

COVID-19 Reinforces Existing White Collar Enforcement Priorities

TOP ATTORNEYS PROVIDE FEEDBACK IN EXCLUSIVE MILLER & CHEVALIER RESEARCH

For the past few weeks, the narrative around white collar enforcement has, broadly speaking, been this: In the short term, investigations and prosecutions – like nearly everything else – will be delayed, and when enforcement picks back up, priority will be given to COVID-19-related domestic fraud, be it cases involving newfangled "miracle cures," insider trading, or CARES Act relief funds.

A recent flash survey of top white collar attorneys, however, adds new depth and complexity to this story.

For executives forced to adjust enforcement postures in this uncertain time, the insights gleaned from this data may help guide crucial compliance decisions – today and in the weeks and months to come.

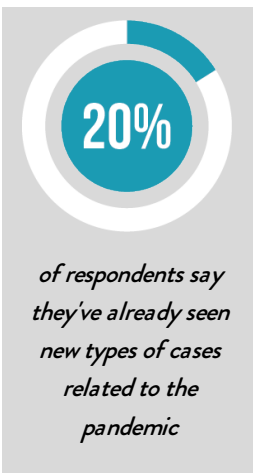
Here are three key takeaways.

1 The White Collar Bar is already beginning to see new COVID-19-related cases emerge.

COVID-19 related cases: On March 24, Attorney General Barr [described](#) over 10 types of new COVID-19-related white collar cases witnessed by the DOJ. Some are already being charged in federal courts. For example, on April 10, the United States [charged](#) an individual with fraud for attempting to sell millions of nonexistent respirator masks to the Department of Veterans Affairs in exchange for large upfront payments.

Nearly 20 percent of white collar practitioners said they'd already seen new types of COVID-19-related cases themselves – a not insignificant number, considering this survey was held during the first week of April.

As the CARES Act rolls out and new pandemic-related [regulatory task](#) forces find their footing, we should expect more novel cases, especially in the areas of health care, False Claims Act and securities fraud.



2

Enforcement of False Claims Act and health care fraud was already on the rise. COVID-19 is poised to accelerate that trend.

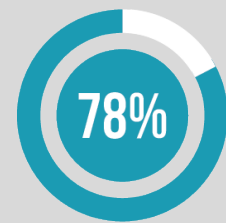
Even before the outbreak of COVID-19, white collar practitioners sensed that regulators were prioritizing health care fraud and False Claims Act prosecutions.

They had proof. Not only did the DOJ recover \$3 billion in False Claims Act cases last year – with the bulk of recoveries coming in the area of health care fraud¹ – but 2019 saw the largest federal health care fraud prosecution in history.² The DOJ's efforts in this domain stemmed in large part from their heightened targeting of large-scale opioid providers, or "pill mills."³

The survey results reflect this emerging trend. When asked to compare enforcement levels now versus six months ago – and without regard for COVID-19 – 28 percent of respondents identified higher levels of health care fraud enforcement, while 23 percent said as much about the False Claims Act. These were two of the three biggest increases among all areas we surveyed, the other being public corruption at 25 percent. At the same time, the survey revealed declining enforcement in several other areas, particularly cartel and FCPA prosecutions.

Thus, even though respondents expected the pandemic would decrease white collar enforcement generally – 78 percent perceived this to be the case – they made clear that the areas expected to draw the most focus during and after COVID-19 were on the rise *before* the pandemic hit. For instance, of the respondents who said they'd already seen new white collar criminal cases emerge, most also reported seeing more enforcement of pre-COVID-19 health care and False Claims Act fraud.

These findings suggest that the current crisis is likely to hasten the trend toward increased enforcement in these specific areas, with DOJ resources potentially being diverted from other areas of white collar practice in the process.



*of respondents say
COVID-19 is causing
a decrease in white
collar enforcement*

¹ <https://www.justice.gov/opa/pr/justice-department-recovers-over-3-billion-false-claims-act-cases-fiscal-year-2019>

² <https://www.justice.gov/opa/pr/federal-law-enforcement-action-involving-fraudulent-genetic-testing-results-charges-against>

³ <https://www.justice.gov/opa/pr/federal-health-care-fraud-takedown-northeastern-us-results-charges-against-48-individuals>

3 For white collar attorneys, a shift toward civil litigation?

As enforcement in several areas of white collar practice declines, some practitioners may find themselves spending more time in the civil arena. In the past year alone, 15 percent of respondents reported an increase in their civil litigation work compared to criminal defense.

Yet with COVID-19 now shaking up the landscape, it remains to be seen whether this balance will tilt even further.

The takeaways gathered from this exclusive research may not entirely rewrite the current narrative around white collar enforcement. But for those rethinking their compliance strategies, they offer vital and nuanced context: namely, that new types of COVID-19-related cases are *already* emerging, and these new cases appear to accelerate a preexisting move by enforcers toward False Claims Act and health care fraud priorities.

In these challenging times, we hope these insights provide some useful guidance. To learn more, feel free to reach out to White Collar Defense Practice Lead Tim O'Toole at totoole@milchev.com and/or experienced White Collar Practitioner Kirby Behre at kbehre@milchev.com.

METHODOLOGY

Between April 2-12, 2020, Miller & Chevalier Chartered distributed a survey via email to leading civil and criminal white collar practitioners across North America. The survey was completed by 40 white collar practitioners. Due to rounding and questions where respondents could select more than one answer, certain final percentages may not equal 100 percent.

We appreciate and thank those who contributed their views and shared their experiences.



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