

## ARTICLE

# Takeaways From DOJ Fraud Section's Enforcement Uptick

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On Feb. 5, the U.S. Department of Justice's Criminal Division's Fraud Section released its annual year-in-review report for 2019. The Fraud Section redesigned the report's format, more than doubling its length, with useful graphics and timelines to aid readers in understanding the section's work throughout the year.

Key takeaways from the 2019 report include: (1) under new permanent leadership, the Fraud Section's individual prosecutions substantially increased and corporate resolutions tied an all-time high; (2) the Fraud Section's total monetary amounts recovered through global resolutions grew and health care fraud loss charged increased by 150%; and (3) all three litigating units had consistent trial success.

Combined with the guidance the Criminal Division continued to release throughout the year emphasizing the DOJ's twin goals of cooperation and enhancing compliance programs, the year-over-year increase in the Fraud Section's metrics is a reminder to industry that the section will apply the enforcement stick when necessary to increase the value of the carrots DOJ policy offers.

## New Permanent Leadership and Impressive Results

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

The number of prosecutors in the Fraud Section remained roughly the

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same in 2019. The section has approximately 150 prosecutors, largely divided among the three litigating units: the Health Care Fraud Unit, the Market Integrity and Major Frauds Unit and Foreign Corrupt Practices Act Unit, in addition to over 120 support staff. The 2019 report also highlights the work of the Strategy, Policy and Training Unit, which continues to gain importance as the Criminal Division implements new white collar crime policies related to corporate investigations and resolutions.

The last year saw significant management changes in the Fraud Section. Rob Zink, who had previously served as acting chief of the Fraud Section, was tapped as the permanent chief in July. Dan Kahn, formerly chief of the FCPA Unit, was promoted to senior deputy chief, along with Joe Beemsterboer, formerly chief of the Health Care Fraud Unit.

The section filled out the senior management team with the naming of two new chiefs, Chris Cestaro (FCPA Unit) and Allan Medina (Health Care Fraud Unit). They joined existing chiefs Brian Kidd (head of the newly rebranded Market Integrity and Major Frauds Unit), Sally Molloy (chief of the Strategy, Policy and Training Unit), and Brian Young, a veteran of the former Securities and Financial Fraud Unit, as chief of litigation. Finally, the section appointed numerous new assistant chiefs throughout the year to support the work of all three litigating units.

According to the 2019 report, under Zink the Fraud Section's prosecutors continued to build on the section's prior success by increasing their enforcement activities in 2019. The section publicly charged 478 individuals — an annual record — and convicted 256, either by guilty plea or at trial. These numbers show a substantial uptick in individual enforcement compared to 2018.

In 2018, the section charged 406 individuals and convicted 268. Similarly, in 2019 the Fraud Section concluded a historically high 15 corporate resolutions, resulting in \$1.9 billion in U.S. criminal fines, penalties, restitution, disgorgement, and forfeiture and a total U.S. resolution amount of \$2.9 billion when civil remedies are included.

In 2018 the section had 10 corporate resolutions with about \$1 billion in criminal monetary amounts. The Fraud Section also continued to work with its international counterparts, resulting in resolutions with a global value of \$3.2 billion — an uptick from 2018's approximately \$3 billion in global resolutions.

Each of the Fraud Section's litigating units was active in 2019. Notably, the section achieved 37 convictions of individuals at trial in 2019 — four in the FCPA Unit, 24 in the Health Care Fraud Unit, and nine in the Market Integrity and Major Frauds Unit. That was nearly equal to the 38 convicted at trial in 2018.

To the section's credit, the more detailed 2019 report also noted that the 37 trial convictions were the result of 37 trials involving 45 total defendants. The eight individuals who were not convicted resulted from a mix of dismissals, acquittals and hung juries.

The 2019 report also notes the important work the Strategy, Policy and Training Unit and the litigating units played in training both foreign and domestic law enforcement.

### **Health Care Fraud Unit**

The Health Care Fraud Unit is the Fraud Section's largest, with 75 prosecutors serving in offices across the country. This 25% increase in headcount over the 60 prosecutors who served in the unit in 2018 reflects the expansion of the Health Care Fraud and Prescription Opioid Strike Force system to 15 strike forces covering 24 judicial districts, including the announcement of a Rio Grande Valley/San Antonio Strike Force in August 2019.

It also reflects the tremendous impact of investment the government sees from these strike forces. According to the 2019 report, for every \$1 spent on the Health Care Fraud Unit in 2019, the Medicare Program is projected to avoid \$209 in fraud losses over the next ten years.

Representing a 56% increase from 2017-2019, the Health Care Fraud Unit charged 344 individuals, up from 309 in 2018 and 220 in 2017. In 2019, the unit convicted 183 individuals, including 24 at trial, down slightly from the 205 convicted in 2018. Looking at the amount of loss charged, however, the Health Care Fraud Unit made a huge leap from \$1.8 billion in losses alleged in 2018 to over \$4 billion in 2019, the highest number ever recorded by the unit, and an approximate 150% increase.

As noted with reference to the Appalachian Regional Prescription Opioid Strike Force takedown in April 2019, opioids continued to be a focus in 2019. However, the 2019 report also demonstrated the Health Care Fraud Unit's range, highlighting two separate takedowns involving telemedicine fraud schemes.

One large takedown charged a \$2.1 billion, 35-defendant health care fraud scheme focusing on genetic testing. The second telemedicine takedown charged \$1.2 billion in fraud against 24 defendants related to the sale of durable medical equipment.

Finally, the Health Care Fraud Unit charged a much smaller, but highly publicized, fraud scheme involving the NFL's Player Health Reimbursement Account plan, which saw 10 former NFL players charged.

### **Market Integrity and Major Frauds Unit**

On Oct. 8, 2019, Assistant Attorney General Brian Benczkowski announced that the Securities and Financial Fraud unit would be rebranded as the Market Integrity and Major Frauds Unit. Citing the breadth of that unit's past work, to include Takata Corp. and Volkswagen AG as well as the prosecutions of major banks in the Libor and FX scandals, Benczkowski noted that the unit's work had far exceeded its "stated message and moniker."

The Market Integrity and Major Frauds Unit had 10 fewer prosecutors in 2019, dropping from the second-

largest to the smallest unit in the Fraud Section with 35 prosecutors. As part of the rebranding, the unit was split into five concentrations, each headed by an assistant chief. These concentrations include securities fraud; commodities fraud; government procurement fraud; fraud on financial institutions; and consumer fraud, regulatory deceit and investor schemes.

Despite the lower prosecutor headcount in 2019, the Market Integrity and Major Frauds Unit charged 100 individuals and convicted 43, including nine at trial. That was a 51% increase over the number of individuals charged in 2018, and the highest number of individual convictions the Unit has ever had.

The Market Integrity and Major Frauds Unit also saw eight corporate resolutions, the most of any Fraud Section unit, helping bring in \$384 million in global resolution dollars. That compared favorably to the three corporate resolutions in 2018.

Notable in the 2019 report was the Market Integrity and Major Frauds Unit's focus on fraud in the health care and pharmaceutical space, perhaps reflecting how the growth in U.S. health care dollar spend breeds new fraud schemes outside of those traditionally prosecuted by the Health Care Fraud Unit.

In that vein, the Market Integrity and Major Frauds Unit secured a corporate resolution with Context Media Health LLC, and indicted several executives, related to an advertising scheme targeting the pharmaceutical industry. It also secured a trial victory against the former CEO of a publicly traded pharmaceutical company for a scheme to defraud a Puerto Rican bank.

Clear in reading the 2019 report is the Market Integrity and Major Frauds Unit's continued focus on complicated trading, accounting and financial fraud schemes. The 2019 report features the Tower Research Capital LLC corporate resolution involving the manipulation of E-mini futures contracts and the criminal resolution with Merrill Lynch Commodities related to spoofing in the precious metals markets, both of which involved parallel resolutions with the U.S. Commodity Futures Trading Commission.

The 2019 report similarly notes individual charges in a precious metals spoofing scheme and convictions in a binary options scheme. The unit also charged five individuals in two separate accounting fraud schemes involving publicly traded transportation industry companies.

### **Foreign Corrupt Practices Act Unit**

The FCPA Unit, although historically the smallest unit within the Fraud Section, produced significant results as Dan Kahn capped off his run as chief with his own success in an FCPA trial. The FCPA Unit resolved nine cases against entities, including two declinations, and convicted 30 individuals. The unit recovered a combined \$2.8 billion globally, with \$2.56 billion reported as U.S. monetary recoveries, a record amount for the FCPA Unit.

Traditionally, the FCPA unit has lagged significantly behind in actual unit related trials as compared to the

Health Care Fraud and Market Integrity and Major Frauds Unit. While in terms of absolute numbers that remained the same, in 2019 the FCPA Unit's lawyers saw four FCPA related trials against individual defendants – three resulting in convictions of four defendants and one in an acquittal.

Most notably, in the Hoskins trial, led by Kahn, Lawrence Hoskins was convicted of substantive FCPA violations in a case that helped define the reach of conspiracy law as it relates to the FCPA. Likewise, Mark Lambert was convicted of violating the FCPA and Joseph Baptiste and Roger Boncy were convicted of conspiracy to violate the FCPA, among other charges.

The acquittal came in the FCPA Unit's Jean Boustani trial, where the jurors interviewed after their verdict indicated that they rejected the notion that the case had anything to do with the Eastern District of New York.

The FCPA Unit saw two large settlements make up the bulk of the monetary penalties assessed against entities – LM Ericsson and Mobile Telesystems PJSC. Together, those two made up \$1.85 billion of the \$2.56 billion in U.S. civil and criminal penalties assessed in 2019 and are two of the biggest settlements in FCPA history.

The FCPA Unit entered into five other corporate resolutions in 2019 and obtained 30 convictions from 34 charged individuals. These numbers are a modest increase over 2018, which saw six corporate resolutions, 31 individuals charged, and 18 individuals convicted.

The FCPA Unit also issued two declinations under its corporate enforcement policy in 2019, declining to prosecute two U.S. companies that voluntarily self-disclosed violations and agreed to pay civil penalties and disgorgement. In 2018 the FCPA Unit issued four such declinations.

Finally, Latin America continued to be a focus of the FCPA Unit's activity, with numerous guilty pleas and other individuals charged related to the Petroleos de Venezuela, SA bribery schemes. Ecuador was also featured prominently in the 2019 report with numerous individuals charged in relation to the payment of bribes to PetroEcuador officials.

### **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 increased. Under Chief Sally Molloy, the Strategy, Policy and Training Unit both assisted the litigating units in evaluating compliance programs and helped determine whether to impose a monitor.

The 2019 report indicated the Strategy, Policy and Training Unit was involved in the selection of four independent compliance monitors related to Fraud Section resolutions. The Strategy, Policy and Training Unit also collaborated with the Criminal Division leadership on several new policies including guidance relating to

the evaluation of corporate compliance programs and evaluating a business's inability to pay a criminal fine.

### **What to Expect in 2020**

Even with interim leadership and furloughed government employees at the beginning of the year, the Fraud Section managed to exceed prior years' results in 2019. Now that the section has permanent leadership in place, expect to see a continuation of the Fraud Section's steady diet of its core cases: Medicare program fraud, FCPA related matters and complex financial fraud cases.

Last year we predicted that the Fraud Section would continue its fervent enforcement related to opioids. In 2019, the Health Care Fraud Unit charged more individuals with opioid-related crimes than in any other year, including 66 health care providers charged for illegal prescriptions. We also expected a rising number of individual prosecutions and cross-border investigations.

Both trends proved true. The Fraud Section charged 478 individuals in 2019, compared to 406 in the prior year, and the section helped recover \$3.2 billion in cooperation with its international counterparts, compared to \$3 billion in 2018.

All three of these trends will likely continue in 2020. Additionally, we expect the section to continue its close alliance with the CFTC. The section is also expected to expand its use of data analytics to detect and covertly investigate crime beyond the health care fraud space, where it has been traditionally utilized to identify potential criminal behavior.

Finally, the section is expected to increase hiring, particularly to grow the FCPA unit. With permanent leadership in place and year-over-year growth in enforcement, 2020 should be a busy year for the Fraud Section.