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How DOJ May Beat The White Collar Fraud Clock Post-COVID

By **Michael Harwin and David Chaiken** (November 19, 2021, 3:44 PM EST)

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Complex white collar and corporate fraud often remain undetected for years before being reported to law enforcement. It then takes years to investigate.

Unlike other kinds of misconduct, white collar matters typically require the collection and analysis of voluminous financial records, corporate records and electronic correspondence, such as email, text and instant messages.

This process is then usually followed by a series of careful, deposition-style witness interviews and grand jury examinations — sometimes dozens — each of which may last a day or more.

After this typically herculean effort is completed, prosecutors analyze the facts and the law to reach a charging decision, obtain supervisory approval and prepare the charging paperwork.

And often, at each step of the way — subpoenas, document productions, interviews, grand jury appearances and charging — there are time-consuming negotiations with lawyers for various stakeholders about issues large and small, from requests to extend subpoena production deadlines to requests for use immunity and declination of prosecution.

Given widespread delays caused by the global COVID-19 pandemic — including U.S. Department of Justice and investigative agency office closures and the outright suspension of federal grand jury proceedings throughout the country for a significant number of months during 2020 — there can be no doubt that, for certain complex white collar matters, the standard five-year statute of limitations applicable to most federal offenses will pose a serious challenge for federal prosecutors.

The DOJ may beat the clock in many of these cases, and it may allow other potential cases to lapse for lack of time and resources. But inevitably, there will be certain investigations that cannot be completed within five years, yet which the DOJ will deem too important for the misconduct to go unpunished.

For these matters, the DOJ will employ creative strategies to try to sidestep statute of limitations problems. Here's how it will do so.

Seeking Tolling Agreements With Defense Counsel

The most common and straightforward way for the DOJ to avoid a statute of limitations problem is to seek a tolling agreement with defense counsel.

Such agreements can be beneficial to investigative targets by allowing additional time to advocate for a declination or negotiate a more favorable resolution with the DOJ, rather than having the prosecutor rush to present charges to a grand jury to beat a statutory deadline.

But at the end of the day, such an agreement ultimately requires the investigative target's consent to allow the government additional time to gather evidence against him or her, so for obvious reasons,

such consent will not always be forthcoming. In these situations, the DOJ will be forced to consider one or more of the strategies below.

Creative Charging Decisions

While the limitations periods applicable to common white collar crimes, such as mail and wire fraud, health care fraud, securities fraud, tax fraud and conspiracies to commit such offenses, are five and six years, a 10-year limitations period applies to bank fraud and related offenses, such as embezzling funds from a federally insured financial institution or making a material false statement to a federally insured financial institution.[1]

If a particular offense could be repackaged as a bank fraud offense, a clever prosecutor could plead around the potential statute of limitations issue and obtain some breathing room.

For example, the first clause of the bank fraud statute requires the government to prove that the defendant intended to defraud a financial institution, but the second, alternative clause merely requires the government to prove that the defendant intended

> to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises.[2]

In other words, this section merely requires proof that the defendant defrauded a nonbank custodian into giving up funds being held by a bank, and that as part of the scheme a misrepresentation would naturally reach the bank. The U.S. Supreme Court so held in U.S. v. Loughrin in 2014.[3]

This alternative bank fraud theory arguably would allow the DOJ to charge certain offenses under the bank fraud statute to take advantage of its 10-year limitations period, even though such offenses do not fit the traditional bank fraud mold.

Along similar lines, the Financial Institutions Reform, Recovery and Enforcement Act, or FIRREA,[4] amended the mail and wire fraud statutes to provide for enhanced penalties and an extended, 10-year statute of limitations if the offense affects a financial institution.[5]

Though this provision has not been extensively litigated, a majority of circuits appear to have held that putting funds insured by the Federal Deposit Insurance Corp. at risk is sufficient to establish that a mail or wire fraud affects a financial institution, and that there is no requirement to prove that the bank suffered any loss.[6]

Accordingly, depending on the facts, the FIRREA amendment may provide the DOJ with a powerful tool to attempt to avail itself of a 10-year limitations period in otherwise seemingly run-of-the-mill mail and wire fraud cases, and it may receive significantly more attention in the wake of the pandemic.

The Wartime Suspension of Limitations Act

Congress enacted the Wartime Suspension of Limitations Act in the 1940s, during World War II, to extend the statute of limitations for criminal charges involving fraud or attempted fraud against the U.S.[7] A predecessor statute was enacted in 1921 to address war-related frauds during World War I.

The WSLA extends the limitations period for certain offenses for five years after the termination of hostilities, provided that:

- The U.S. is at war or Congress has enacted a specialized authorization for the use of armed forces; and
    - The cause of action involves fraud or attempted fraud against the U.S; or
    - The cause of action involves any misdeed committed in the handling of U.S. property; or

- The cause of action involves misconduct in the "negotiation, procurement, award, performance, payment for, interim financing, cancelation, or other termination or settlement, of any contract, subcontract, or purchase order which is connected with or related to the prosecution of the war."[8]

Notably, the WSLA is limited to a narrow subset of white collar offenses in which the victim is the U.S. government, such as fraud involving government contracts and government benefit programs.

It would not seem to be available, for example, to extend the limitations period for securities fraud and other crimes that do not involve a federal government victim, or where the defendant did not actually seek or obtain money or property from the U.S., and instead merely underreported taxable income or omitted information.[9]

Where available, however, the WSLA may still be viable because there has been no official presidential or congressional declaration of termination of hostilities in Iraq or Afghanistan since Congress authorized the use of the armed forces in response to the Sept. 11 terrorist attacks, and courts have opined that the limitations periods applicable to WSLA-covered offenses remain tolled.[10]

Waiver-Free Criminal Informations in Lieu of Indictment

The Fifth Amendment to the U.S. Constitution provides that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury."[11]

Federal Rule of Criminal Procedure 7(a) gives effect to this provision with the requirement that felonies be prosecuted by an indictment.[12]

Nevertheless, the federal rules except noncapital felony offenses from this rule and permit the government to instead proceed via what is known as a criminal information, if the defendant agrees to waive his or her right to a grand jury indictment.[13]

A criminal information closely resembles an indictment, but it is signed only by the DOJ prosecutor and not the grand jury foreperson, and thus it does not comport with the Fifth Amendment.

During the pandemic, however, when the suspension of grand juries throughout the country prevented federal prosecutors from presenting cases and obtaining grand jury indictments, in numerous instances the DOJ attempted to proceed by criminal information without the defendant's consent to toll expiring limitations periods.

In other words, the DOJ filed criminal informations to beat the clock, but without obtaining a waiver of indictment from the defendant. Then, after grand jury proceedings resumed, most of those defendants were subsequently indicted.

Most courts have upheld this practice as a means to effectively toll the statute of limitations, including in two recent white collar cases.

Specifically, in two recent prosecutions — for health care fraud in U.S. v. Rosecan in March, and access device fraud in U.S. v. Webster last month — the U.S. District Court for the Southern District of Florida denied motions to dismiss the charges on statute of limitations grounds where waiver-free criminal informations, instead of indictments, were filed.[14]

The courts held that the relevant federal statute of limitations, Title 18 of the U.S. Code, Section 3282, merely required that "the indictment is found or the information is instituted within five years next after such offense shall have been committed."[15]

In so holding, these courts followed the U.S. Court of Appeals for the Seventh Circuit's 1998 decision in U.S. v. Burdix-Dana, in which the court opined that an information lacking a waiver of indictment is instituted pursuant to Section 3282, and thus tolls the limitations period even if a grand jury indictment is not returned until after the limitations period expires.[16]

Further, filing a waiver-free information to stop the limitations clock gives the DOJ another six months after the information is dismissed to obtain a grand jury indictment, a significant extension of the limitations period that can make a world of difference in a complex white collar matter.[17]

It should be noted, however, that this is merely a temporary fix for the DOJ to sidestep an expiring statute of limitations, because the DOJ must eventually obtain a grand jury indictment in the case absent a waiver from the defendant.

Further, this practice is not without controversy; several district courts have rejected it, and one such rejection in U.S. v. B.G.G. is currently on appeal to the U.S. Court of Appeals for the Eleventh Circuit.[18] Accordingly, this potential solution carries significant risk until the case law develops further.

Legislative Extension of Statutes of Limitations

It is conceivable that the DOJ could look to Congress for a legislative fix if expiring limitations periods became a significant impediment to the prosecution of complex white collar and corporate fraud cases after the pandemic.

That said, absent a prominent triggering event, like the 2008 financial crisis, the political will to focus on white collar offenders is typically underwhelming.

Accordingly, legislative action seems unlikely unless there is a significant resurgence in COVID-19 illness, and concomitant federal office closures and federal court and grand jury suspensions.

It is worth noting, however, that any potential legislative extension is limited by the constitutional prohibition against ex post facto punishments.

To that end, the Supreme Court has indicated that Congress would violate the ex post facto clause if it attempted to revive expired charges, but that it is constitutionally permissible to extend the limitations period for charges that have not yet expired, as the court held in Stogner v. California in 2003.[19]

Referral of Expired Cases to States for Prosecution

Finally, as a last resort if criminal prosecution is warranted but cannot be accomplished by the DOJ within the applicable limitations period or any available extension, the DOJ may refer investigations to its state and local counterparts in certain circumstances.

Specifically, federal and state law encourage multiagency and multijurisdictional cooperation and coordination, and the Federal Rules of Criminal Procedure authorize the DOJ to disclose grand jury matters to state and local law enforcement with court approval.[20]

Referring cases to state and local law enforcement may allow an otherwise time-barred prosecution to proceed because, in certain states, prosecutors may avail themselves of tolling doctrines that are not available under federal law.

In Florida and Georgia, for example, there is a civil-style discovery rule that tolls the limitations periods for certain crimes involving fraud and breaches of fiduciary duty for a period of time until after the crime is actually discovered, instead of simply after it is committed.

For otherwise time-barred offenses involving fraud or breach of fiduciary duty, Florida law allows charges to be brought within one year of the discovery of the crime, although the original time limit cannot be extended for more than three years.[21]

Florida law also tolls the limitations periods applicable to certain environmental crimes pending the discovery of the crime.[22]

Similarly, for crimes involving misconduct in public office, a case can be brought within two years of the person leaving office or any above limit, whichever is greater.[23]

Georgia's discovery rule is even broader, tolling the limitations periods applicable to a broad class of

crimes, including fraud, for the entire period in which the crime or its perpetrator are unknown.[24]

Accordingly, while the DOJ might ordinarily be reluctant to cede jurisdiction over a serious white collar or corporate fraud matter to state and local law enforcement authorities, more forgiving tolling provisions may provide an avenue to pursue charges that would be time-barred in the federal system and thus encourage such a referral.

The Path Ahead

In making charging decisions in complex white collar and corporate fraud matters, federal prosecutors typically seek to minimize risk in an effort to efficiently secure a just conviction and move on to the next case. Few want their case to reach the Supreme Court, or to raise issues that will receive appellate scrutiny.

Nevertheless, given the unprecedented challenges of the COVID-19 pandemic, federal prosecutors focusing on complex fraud matters may find themselves with no choice but to consider and implement some of the creative, albeit imperfect, solutions summarized here.

Defense counsel should be aware of the nuances and weaknesses of each method, and stand ready to mount appropriate challenges.

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[1] 18 U.S.C. § 3293.

[2] 18 U.S.C. § 1344(2).

[3] Loughrin v. United States, 573 U.S. 351, 357 (2014).

[4] Pub. L. No. 101-73.

[5] 18 U.S.C. §§ 1341, 1343; U.S.C. § 3293(2).

[6] United States v. Stargell, 738 F.3d 1018, 1022-23 (9th Cir. 2013); see also United States v. Murillo, 443 F. App'x 472, 475 (11th Cir. 2011) (same).

[7] Kellogg Brown & Root Servs., Inc. v. U.S., ex rel. Carter, 575 U.S. 650, 658 (2015).

[8] 18 U.S.C. § 3287.

[9] See, e.g., United States v. DeLia, 906 F.3d 1212, 1221 (10th Cir. 2018) (rejecting application of WSLA to healthcare fraud charges under 18 U.S.C. § 1347 where proof of fraud against the federal government was not required, and offense merely involved fraud against a program that received federal and state funds); Bridges v. United States, 346 U.S. 209, 221 (1953) (rejecting application of WSLA to false statement under oath in immigration proceeding, conspiracy, and aiding and abetting same because such offenses did not "involve the defrauding of the United States in any pecuniary manner or in a manner concerning property").

[10] United States v. Frediani, 790 F.3d 1196, 1200–1201 (11th Cir. 2015); Burnett v. United States, No. 516CR154SLBSGC1, 2021 WL 2163528, at *6 (N.D. Ala. May 27, 2021). The impact of President Biden's August 31, 2021 Afghanistan troop withdrawal on the WSLA, if any, remains

unclear.

[11] U.S. Const. amend. V.

[12] Fed. R. Crim. P. 7(a) (quoting 1944 advisory committee note to subdivision (a)).

[13] Fed. R. Crim. P. 7(b).

[14] United States v. Webster , No. 20-20172, 2021 WL 4949170 (S.D. Fla. Oct. 25, 2021); United States v. Rosecan , No. 20-80052-CR-Ruiz(s), DE 49 (S.D. Fla. Mar. 17, 2021).

[15] 18 U.S.C. § 3282(a).

[16] United States v. Burdix-Dana , 149 F. 3d 741, 742-43 (7th Cir. 1998).

[17] 18 U.S.C. § 3288.

[18] United States v. B.G.G., No. 20-cr-80063-DMM, DE 19 (S.D. Fla. Jan. 11, 2021).

[19] Stogner v. California, 539 U.S. 607 (2003).

[20] See Fed. R. Crim. P. 6(e)(3)(E)(iv) ("The court may authorize disclosure . . . of a grand-jury matter . . . at the request of the government if it shows that the matter may disclose a violation of State, Indian tribal, or foreign criminal law, as long as the disclosure is to an appropriate state, state-subdivision, Indian tribal, or foreign government official for the purpose of enforcing that law").

[21] Fla. Stat. § 775.15(12)(a).

[22] Fla. Stat. § 775.15(9).

[23] Fla. Stat. § 775.15(12)(a).

[24] See O.C.G.A. § 17-3-2 ("The period within which a prosecution must be commenced under Code Section 17-3-1 or other applicable statute does not include any period in which … [t]he person committing the crime is unknown or the crime is unknown.").
