

Beware DOJ's Statutory Tool For Fighting COVID-19 Fraud

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The U.S. Department of Justice has made clear that it is pursuing civil enforcement actions and criminal prosecution of fraudsters exploiting the COVID-19 pandemic.

Its civil enforcement efforts target a broad range of COVID-19 schemes, ranging from fraud under the Paycheck Protection Program to hawking fake testing and treatment scams.

The DOJ has notched some early victories in recently filed cases using the fraud injunction statute, Title 18 of the U.S. Code, Section 1345, a hybrid civil-criminal statute that gives the government the power to seek injunctions in civil actions to stop current or potential future violations of certain fraud-related laws and to freeze alleged fraudsters' assets before trial, including assets unrelated to alleged fraud.

Individuals and entities engaged in commerce related to COVID-19, as well as entities that have received funding from the government under the PPP, and other loan and relief programs, should be aware of Section 1345 and its application.

As the DOJ's COVID-19 fraud enforcement efforts develop, the DOJ will surely move beyond the obvious internet scams that have been the early targets of Section 1345 actions.

Section 1345 became law as part of the Comprehensive Crime Control Act.[1] The DOJ's handbook on the Crime Control Act explained that the purpose of the fraud-injunction provision was "to provide prosecutors with an effective tool to prevent the continuation of a fraudulent scheme during the pendency of the investigation." [2]

Congress recognized that fraud investigations can take many months or years and therefore sought to protect innocent victims of schemes while investigations were underway.

In 1990, Congress expanded Section 1345 to allow the government to seek to freeze an alleged fraudster's assets before trial — and even before a person has been indicted.[3]



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A review of recent U.S. district court dockets reveals that the DOJ has been pursuing Section 1345 injunctions in a variety of cases in the wire fraud context. For example, the DOJ sought an injunction where defendants were creating and operating websites that appear to offer health and safety products in high demand due to the COVID-19 pandemic, but then not shipping any of the purchased products to the consumers.[4]

Similarly, the DOJ sought to enjoin a defendant who was not registered to develop or manufacture a vaccine for COVID-19, but who was nevertheless creating and operating websites that purportedly allowed consumers to preorder a vaccine for COVID-19.[5]

In these cases, the DOJ used Section 1345 injunctions to restrain defendants from continuing their allegedly fraudulent schemes. Similarly, the DOJ sought to stop defendants from promoting and marketing silver products as effective protection against, and treatment for, COVID-19.[6]

And in another case, the DOJ sought to enjoin a defendant from operating a website claiming to provide free World Health Organization vaccine kits for COVID-19, which did not exist, if consumers paid for shipping.[7]

While the DOJ has focused on traditional consumer protection areas, such as shutting down fake sales websites and stopping fraudulent advertising of ineffective COVID-19 treatments, the DOJ's efforts will soon expand to other COVID-19 fraud schemes such as fraudulent billing for medical services and fraud under the PPP. Although the cases are still ongoing, the DOJ has generally been successful in obtaining Section 1345 injunctions, illustrating that courts concerned about COVID-19 fraud are likely to grant injunctions even before the defendants are charged with a crime.

Section 1345 Injunctions to Stop Fraudulent Activities

The schemes targeted by Section 1345 include any federal fraud described in Chapter 63 of the U.S. Code: mail fraud, wire fraud, bank fraud, health care fraud, and securities and commodities fraud. Because mail and wire fraud alone encompass any crimes that involve the interstate use of mail or wires — e.g., using the phone, email, mail, UPS, FedEx, etc. — the reach of the statute is incredibly broad.

The statute reaches even further, however, as it can also be used to enjoin certain criminal activity outside of Chapter 63, including false claims under Title 18 of the U.S. Code, Section 287, conspiracy to commit fraud under Title 18 of the U.S. Code, Section 371, banking law violations as defined in Title 18 of the U.S. Code, Section 3322(d), and health care offenses, as defined in Title 18 of the U.S. Code, Section 24.[8]

Hybrid Structure

Injunction proceedings under Section 1345 are governed by the Federal Rules of Civil Procedure up until the point in time when an indictment is returned, at which point the Federal Rules of Criminal Procedure must be followed.[9]

This distinction is an important consideration for a prosecutor seeking a Section 1345 injunction. On the one hand, managing discovery under the Federal Rules of Civil Procedure would allow the defendant's counsel to seek materials that would not normally be discoverable under the criminal rules, such as investigative notes and reports of interviews, even before their client has been charged.

On the other hand, once an indictment has been returned, managing discovery under the Federal Rules of Criminal Procedure requires a court to protect the defendant's rights while also preventing the defendant from receiving information such as investigative notes that may be available in civil proceedings.

Evolving Standard

The federal district courts hearing Section 1345 cases across the country have taken varied approaches to the standard the government must meet to be granted an injunction.

Some courts have stated that, because Section 1345 is a statute-based injunction, the government does not have to show the traditional, common law requirements of an injunction such as irreparable hardship, the inadequacy of other remedies at law, or the balance of the parties' interests.[10]

This position is consistent with DOJ's handbook on the Crime Control Act, which states, "When an injunction is sought pursuant to statute and for the public good, it is not necessary to demonstrate that there is an inadequate remedy at law." [11]

The DOJ handbook suggests that:

it should be sufficient for the Government to show: (1) that the person or entity sought to be enjoined is engaged in, or is about to engage in, conduct that would violate [federal fraud statutes]; and (2) that equitable relief is warranted to prevent continuing and substantial injury to the United States or to the public.[12]

Prosecutors must identify the class of persons who might be injured by the scheme and describe the scheme with particularity.

Other courts have applied the traditional injunction test to requests under Section 1345, requiring the government to demonstrate the balance of factors in favor of an injunction.[13]

Some courts have implemented an additional burden-shifting approach that can benefit the defendant: Once the government sets forth its substantive proof for an injunction, the defendant is allowed to explain why the fraudulent action will not recur, making an injunction unnecessary.[14]

Though the law is evolving as more COVID-19 fraud cases are brought, the two most common standards adopted by courts at this point are: (1) requiring the government to show that probable cause exists that the person to be subject to the injunction is engaging or is about to engage in a fraudulent scheme, or (2) requiring the government to prove the basis for the injunction by a preponderance of the evidence.[15] This mix of civil and criminal standards derives from the hybrid nature of the statute.

Section 1345 Injunctions to Freeze Assets

Along with bringing an injunction to halt fraudulent activities, Section 1345 also provides the government the ability to request an injunction that freezes a person's assets if that person is allegedly engaged in fraudulent schemes.

The DOJ can request an injunction or restraining order preventing a person from withdrawing,

transferring or disposing of property resulting from a banking law violation or federal health care offense, as well as other property of equivalent value.[16]

Importantly, the government can freeze these assets before trial — and even before the person has been indicted — to conserve the alleged fraudster's assets.

Broad Application

Its plain language indicates that Section 1345's ability to freeze assets is limited to banking law violations and federal health care offenses. In practice, however, these injunctions or restraining orders may be much broader. Courts have expanded the scope of the statute to freeze assets tied to essentially any federal fraud offense.[17]

Untainted Assets

A particularly notable aspect of Section 1345 is its use in freezing assets of equivalent value to those that came as a result of, or are traceable to, the fraud-related activity. Normally, the government is limited to freezing assets that can be traced to the alleged crime. This provision, however, allows the government to seek to freeze assets that are unrelated to, or untainted from, the activities of the alleged crime.

The ability to freeze untainted assets comes with limitations, though. For example, the government may not freeze untainted assets that complicate a defendant's constitutional right to retain counsel,[18] and it is possible other such limitations could arise if the statute is used in circumstances that impact a defendant's constitutional rights.

Section 1345 — Part of COVID-19 Legal Playbook

The DOJ's initial track record of successfully obtaining Section 1345 injunctions in obvious fraud cases is building case law that may help the DOJ succeed in future cases in which the acts are not clearly fraudulent.

If more sophisticated and legitimate businesses find themselves in the crosshairs of the DOJ, whether it be related to allegedly fraudulent medical services billing, a PPP loan application or something else entirely, Section 1345 and its ability to restrain the use of assets and property before trial can be detrimental to the continued operation of an entity's business or an individual's livelihood.

Learning about Section 1345 and preparing to respond to a request for an injunction should be a part of anyone's COVID-19 legal playbook.

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[1] Pub L. No. 98-473, tit. II, § 1205(a), 98 Stat. 1976 (1984). The provision originally allowed the Government to seek injunctions for violations of a limited number of fraud-related statutes. Congress

amended Section 1345 in 1988 to authorize injunctions under additional federal fraud statutes. Pub. L. No. 100-690, tit. VII, § 7077, 102 Stat. 4406 (1988). In 1996, Congress amended the statute to include health care offenses among the violations that can be enjoined. Pub. L. No. 104-191, tit. II, § 247, 110 Stat. 2018 (1996).

[2] U.S. Department of Justice, Handbook on the Comprehensive Crime Control Act of 1984 and Other Criminal Statutes Enacted by the 98th Congress, at 152 (1984) ("DOJ Handbook").

[3] Pub. L. No. 101-647, tit. XXV, § 2521(b)(2), 104 Stat. 4865 (1990).

[4] See Compl., ECF No. 1, United States v. Dinh, No. 8:20-cv-1794-CEH-AAS (M.D. Fla. Aug. 3, 2020).

[5] See Compl., ECF No. 1, United States v. Flint, No. 3:20-cv-489-CHB (W.D. Ky. July 10, 2020).

[6] See Compl., ECF No. 1, United States v. My Doctor Suggests LLC, No. 2:20-cv-279-DBB (D. Utah Apr. 27, 2020).

[7] See Compl., ECF No. 1, United States v. Doe, No. 1:20-cv-306-RP (W.D. Tex. Mar. 21, 2020).

[8] 18 U.S.C. § 1345(a)(1).

[9] 18 U.S.C. § 1345(b) ("A proceeding under this section is governed by the Federal Rules of Civil Procedure, except that, if an indictment has been returned against the respondent, discovery is governed by the Federal Rules of Criminal Procedure.").

[10] See, e.g., United States v. Livdahl, 356 F. Supp. 2d 1289, 1290-91 (S.D. Fla. 2005) (finding that, for a Section 1345 injunction, "no specific finding of irreparable harm is necessary, no showing of the inadequacy of other remedies at law is necessary, and no balancing of the interests of the parties is required prior to the issuance of a preliminary injunction"),

[11] DOJ Handbook at 153.

[12] *Id.*

[13] See, e.g., United States v. Williams, 476 F. Supp. 2d 1368, 1377 (M.D. Fla. 2007) (finding that, for a Section 1345 injunction, "the United States must still demonstrate that the balance of the ... equitable factors counsel in favor of granting the requested injunction").

[14] See, e.g., United States v. Am. Therapeutic Corp., 797 F. Supp. 2d 1289, 1292 (S.D. Fla. 2011) ("Once the government establishes the existence of the statutory violation, the burden shifts to the defendants to show that there is no reasonable expectation that the wrong will be repeated.").

[15] Compare, e.g., United States v. William Savran & Assocs., Inc., 755 F. Supp. 1165, 1177 (E.D.N.Y. 1991) ("To support an application for a preliminary injunction under 18 U.S.C. § 1345, the Government must demonstrate that 'probable cause' exists to believe that the defendant is currently engaged or about to engage in a fraudulent scheme."), with, e.g., United States v. Sriram, 147 F. Supp. 2d 914, 938 (N.D. Ill. 2001) ("[T]o establish a likelihood of success as required by Section 1345, the Government must show by a preponderance of the evidence that a predicate fraud offense has been or is being committed.").

[16] 18 U.S.C. § 1345(a)(2).

[17] See, e.g., *United States v. Payment Processing Ctr., LLC*, 435 F. Supp. 2d 462, 464 (E.D. Pa. 2006) (holding that "[Section] 1345 authorizes broad injunctive relief, including property restraints, for any violation of chapter 63 of the United States Code, such as mail and wire fraud, regardless whether the offense constitutes a banking law violation or health care fraud").

[18] *Luis v. United States*, 136 S. Ct. 1083, 1096 (2016) (opinion of Breyer, J.) ("[W]e conclude that the defendant in this case has a Sixth Amendment right to use her own 'innocent' property to pay a reasonable fee for the assistance of counsel.").