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DOJ Criminal Division in 2016: Fraud Section Rising

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The U.S. Department of Justice Criminal Division's Fraud Section recently released its "2016 Year in Review." The brief document provides a useful overview of what the Criminal Division's largest litigating section has accomplished in the last year, and important hints at what the future holds for individuals and entities whose activities come within the Fraud Section's broad reach.

Size and Overall Productivity of the Fraud Section Increased From 2015

The Fraud Section went on a major hiring binge over the last year. According to the "2016 Year in Review," the Fraud Section currently employs more than 150 prosecutors, divided into three major units, with others fulfilling support and training roles. This was an increase of 25 prosecutors over the number discussed in the 2015 report, or a 20 percent growth in prosecutor headcount. 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 devoted, even in the largest districts.

The Fraud Section's ability to focus on large white collar cases and to be selective in the cases it prosecutes bore impressive results, as both the 2015 and 2016 numbers demonstrate. According to the "2016 Year in Review," Fraud Section prosecutors last year charged 300 individuals, convicted 201, concluded 15 corporate resolutions, and recovered \$1.51 billion in corporate U.S. criminal fines, penalties,

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and forfeiture, as part of resolutions that returned \$7.8 billion globally. Those numbers were relatively stable as compared to the 2015 results — 225 individuals convicted, 11 corporate resolutions and pleas, and corporate fines and penalties of just under \$4 billion — but notably the number of corporate resolutions increased by approximately 35 percent. As the 2016 report notes, the 2016 figures do not include several major resolutions that were inked at the end of the Obama Administration in January of 2017, including the multibillion-dollar Volkswagen resolution.

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 productive in 2016. That momentum should continue into 2017, as some of the cases announced already in the first weeks of 2017 indicate.

Health Care Fraud Unit

The Health Care Fraud (HCF) Unit is the largest of the three main units, with 56 prosecutors deployed in locations across the country. Notably this year, the year-in-review document reports that the HCF Unit stood up a “Corporate Health Care Fraud Strike Force” to go along with the eight Medicare Fraud Strike Forces located in Los Angeles, Houston, Southern Louisiana, Chicago, Detroit, Brooklyn, Tampa and Miami. In 2016, the HCF Unit reported 233 individuals charged, 152 individuals convicted and one corporate resolution, involving Tenet Healthcare Corporation, which generated a \$144 million criminal penalty as part of a \$512 million total resolution. The Tenet resolution was the first corporate resolution involving the Corporate Health Care Strike Force.

The HCF Unit’s creation of a Corporate Health Care Fraud Strike Force suggested that more corporate health care cases are in the offing, and in fact the “2016 Year in Review” notes the corporate strike force has “undertaken numerous active investigations.” By creating a group focused on corporate investigations and prosecutions as distinct from the more traditional provider cases, the HCF Unit is clearly signaling recognition of the different timeline and approach those cases require. Moreover, we should expect to see more corporate healthcare executives charged, as happened with the indictment of a Tenet Healthcare Corporation executive in the first few weeks of 2017.

Securities and Financial Fraud Unit

The Securities and Financial Fraud (SFF) Unit is a close second behind HCF in number of prosecutors at 50. While the SFF Unit’s name suggests its traditional focus on fraud related to securities, commodities and bank fraud, its mandate is actually far larger. As the “2016 Year in Review” notes, the SFF Unit continued to take the lead on very large and complicated global fraud schemes, routinely working with foreign regulators and law enforcement. This international reach will be solidified by the SFF Unit’s placement of a prosecutor in London for two years to work with the U.K.’s Financial Conduct Authority and Serious Fraud Office.

Following 2015, where the SFF Unit resolved multinational Libor and forex cases against many of the world’s largest financial institutions, this year the SFF Unit demonstrated the breadth of its work, bringing major cases involving foreign automotive industry manufacturers, in addition to continuing to prosecute traditional financial fraud cases. According to the “2016 Year in Review,” in 2016 the SFF Unit charged 52 individuals and

convicted 34. The report notes only one corporate resolution, but in a footnote explains that the VW, Takata, and State Street resolutions all occurred at the very beginning of 2017. The VW resolution alone was over \$4.3 billion.

One area that bears watching is the SFF Unit's increased focus on criminal procurement fraud cases. The experience investigating and prosecuting VW and Takata may lend itself to creatively prosecuting other large entities on matters involving testing and certifications, which frequently apply to government contractors. The SFF Unit's continued work on the Glenn Defense Marine Asia case involving overseas corruption in the U.S. Navy is also indicative of the success it has had with larger procurement fraud matters. The Fraud Section has placed an experienced SFF Unit assistant chief in charge of developing and supervising procurement fraud cases. Coupled with the continued review of government contractor mandatory disclosures pursuant to the Federal Acquisition Regulation and an increased review of qui tam actions looking for large procurement fraud cases, the SFF Unit's trajectory is toward more significant procurement fraud matters. This growth should only be enhanced by the Yates memorandum directive that DOJ Civil Division prosecutors work from the outset of investigations with their Criminal Division counterparts, making it more likely that criminal cases will be identified earlier, leading to more successful prosecutions.

Foreign Corrupt Practices Act Unit

The Foreign Corrupt Practices Act Unit is the smallest of the three major units, but achieved significant results in 2016. The FCPA Unit has approximately 30 prosecutors focused on the investigation and prosecution of the FCPA and related statutes. In 2016, the FCPA Unit reported 17 individuals charged or pleaded guilty and 13 corporate resolutions. The FCPA Unit collected \$1.36 billion in corporate U.S. criminal fines as part of \$7.3 billion collected by U.S. and foreign authorities in related actions. Notably, the FCPA Unit announced its one-year pilot program in April of 2016, which resulted in five declinations in which companies agreed to disgorge \$15 million to either the DOJ or the U.S. Securities and Exchange Commission.

FCPA watchers have commented on the flurry of large resolutions the FCPA Unit achieved in 2016. Beginning with VimpelCom in February of 2016 and ending with Odebrecht SA and Braskem SA, the FCPA Unit pumped out a steady flow of headline-grabbing resolutions. The FCPA Unit, currently the largest it has ever been in terms of manpower, also now has the assistance of full-time FBI international corruption squads. Despite some suggestions that the new Administration will pare back FCPA enforcement, given the fact that many of the corporations the FCPA unit has recently prosecuted are foreign-based entities, core criminal enforcement of the FCPA should continue on its upward trajectory. Moreover, the additional manpower will allow the unit to clear its substantial backlog of investigations, which should result in an increasing number of resolutions in the short term.

What to Expect in 2017

The Fraud Section's size, resources and headcount growth suggest the DOJ's front office appreciates the return on investment it is getting from allowing the Fraud Section to be selective in choosing its cases and to properly resource them. The ability to place numerous prosecutors on long-term investigations allowed the

Fraud Section to handle the amount of domestic and international work these cases required. With few exceptions, the Fraud Section continued to pair with various U.S. attorney's offices to prosecute these cases, allowing the DOJ to appropriately match its resources and experience handling large-scale national and international cases with prosecutors in jurisdictions where the cases are most appropriately venued, such as bringing the VW and Takata automotive cases in Detroit with that U.S. attorney's office versus other possible venues, such as New York.

Given the DOJ's investment in the Fraud Section and the returns that investment has generated in the last two years, the Fraud Section should be expected to continue bringing large, multinational prosecutions in 2017. The SFF and FCPA Units continue to work extensively with foreign law enforcement and regulators. All three units work closely with domestic regulatory agencies to develop their cases, particularly the SEC and the Commodity Futures Trading Commission. Whether the composition of the commissioners at those agencies, and their respective new enforcement directors, affect their ability to generate cases remains to be seen, but absent significant funding cuts, core enforcement activity, and subsequent criminal referrals, is unlikely to change.

Also relevant for all three units' focus on corporate prosecutions is the reported dislike of deferred prosecution agreements and nonprosecution agreements by attorney general nominee Sen. Jeff Sessions (R-AL). If the DOJ's policy shifts away from using these alternative resolutions, that will slow the pace of some, but not all, corporate cases. As the VW, Takata and Oderbrecht/Braskem cases demonstrated in 2016, where there is sufficient evidence to charge even parent-level corporate entities, the Fraud Section is demanding corporate guilty pleas regardless of the availability of other, easier-to-obtain corporate resolutions. What may change going forward, and appears already to be the trend in the SFF Unit, is a diminished ability of corporate parents to avoid a guilty plea by having their corporate subsidiary plead guilty while the parent obtains a DPA, as happened in 2016 with the Tenet, VimpelCom, and Och-Ziff resolutions.

Regardless of how those issues develop in the new Administration, the Fraud Section's 2017, and thus overall large-scale white collar criminal prosecutions in the United States, should be at least as busy as in the previous few years.