

Impressive Results From DOJ Fraud Section In 2018

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The U.S. Department of Justice Criminal Division's Fraud Section recently released its 2018 year-in-review report.[1] The 22-page document provides a useful overview of what the Criminal Division's largest litigating section has accomplished in the last year, comparisons to years past, and important hints at what the future holds for individuals and entities whose activities come within the Fraud Section's broad reach.

Section Size, Leadership and Results

While the 2017 report showed a slight decrease in total prosecutorial headcount from 2016 (when the section had a major hiring push), the 2018 report has the Fraud Section back to approximately 150 prosecutors, mostly divided into three major units, with others fulfilling support and training roles. This was an increase of 10 prosecutors over the number identified in the 2017 report, or a roughly 7 percent overall increase in prosecutor headcount. Notably, this was the second annual report issued by the Fraud Section under the leadership of Acting Chief Sandra Moser and Acting Principal Deputy Chief Robert Zink. Section Chief Andrew Weissmann left for the special counsel's office at the end of May 2017.

The Fraud Section is the largest litigating section in the Criminal Division, on par with most of the larger U.S. attorney's offices. Comparing the overall Fraud Section's size with that of any U.S. attorney's office is misleading, however, because all of the Fraud Section's 150 prosecutors are devoted to white collar crime, whereas, in any other office, only a small subset may be so assigned – even in

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FCPA and Anti-Corruption
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the largest districts.

The Fraud Section's ability to focus on large white collar cases and to be selective in the cases it prosecutes continues to produce impressive results, as the 2018 numbers demonstrate. A comparison of the 2016, 2017 and 2018 reports reveals a noticeable shift from 2016's focus on corporate prosecutions to a continuation of 2017's focus on prosecuting individuals, including a very obvious focus on individual prosecutions related to opioids in 2018. According to the 2018 report, Fraud Section prosecutors last year charged 406 individuals, convicted 268 by plea or at trial, brought 10 corporate enforcement actions, and recovered more than \$1 billion in corporate U.S. criminal fines, penalties, restitution and forfeiture, as part of resolutions that returned \$3 billion globally.

The number of individuals charged by Fraud Section prosecutors substantially increased over both 2016 and 2017 – 2018 saw more than a 33 percent jump over 2017. The 2018 report shows 38 individuals were convicted at trial, which was a 40 percent increase over the 27 convicted at trial in 2017. Notably, the number of corporate enforcement actions reported remained exactly the same, at 10, though the total dollar value of those resolutions was substantially down from \$4.6 billion in 2017 to roughly \$1 billion in 2018. Much of that difference is attributable to the multibillion-dollar Volkswagen resolution and the billion-dollar Takata Corporation airbag resolution, which accounted for a significant portion of the 2017 numbers.

The Fraud Section is divided into three major units: Health Care Fraud, Securities and Financial Fraud, and Foreign Corrupt Practices Act. As discussed below, each unit was again productive in 2018. While some voiced concern that resource constraints and a continued lack of permanent leadership over the past two years would limit the section's prosecutors in 2018, any such questions were put to rest after Moser's and Zink's first full year of leadership. The section's reported numbers clearly demonstrate continued growth and success helping the DOJ achieve its stated goals of prosecuting individuals and entities and focusing on opioid abuse.

Health Care Fraud Unit

The Health Care Fraud Unit is the largest of the three main units, with 60 prosecutors deployed in locations across the country, an increase of 10 prosecutors over 2017. The 2016 report highlighted the formation of the "Corporate Health Care Fraud Strike Force" based in Washington, D.C. to go along with the then eight Medicare Fraud Strike Forces located in cities across the country. The 2017 report focused on individual prosecutions, prosecutions involving opioids, and the unit's formation of a "data analytics team." The 2018 report emphasizes two accomplishments – new strike force locations (Philadelphia, Newark and the Appalachian region) and a continued focus on opioid prosecutions.

In 2018, the HCF Unit reported 309 individuals charged and 205 individuals convicted by plea or at trial. That compares to 220 individuals charged and 172 individuals convicted by plea or at trial in 2017, representing increases of 40 percent and 20 percent. Further driving home the effectiveness of the HCF Unit's prosecutors

under Chief Joe Beemsterboer, the HCF Unit for the first time reported an “Impact on Investment” of \$100 to \$1 for fiscal year 2018. While the 2017 report did not identify any corporate resolutions, in 2018 the HCF Unit brought one corporate criminal enforcement action involving Health Management Associates LLC, resulting in \$37.5 million in corporate U.S. criminal fines and penalties (\$261 million when civil remedies are included).

If there were any doubt about the DOJ’s continued focus on opioids, the word “opioid” appears 13 times in the first four pages of the HCF section of the 2018 report. Further demonstrating the DOJ’s interest in opioid prosecutions, the 2018 report for the first time breaks out the increase in the number of opioid-related prosecutions, reporting 67 “individuals charged with opioid-related crimes,” a 56 percent increase in “opioid defendants” over the prior year’s numbers. Finally, the HCF portion of the 2018 report discusses the launch of the Appalachian Regional Prescription Opioid Strike Force in October of 2018, which, unlike the other strike force locations, covers a larger geographic area (nine federal districts from the Southern District of Ohio down to the Northern District of Alabama) and focuses on a particular type of health care crime – criminal conduct associated with the improper prescription and distribution of prescription opioids by physicians, pharmacists and other health care professionals.

Securities and Financial Fraud Unit

The Securities and Financial Fraud Unit is second behind HCF in number of prosecutors at 45 – the same number it reported for FY 2017. While the SFF Unit’s name suggests a traditional focus on fraud related to securities, commodities and bank fraud, it continues to demonstrate that its reach is actually far broader. As the 2018 report notes, the SFF Unit frequently takes the lead on very large and complicated global fraud schemes, routinely working with foreign regulators and law enforcement.

Unlike in prior years, where the SFF Unit reported staggering corporate resolutions related to the VW emissions scandal and global schemes to manipulate Libor and FX, the FY 2018 report focuses on the prosecution of individuals in complex financial fraud schemes, some of which were the natural follow-ons to those earlier corporate prosecutions. As predicted in last year’s article on the 2017 report, in 2018 the SFF Unit concentrated on spoofing. In that vein, the SFF Unit reports a dozen individuals charged with “spoofing-related crimes,” leading to several guilty pleas in 2018, and spoofing-related trials scheduled for 2019.

In 2018 the SFF Unit charged 66 individuals and convicted 44 by plea or at trial, compared to 57 individuals charged and 41 convicted in 2017, increases of 16 percent and 7 percent. As with 2017, in 2018, the SFF Unit reported three corporate criminal enforcement actions, but the dollar figure was lower, down from \$3.8 billion in 2017 to \$373.1 million in FY 2018 (\$4.38 billion and \$886.5 million, respectively, when total global resolutions are included). In 2018, the SFF Unit implemented its first ever “declination with disgorgement,” applying the FCPA Unit’s Corporate Enforcement Program to a financial fraud case and issuing a declination to Barclays for its role in front-running FX transactions.[2]

As the last few years have demonstrated, the SFF Unit has been at the forefront of prosecuting complex

financial fraud schemes. To that end, the FY 2018 report also notes the trial convictions of Deutsche Bank Libor traders, the trial conviction of State Street Bank executive Ross McLellan for defrauding bank customers related to portfolio transition management services, and the guilty plea of Bankrate Inc.'s chief financial officer, which resulted in a 10-year sentence. Finally, the 2018 report for the first time discussed the SFF Unit's yearslong effort to prosecute foreign telemarketing scams affecting elderly Americans, noting that over five years the SFF Unit has charged 48 defendants and obtained 30 convictions.

Foreign Corrupt Practices Act Unit

The Foreign Corrupt Practices Act Unit remains the smallest of the three major units, at 35 prosecutors, an increase of only three prosecutors over 2017, but an increase of 40 percent over the approximately 25 reported in 2015. As in 2017, the FCPA Unit achieved significant results in 2018, reporting 31 individuals charged and 19 convictions (18 by guilty plea and one after a trial). That compares to 24 individuals charged in 2017 and 21 convictions (18 by guilty plea and three in FCPA-related trials), for a nearly 30 percent increase in the number of individuals reported charged in 2018. This was in addition to a reported six corporate criminal enforcement actions resulting in \$597.2 million in U.S. criminal fines, penalties and forfeiture in matters that generated \$1.86 billion globally. The number of corporate criminal resolutions reported was down from those reported in 2017 (seven) and in 2016 (13). The 2018 report also discusses four declinations under the FCPA Corporate Enforcement Program, resulting in \$45.7 million in profits disgorged to the DOJ, U.S. Securities and Exchange Commission, and United States Postal Inspection Service.

While the 2016 report touted the flurry of very large corporate FCPA resolutions, and the 2017 report highlighted the FCPA Unit's three trial successes against individuals, in 2018 the report's focus was on the continued increase in international cooperation and individual prosecutions. The 2018 report discusses two corporate FCPA resolutions, Societe General SA and Petroleo Brasileiro SA, specifically noting that penalties in those matters were shared with France and Brazil.

Almost half of the pages dedicated to the FCPA Unit in the 2018 report describe the large number of individuals charged in 2018 related to corruption in Venezuela and its state-run energy company, PDVSA. The 2018 report not only concentrates on the number of individuals charged in relation to PDVSA, but also the significant sentences some received, including 120 months of imprisonment for Alejandro Andrade for his role in laundering money related to the bribe scheme and 120 months for Mathias Krull, who pleaded guilty for his role in laundering \$1.2 billion worth of funds embezzled from PDVSA. These sentences, combined with the recent increase in individuals prosecuted by the FCPA Unit, are particularly notable because of the potential effect they could have on enforcement of the FCPA itself. If 10-year sentences become more common, individuals may be more likely to take the FCPA Unit to trial, rather than pleading guilty, allowing for further development of the law through litigation. As the Second Circuit's August 2018 Hoskins decision (which curtailed the use of accomplice liability and conspiracy as theories to charge certain individuals with FCPA violations) made clear, the development of FCPA jurisprudence is not really possible without an individual or entity willing to challenge the DOJ or SEC in court.

Finally, the 2018 report devotes a full page to describing the four 2018 Corporate Enforcement Policy declinations the FCPA Unit issued last year. Of note in those descriptions is the relatively small amount of disgorgement paid by the Insurance Corporation of Barbados Ltd., only \$94,000 on \$1 million in revenue, as compared to the \$31 million in profits Polycom disgorged to get its declination, based on bribes generating \$47 million in revenue. The FCPA Unit's description of the Polycom declination is also interesting; the Fraud Section touted the fact that where the SEC's ability to obtain disgorgement is limited by the U.S. Supreme Court's *Kokesh* decision, the DOJ is able to step in and obtain those funds.

What to Expect in 2019

Last year we wrote: "clearly the most interesting indicator of the Fraud Section's future direction will be in the form of a decision by the DOJ Front Office on permanent Fraud Section leadership. But of course, that decision presupposes permanent Criminal Division leadership that is still not in place." One year later, we have permanent Criminal Division leadership (as of July of 2018), yet the Fraud Section still has acting leadership in numerous positions, including its two top positions and the SFF Unit Chief, following Ben Singer's departure in the summer of 2018.

The coming year will be one of even more transition for the Fraud Section's leadership. After an impressive run at the helm, Sandra Moser is leaving for private practice this month. Similarly, one of the longest serving Fraud Section prosecutors, Ellen Meltzer, acting chief of the Strategy, Policy and Training Unit, is retiring after a tremendous 38-year career in the Fraud Section (1981-2019), which included many roles, from senior litigation counsel to acting chief of the section.

Given the DOJ's continued investment in the Fraud Section's personnel and resources, and the returns that investment has generated in terms of convictions and financial penalties returned to the fisc, the Fraud Section should be expected to continue bringing large, multinational prosecutions in 2019. The SFF and FCPA Units will continue to work extensively with foreign law enforcement and regulators, and the HCF Unit will continue to thrive through the strike force model. Whether the Fraud Section next year will be able to report corporate resolution recoveries similar to 2016 and 2017 remains to be seen. All three units work closely with and rely upon domestic regulatory agencies to develop their cases, and the impact of the current furlough could hamper the development of Fraud Section cases, particularly in the SFF and FCPA Units with the SEC and U.S. Commodity Futures Trading Commission operating with skeleton staffs.

Two years into the Trump administration, complex white collar criminal prosecutions continue to be the focus of the Fraud Section, with the addition of opioid prosecutions by the HCF Unit. Whether the furlough and changes in Fraud Section leadership affect the Fraud Section's productivity in the long term is impossible to predict, but if the trend from 2016 to 2018 is any indication, 2019 should be another active year in the Bond Building, particularly for individual prosecutions, opioid related prosecutions, and international cooperation efforts.

[1] Available at <https://www.justice.gov/criminal-fraud/file/1123566/download>.

[2] See <https://www.justice.gov/criminal-fraud/file/1039791/download>.