



Professional Perspective

A Guide to Post Pandemic Government Investigations

*Joshua Berman, Glen Donath, and Jacquelyn Desch,
Clifford Chance*

Reproduced with permission. Published May 2020. Copyright © 2020 The Bureau of National Affairs, Inc. 800.372.1033. For further use, please visit: <http://bna.com/copyright-permission-request/>



A New Target of ERISA Class Action Lawsuits: COBRA Election Notices

Contributed by Joshua Berman, Glen Donath, and Jacquelyn Desch, Clifford Chance

In the midst of the Covid-19 pandemic, businesses face challenges from every direction. But as the curve of at least the first wave of the outbreak starts to flatten, governors of states are beginning to relax restrictions, and—hopefully sooner rather than later—the crisis will begin to ebb. Companies will then return to business with some semblance of normalcy.

Regulators like the Securities and Exchange Commission and the U.S. Departments of Justice, Treasury, and Commerce, as well as investigators at the FBI, state enforcement agencies, and elsewhere have necessarily slowed enforcement efforts, but they too will be back to work soon. Because the government can be expected to launch new investigations with increased intensity once the crisis passes, it is not too early to begin thinking about the nature of the expected investigations and how best to prepare for them.

Current Snapshot

The impact of Covid-19 on government investigations is readily apparent. Like many employers, the federal government has instructed agencies to limit face time, maximize telework abilities, and focus on mission-critical functions. The DOJ, Treasury, Commerce, SEC, FBI and other state and federal agencies have necessarily slowed enforcement efforts, but they are already working to shift their attention to criminal and regulatory opportunities created by the pandemic, and transition plans for when they are physically back at work.

Practical considerations have, of course, affected this shift. Teleworking has diminished use of traditional investigative tools like search warrants and subpoenas. As a result, expect to see increased reliance on T-III wiretaps—assuming agents can find ways to file periodic reports to ensure the wiretaps remain active—and increased enforcement of crimes with primarily electronic evidence. For example, the SEC's tools to monitor improper trading are unlikely to be affected as recently demonstrated by the investigations of Senators Richard Burr and Kelly Loeffler. The SEC clearly remains active in its vigilant enforcement of insider and illegal trading and financial fraud.

The pandemic has slowed down requests for witness interviews. Travel bans effectively terminated all in-person interview requests. Video conferencing, perhaps the second-best option, is being used sporadically given technological limitations and confidentiality concerns. The government may still insist on conducting telephonic interviews but will receive strong pushback from attorneys who want to be present with their clients. In some cases, prosecutors, investigators, and defense attorneys have landed on attorney proffers as a temporary compromise.

Indictments have slowed to a trickle after courts across the country closed their doors to the public and suspended grand jury proceedings. While some emergency grand juries are sitting, many states and districts have postponed new sittings until May or later. Other aspects of the justice system have slowed, though several federal courts successfully continue operating.

Notwithstanding extensive technological efforts, responding to subpoenas and document requests has become drastically more difficult. IT systems and departments that would typically assist with such requests are working overtime just to maintain the status quo. Hard drives and paper records are often inaccessible given stay-at-home orders and broader hygienic concerns. The pandemic has similarly hampered proactive cooperation. But as teleworking becomes the new normal, regulators will increasingly expect large firms to continue document collections and reviews remotely.

Requests from monitors and the DOJ continue for clients subject to monitorships. The monitors and the DOJ understand the difficulties clients face but have nonetheless expected deadlines for document requests and other information to be met. Plea agreements and deferred prosecution periods have not been tolled and companies have intense continuing compliance obligations. Indeed, the crisis will test compliance efforts in ways neither the DOJ nor monitors ever could. This is a critical time for all companies, not just those under monitorships, to ensure compliance programs can handle unexpected, drastic disruptions.

Not only have stay-at-home and shelter-in-place orders significantly slowed investigative efforts, the Attorney General has also shifted [enforcement priorities](#) to frauds perpetrated in relation to the coronavirus. The prioritization includes a

dedicated hotline and a Coronavirus Coordinator appointed by the U.S. Attorney in every district. The DOJ took its first Covid-19 [enforcement action](#) in Austin, Texas on March 21, 2020, with a temporary restraining order against a fraudulent website offering a vaccine, and the DOJ has only increased its efforts since.

Expectations for the New Normal

As the crisis abates, companies and their boards, compliance functions, and executives will need to be ready to jump back into a new normal. For government investigators and prosecutors, a return to semi-normal operations will necessitate a near immediate deluge of wrapping up pending investigations and expediting new enforcement actions. As the November election approaches—no matter the outcome—regulators and law enforcement will be ramping up aggressively. Senior DOJ prosecutors have made clear that they anticipate a period following the pandemic when settlement offers would be made and then shortly thereafter, if necessary, indictments or further proceedings initiated.

In addition to coronavirus-related frauds, expect to see several enforcement priorities draw the attention of regulators newly returned to work.

Foreign Corrupt Practices Act Enforcement

The temporary lull in Foreign Corrupt Practices Act enforcement actions brought by DOJ and SEC will disappear with the reinstatement of global travel. FCPA officials of the DOJ and SEC recently emphasized continued compliance and transparency with Covid-19 challenges. The first quarter of 2020 saw two corporate enforcement actions, including [one of the largest](#) FCPA resolutions of all time. In the past three years, the number of Q1 corporate enforcement actions ranged from three to six, and with the top five largest resolutions also occurring during this timeframe, a renewed appetite for resolving active FCPA cases is expected. Goldman Sachs' settlement of the 1MDB scandal in Malaysia may be one of the first record-setting cases regulators will expedite after the pandemic. The [trend](#) for prosecution of individuals, with record numbers of charges and guilty pleas since 2017, will also resume.

SEC Enforcement Actions

The next year can be expected to produce a historic number of SEC enforcement actions, especially as whistleblowers are incentivized by [large awards](#) and as the SEC is [committing substantial resources](#) to enforcement. The SEC's pursuit of insider trading remains arguably unaffected by the pandemic. The SEC tools to detect improper trading include market surveillance, the Analysis and Detection Center, the Advanced Relational Trading Enforcement Metrics Investigation System (ARTEMIS), other data analysis tools, tips, and media reports. The SEC's role in policing the market is never more critical or active than during historic times of market volatility. In 2008, the SEC [brought](#) a historic number of enforcement actions, with a significant focus on insider trading and market manipulation.

Antitrust Enforcement

Coordination between traditional competitors to respond to Covid-19 demands may breach criminal antitrust rules. Regulators will closely monitor how industries manage financial loss during the pandemic and as businesses strive to recover. There is a recognition that traditional competitors have been in communication throughout the crisis. The government very well may scrutinize manufacturers repurposed for PPE or ventilator production, partnerships to develop crisis-related technology, and strategic discussions on combatting decline and reviving suffering industries. In particular, the government will look closely at airlines, hotels, and others in the travel industry; consumer products; professional sports leagues; education; financial services; health care; technology; and oil and gas. In addition, DOJ and the Federal Trade Commission recently [cautioned](#) employers, staffing companies, and recruiters who might engage in anticompetitive conduct that harms workers, such as the suppression or elimination of competition with respect to compensation, benefits, and hours worked, as well as the hiring and retention of workers.

Congressional Investigations

Congressional investigations into Covid-19 federal relief programs are certain, particularly given Congressional pushback to changes in leadership of the Pandemic Response Accountability Committee. The watchdog committee, charged with overseeing the distribution of \$2 trillion in relief funds, has an \$80 million budget to advance its efforts. The DOJ is reportedly also preparing for extensive coronavirus stimulus fraud by training federal prosecutors on what to look for and deploying data analytics tools for early detection of frauds such as kickback schemes, [false statements](#) on small business

loan applications, and inflation of payroll numbers as part of the Paycheck Protection Program. The DOJ has already referred more than 3,000 tips made to the Criminal Division's National Center for Disaster Fraud to state and federal agencies for possible investigation. Relatedly, as with the 2008 financial crisis, qui tam actions under the False Claims Act will abound.

Price Gouging

State investigations into price gouging will target actors who sought to take advantage of high consumer demand. Anti-price gouging laws often accompany emergency legislation and several states recently enacted them. The DOJ also [initiated](#) a Hoarding and Price Gouging Task Force in late March 2020 to “aggressively” pursue bad actors who amassed critical supplies far beyond what they could use. Class actions by consumers are also likely and, indeed, have already [begun](#).

Mail and Wire Fraud

With shelter-in-place and stay-at-home orders, schemes are increasingly likely to require use of the U.S. mail and electronic communications to achieve success. Prosecutors will rely on, and judges may be newly inclined towards, charges of mail and wire fraud to capture criminal activity and to extend U.S. jurisdiction over what would traditionally be state or extraterritorial crimes. On April 10, 2020, as part of the new Hoarding and Price Gouging Task Force's efforts, DOJ [charged](#) a Georgia resident with wire fraud for attempting to sell millions of nonexistent respirator masks to the Department of Veterans Affairs.

Sanctions and Export Controls

The U.S. Department of the Treasury provided an optional deferment of duties for importers impacted by Covid-19 hardship and the Office of the U.S. Trade Representative temporarily relaxed some medical product tariffs, but most sanctions and export controls remain unaffected. The Office of Foreign Assets Control released an [FAQ](#) on humanitarian assistance to Iran in light of the virus, which OFAC simultaneously promised to carefully [monitor](#).

EPA Enforcement

The Environmental Protection Agency [continues](#) to settle oil spill and leak investigations, and environmental charges may quickly return to the spotlight if a return to business as usual coincides with a change in Administration. Though the EPA temporarily [relaxed](#) some of its enforcement guidelines during the pandemic, it has received pushback which may motivate harsher penalties for noncompliance. The EPA also [joined](#) consumer protection efforts, working with DOJ and other regulators to block fraudulent coronavirus disinfectant claims. Perhaps missed by many amongst pandemic headlines, the recent demise of [Supplemental Environmental Projects](#) as part of civil settlements will also play out in the coming months.

Data Privacy and Cybersecurity

Teleworking has created numerous data privacy and cybersecurity risks. Companies must operate and respond to regulators without exposure to data protection or privacy problems arising from electronic cross-border transfer or security lapses. The U.S. Attorney's Office for the Eastern District of Michigan has already [announced](#) cybersecurity efforts to crack down on “Zoom-bombing,” threatening charges for participation in the new fad of hacking teleconference meetings.

Workplace Safety and Health

Workplace safety and health will continue to be an enforcement priority. Companies are already under scrutiny for alleged Covid-related federal and state violations of safety, health, labor and employment laws and regulations. Likewise, there has been an increase in whistleblower complaints being investigated by authorities and related alleged retaliation in response to such complaints.

Though impacted by many of the topics addressed above, the health-care industry merits special mention. Regulator and public scrutiny will dissect the response of industry players to these difficult times, especially pharmaceutical companies, medical device manufacturers and sellers, hospitals and health care systems, insurance companies, laboratories, pharmacies, and individual practitioners. The DOJ has already targeted health care fraud and abuse, and health-care entities will continue to be major targets.

The DOJ's National Nursing Home Initiative [launched](#) investigations into 30 individual nursing facilities by early March 2020. On April 10, 2020, the DOJ's Civil Rights Division and the U.S. Attorney's Office for the District of Massachusetts [opened](#) an investigation into a nursing home for veterans under the Civil Rights of Institutionalized Persons Act. According to the DOJ, failure to provide adequate medical care exposed actors to liability under this act. This case is worth following as an indicator of future fallout.

The False Claims Act will likely serve as the government's primary enforcement mechanism for health care fraud, as it has in the past. In the past [two years](#), the DOJ recovered almost \$6 billion from False Claims Act cases, primarily from actions against the drug and medical device industry for drug pricing and copayment assistance. Whistleblower qui tam suits drove much of the government's action. To pass muster under this highly motivated scrutiny, participants in Medicare, Medicaid, and federal coronavirus relief programs must invest in enhanced compliance now more than ever.

Preparing for Reopening

To prepare for the reopening of broader economic activity, companies, boards, and executives should take advantage of any opportunity to complete all feasible pending requests from regulators and close out investigations. Regulators will be motivated to settle many cases on relatively favorable terms to free up bandwidth to pursue coronavirus-related frauds. Senior DOJ officials expect that when things return to normal, lawyers and clients will have had time to review documents, promptly conduct interviews, and generally be ready to respond to settlement resolutions.

Companies in settlement discussions that are struggling in the bleak economic climate should take advantage of the government's recent transparency in inability-to-pay considerations. The DOJ's October 2019 [memorandum](#) sets forth the factors DOJ will evaluate to determine the company's ability to pay. The burden falls to the company to demonstrate an inability, and it must fully cooperate with financial inquiries to qualify for the relief.

Companies under duress from Covid-19 will be eligible for relief under the new guidance given the obvious burdens on cash flow, budgets, expenditures, encumbrances, restructuring plans, and insurance claims imposed by the pandemic. The DOJ will also consider the compensation plans for the ten most highly compensated executives. Pecuniary loss inflicted upon others or attributable to the offense will weigh against the company. Companies exposed to Covid-19 risks should not wait for an enforcement action to carefully consider the factors enumerated in the guidance.

Investigators and regulators will expect compliance teams to specifically implement crisis-related measures and, if necessary, enhance their existing compliance protocols to account for pandemic-related conduct. The pandemic will not excuse lapses in compliance programs that allow misconduct to fall through the cracks, especially as the international community's efforts to entice foreign investment to rebound economies may create attractive opportunities for bribery and corruption. An [effectively designed compliance program](#) will account for the unexpected, and is essential for positive consideration during government investigations, charging determinations, and negotiating plea or other agreements.

Conclusion

The primary focus for boards, companies and financial institutions must be on responding to the current pandemic and protecting the health and well-being of the company and its employees. As society reemerges to a new normal, it is essential to be prepared for the onslaught of investigative, regulatory, and oversight scrutiny that will come soon.