

ARTICLE

Takeaways From DOJ Fraud Section's Pandemic Year

Kevin B. Muhlendorf, Holly Wilson

Law360

February 24, 2021

On Feb. 24, the U.S. Department of Justice's Criminal Division's Fraud Section released its annual year-in-review report for 2020.[1] The 2020 report covers the Fraud Section's accomplishments over the past year, compares 2020 statistics to prior years, and previews enforcement trends we can expect to see in 2021 and beyond.

Internal Promotions and Continued Growth

The Fraud Section is the largest litigating section in the DOJ's Criminal Division. Although larger than many U.S. Attorney's offices, the Fraud Section prosecutes only white collar crime.

It has 166 prosecutors, 16 more than in 2019, largely divided among the three litigating units: Health Care Fraud, Market Integrity and Major Frauds, and Foreign Corrupt Practices Act.

The Fraud Section also has a Strategy, Policy and Training Unit, which helps implement new, and update existing, white collar crime policies related to corporate investigations and resolutions. In 2020, the Fraud Section created a new unit, the Special Matters Unit, to handle privilege reviews, litigate privilege disputes and conduct legal ethics trainings.

After significant management changes last year, the Fraud Section now has one of the most experienced senior leadership teams in its history, with several individuals having spent more than a decade in the Fraud Section.

Authors

Kevin B. Muhlendorf

Partner

202.719.7052

kmuhlendorf@wiley.law

Practice Areas

FCPA and Anti-Corruption

White Collar Defense & Government Investigations

In September, Chief Robert Zink was promoted to Deputy Assistant Attorney General. In his place, former Senior Deputy Chief Daniel Kahn was promoted to Acting Chief. Former Senior Deputy Chief Joseph Beemsterboer was promoted to Principal Deputy Chief.

Having returned from a three-year detail in the U.K.'s Serious Fraud Office and Financial Conduct Authority, Albert "BJ" Stieglitz became the Senior Deputy Chief. Lisa Miller replaced Brian Kidd, who left for private practice, as Chief of the Market Integrity and Major Frauds Unit.

Allan Medina (Health Care Fraud), Chris Cestaro (FCPA), Sally Molloy (Strategy, Policy and Training), Brian Young (Litigation) and former Fraud Section prosecutor Jerrob Duffy (Special Matters) rounded out the senior leadership. The section appointed numerous new assistant chiefs throughout the year.

According to the 2020 report, the Fraud Section's prosecutors continued to build on the section's prior success. The Fraud Section publicly charged 326 individuals and convicted 213, either by guilty plea or at trial. These numbers show a decline from 2019, a predictable result given the months lost to COVID-19 court shutdowns and travel restrictions. In 2019, the Fraud Section charged 478 individuals and convicted 256.

Despite the pandemic's restrictions, the Fraud Section's litigating units still managed 16 trial convictions in 2020, which was down from 37 in 2019, with each unit seeing fewer trials.

Similarly, in 2020, the Fraud Section concluded 13 corporate resolutions, just shy of the 15 in 2019, but the resulting \$2.9 billion in U.S. criminal fines, penalties, restitution, disgorgement and forfeiture exceeded 2019's figure by \$1 billion.

The Fraud Section also continued to work with its international counterparts and achieved a nearly three-fold increase in the reported value of global monetary amounts from \$3.2 billion in 2019 to \$8.9 billion in 2020.

Health Care Fraud Unit

The Health Care Fraud Unit is the Fraud Section's largest unit, with 80 prosecutors nationwide, representing a five prosecutor increase over 2019, but a 20 prosecutor increase over 2018. The continued growth in the Health Care Fraud Unit's headcount tracks the government's focus on tackling illegal opioid prescriptions, as well as its focus on new health care-related crimes, including those involving telemedicine.

To that end, the 2020 report notes that 37% of the individuals charged by the Health Care Fraud Unit were medical professionals and 21% of those medical professionals were charged for conduct related to illegal opioid prescriptions.

While the 2019 report detailed the impact of investment the government saw from the Health Care Fraud Unit's strike forces, the 2020 report highlights a different statistic: a dramatic, nearly 300% increase in "average loss per individual charged," from \$5.8 million in 2018 to \$22.6 million in 2020.

Although the Health Care Fraud Unit charged only 167 individuals in 2020 versus 344 in 2019, a 51% decrease, the losses alleged in those 2020 prosecutions decreased only nominally from 2019.

Thus, while the ability to investigate and prosecute health care-related fraud was hampered by the pandemic, the profile of the cases brought demonstrates an increased focus on higher dollar, more complex, larger schemes and continues a three-year trend of growth in the dollar value of the fraud schemes prosecuted.

The 2020 report puts the Health Care Fraud Unit's long-term success on display, noting that since 2018, the unit has charged 820 individuals with nearly \$10 billion in alleged fraud losses. In 2020, the Health Care Fraud Unit convicted 144 individuals, including 10 at trial, falling slightly from the 183 convicted in 2019.

Illegal opioids continued to be a focus in 2020. Indeed, the 2020 report devotes a full page to a 2020 national health care fraud and opioid takedown, in which DOJ, led by the Health Care Fraud Unit, charged 345 defendants responsible for more than \$6 billion in alleged losses across 53 judicial districts.

The Health Care Fraud Unit's Appalachian Regional Prescription Opioid Strike Force charged 86 defendants, targeted the illegal distribution of 350,000 prescriptions, and achieved 41 convictions. The 2020 report also mentions the formation of the so-called sober homes initiative to prosecute fraud schemes in the substance abuse treatment industry.

In a September 2020 press release announcing the 2020 takedown, the DOJ revealed the formation of a National Rapid Response Strike Force and described its mission as prosecuting major health care providers that operate in multiple jurisdictions.[2]

The 2020 report further describes the strike force as a way for the Health Care Fraud Unit to surge resources to emerging multijurisdictional health care fraud cases and priorities without disrupting the existing strike force activities. Evidencing this new strike force's focus, as part of the 2020 takedown, the strike force's work led to charges against 80 individuals related to telemedicine for \$4 billion in alleged losses.

Market Integrity and Major Frauds Unit

The Market Integrity and Major Frauds Unit gained seven prosecutors in 2020, a 20% increase from the 35 prosecutors in 2019. Despite the difficulties inherent in 2020 prosecutions, the Market Integrity and Major Frauds Unit significantly increased its overall productivity over 2019.

In 2020, the Market Integrity and Major Frauds Unit charged 131 individuals and convicted 54, with five trial convictions. That is a 31% increase in the number of individuals charged and a 26% increase in the number of individuals convicted. While the trial convictions were down 44%, the increase in the number of individuals charged continued a trend that began in 2018.

The Market Integrity and Major Frauds Unit also completed five corporate resolutions, down from eight in 2019, but the \$1.06 billion in U.S. monetary amounts recovered was a 176% increase over 2019, and the \$578.2 million in U.S. criminal monetary penalties was a 91% increase over 2019.

In 2020, the Market Integrity and Major Frauds Unit focused its efforts, unsurprisingly, on COVID-19 relief fraud. According to the 2020 report, the Market Integrity and Major Frauds Unit's role spearheading the DOJ's effort to combat Paycheck Protection Program fraud resulted in 67 cases involving 97 defendants in PPP-related cases in the nine months of 2020 after passage of the Coronavirus Aid, Relief, and Economic Security, or CARES, Act.

The COVID-19 relief fraud cases were both single-defendant frauds and multidefendant fraud rings involving tens of millions of dollars in fraudulent loans.

The Market Integrity and Major Frauds Unit also continued its focus on complicated trading and financial fraud schemes such as spoofing. Most notably, it achieved a corporate resolution with JPMorgan Chase & Co. wherein JP Morgan agreed to pay over \$920 million in criminal penalties, disgorgement and victim compensation.

Additionally, the 2020 report states that "Fraud Section prosecutors have developed unique algorithms to comb marketwide data for patterns indicative of manipulative trading practices."

The increased use of data analytics – traditionally unique to the Health Care Fraud Unit – is reflected not only in the 2020 report's discussion of commodities fraud prosecutions but also in the PPP fraud section. For 2021, we expect there to be a continued focus on spoofing and PPP prosecutions as well as an increase in procurement fraud prosecutions.

Foreign Corrupt Practices Act Unit

The FCPA Unit gained three prosecutors for a total of 39 in 2020. Despite the pandemic's effect on international investigations, the FCPA Unit still managed to significantly exceed 2019's corporate resolution numbers in total dollars assessed.

But, of course, those investigations started long before the pandemic – it remains to be seen how the pandemic's travel restrictions will affect numbers in 2021 through 2023. The 2020 report shows that the FCPA Unit concluded eight corporate resolutions, versus seven in 2019. The FCPA Unit had one declination versus two in 2019, resulting in the public conclusion of nine corporate investigations in each year.

But the FCPA Unit increased the monetary size of those resolutions significantly – from \$2.8 billion in global monetary amounts recovered in 2019 to \$7.84 billion in 2020 – a 180% increase.

Similarly, the U.S. monetary amounts recovered increased from \$2.5 billion to \$3.33 billion, and the U.S. criminal monetary amounts increased from \$1.6 billion to \$2.33 billion. Those increases were largely due to the Goldman Sachs Group Inc.'s \$2.9 billion and Airbus SAS' \$3.9 billion resolutions, which each exceeded the total global monetary amount recovered in 2019.

In addition to the corporate resolutions, the FCPA Unit continued to focus on individuals, charging 28 individuals for FCPA or FCPA-related crimes, versus 34 in 2019. Unlike 2019, which saw several trials, 2020 had a single conviction by trial in an FCPA-related matter. The FCPA Unit, in coordination with the SEC, also put out

a second edition of the FCPA Resource Guide.

Finally, while Latin America continued to be a focus of the FCPA Unit's activity, the geographic mix of the FCPA Unit's 2020 prosecutions again spanned the globe with the Airbus, Alcon Pte. Ltd. and Novartis Hellas S.A.C.I., and Goldman Sachs resolutions. Natural resources-related cases continue to make up a significant portion of the FCPA docket, but 2020 also saw corporate resolutions in the aerospace, pharmaceutical and health care, consumer products, and financial services industries.

Though the telecommunications industry was notably absent from last year's list of corporate resolutions, we predict the global 5G rollout will bring telecommunications back into focus in years to come.

Strategy, Policy and Training Unit

As the Fraud Section's approach to corporate resolutions has matured, the Strategy, Policy and Training Unit's involvement with the litigating units has grown.

The 2020 report indicates that the Strategy, Policy and Training Unit was involved in the oversight of the work of 13 existing independent compliance monitors and the selection of one, and that the unit began the selection process for another compliance monitor.

The Strategy, Policy and Training Unit also updated DOJ's Evaluation of Corporate Compliance Programs guidance.

What to Expect in 2021

Given the limitations on travel in 2020 and the resulting effect on white collar prosecutions, the Fraud Section's productivity was nonetheless impressive. With the vaccine rollout this year, investigations that had been slowed should come back to life, and we anticipate that the existing pipeline of cases will lead to an increase in prosecutions in late 2021 into 2022 and 2023.

President Joe Biden's administration has not nominated an Assistant Attorney General for the Criminal Division. The eventual nominee will be critically important in determining the Fraud Section's priorities and resources.

Despite that uncertainty, the current Fraud Section leadership will continue to press forward with the section's core cases: Medicare program fraud, FCPA-related matters and complex financial fraud cases. Layered on top of that will be an ever-increasing number of fraud cases involving pandemic relief and procurement fraud. As evidence of this, the 2020 report notes that between the end of 2020 and the publication date, another 12 individuals were charged with PPP fraud.

Last year in a *Law360* guest article, we predicted the Fraud Section would continue its fervent enforcement related to opioids. That certainly proved true, and we do not expect a decline in opioid-related prosecutions in the coming year. Additionally, while the number of trials this year was down across all three litigating units, the pandemic obviously limited access to courts. We expect that there will be a significant increase in late

2021 into 2022 as courts begin to reopen.

Additionally, we expect the section's close alliance with the Commodity Futures Trading Commission to continue, as evidenced in 2020 by the CFTC's first appearance in an FCPA-related resolution with a parallel enforcement action against Vitol Inc. Finally, assuming buy-in from the eventual Assistant Attorney General, the Fraud Section is expected to increase hiring, particularly to grow the Market Integrity and Major Frauds Unit.

Kevin Muhlendorf is a partner at Wiley Rein LLP. Previously, he was an assistant chief in the DOJ Fraud Section, and senior counsel at the U.S. Securities and Exchange Commission's Enforcement Division.

Holly Wilson is an associate at the firm.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] <https://www.justice.gov/criminal-fraud/file/1370171/download>.

[2] [https://www.justice.gov/criminal-fraud/Health Care Fraud-2020-takedown/press-release](https://www.justice.gov/criminal-fraud/Health%20Care%20Fraud-2020-takedown/press-release).