_law_and_policy/2020/09/spotlighting-remarkable-but-still-cursory-data-on-compassionate-release-after-first-step-act.html; BOP, First Step Act, https://www.bop.gov/inmates/fsa/ (last accessed Nov. 30, 2020) (showing number of compassionate release reductions in sentence).

[5] United States v. Bulloch, et al., No. 20-mj-00327 (E.D.N.Y.).

[6] See, e.g., United States v. Staveley, No. 20-cr-00074 (D.R.I.).

[7] Trump v. Vance, 140 S. Ct. 2412, 2431 (2020).

[8] Trump v. Mazars USA, LLP, 140 S. Ct. 2019, 2026, 2033 (2020).

[9] United States v. Stone, No. 19-cr-00018 (D.D.C.).

[10] In re Flynn, 973 F.3d 74 (D.C. Cir. 2020) (en banc) (per curiam).

[11] 373 US 83 (1963).

[12] United States v. Nejad, No. 18-cr-00204 (S.D.N.Y.)

[13] Id. at Docket Entry 379.

[14] No. 19-cr-10080 (D. Mass.).

[15] Id. at Docket Entry 1169.

[16] United States v. Purdue Pharma L.P. (D.N.J.).

[17] United States v. Napout, 963 F.3d 163, 179–80 (2d Cir. 2020).

[18] United States v. McLellan, 959 F.3d 442 (1st Cir. 2020); United States v. Hussain, 972 F.3d 1138 (9th Cir. 2020).

[19] McLellan, 959 F.3d at 470 n.7; Hussain, 972 F.3d at 1144 n.2.

[20] 140 S. Ct. 1565 (2020).

[21] See 18 U.S.C. § 1343 (wire fraud); id. § 666(a)(1)(A) (federal program fraud).

[22] 140 S. Ct. at 1572 (internal quotation marks and alterations omitted).

[23] Id. at 1572–73.

[24] Id. at 1572.

[25] Id.

[26] Id. at 1574.

[27] Stanford Law School, Foreign Corrupt Practices Act Clearinghouse, 2020 Q3 Report, http://fcpa.stanford.edu/fcpac-reports/2020-fcpa-q3-report.pdf.

[28] United States v. Hoskins, No. 12-cr-238 (D. Conn.).

[29] United States v. The Goldman Sachs Group, Inc., No. 20-cr-00437 (E.D.N.Y.).

[30] United States v. Goldman Sachs (Malaysia) SDN. BHD., No. 20-cr-00438 (E.D.N.Y.).

[31] United States v. Leissner, No. 18-cr-00439 (E.D.N.Y.); United States v. Ng, No. 18-cr-00538 (E.D.N.Y.).

[32] 18 U.S.C. § 1030(a)(2)(C).

[33] Van Buren v. United States, No. 19-783.

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