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Despite Pandemic, DOJ's Fraud Section Weathers 2020 Storm

By **Stewart Bishop**

Law360 (March 1, 2021, 8:10 PM EST) -- The prosecutions of individuals by the U.S. Department of Justice's Fraud Section trended downward in 2020 amid the COVID-19 pandemic, but the section's strong performance on corporate resolutions and other metrics bodes well for white collar enforcement going forward.

In a February year-in-review report, the Fraud Section said it charged 326 individuals last year across its three litigation units: the Foreign Corrupt Practices Act Unit, the Healthcare Fraud Unit, and the Market Integrity and Major Frauds Unit.

While that marks a 31% percent drop from 2019, the number of corporate resolutions remained steady, with 13 total in 2020 compared with 15 in 2019. The U.S. criminal monetary penalties resulting from Fraud Section actions actually rose in 2020 to over $2.9 billion, from $1.9 billion in 2019.

The bulk of the reduction in prosecutions in 2020 appears to come from the Health Care Fraud Unit, which charged 344 individuals in 2019, compared with 167 people in 2020.

David Miller, a former federal prosecutor for the Southern District of New York, told Law360 that even with the dip in white collar prosecutions in some DOJ offices, the Fraud Section actually stayed very active in 2020 despite COVID-19, chalking up a substantial number of corporate resolutions and a high total amount of fines, penalties and disgorgements.

"I think the report makes clear that there are a number of cases in the pipeline and there is likely to be an increase in focus on white collar crime by the new DOJ leadership, and that could lead to an increased number of white collar prosecutions," said Miller, now a partner at Greenberg Traurig LLP.

Among other Fraud Section cases, Goldman Sachs in October agreed to pay $2.9 billion to resolve the U.S government's criminal investigation into the bank's role in the 1Malaysia Development Bhd., or 1MDB, scandal. A month before, JPMorgan Chase & Co. agreed to pay over $473.7 million in U.S. financial penalties out of a global $920.2 million to resolve market manipulation investigations into alleged "spoofing" by its traders.

Former Deputy Assistant Attorney General Matthew Miner, who previously oversaw the DOJ Criminal Division's fraud and appellate sections, told Law360 that the decrease in individual prosecutions makes sense in light of pandemic restrictions. Those include courthouse closures, grand juries being shut down and people not being able to travel.

"Many of the health care prosecutors do travel, and if the grand juries aren't operating or are operating in a limited capacity, you can only bring so many charges," Miner said. "There's only so much bandwidth to actually indict people."

Miner, a partner at Morgan Lewis & Bockius LLP, noted that the amount of time in front of grand juries is limited even during the ordinary course of business, and in some of the smaller districts around the country, grand juries don't meet as often. Looking back at 2020, it appears that the Fraud Section tried to push some of the larger cases, he said.

Indeed, in 2020 the Fraud Section reported that the average loss per individual charged in cases brought by the Health Care Fraud Unit was $22.6 million, a figure which has risen dramatically since 2018, when the average loss was $5.8 million.

"I think there's a lot of inventory that the Fraud Section will be working through. When I see the number of health care fraud cases, I suspect that there is a large inventory of cases that were unable to be brought last year, but will likely be brought this year going into next year," Miner said.

Additionally, the Fraud Section's Market Integrity and Major Frauds Unit has brought a sizable number of cases in connection with the Paycheck Protection Program, which was created by Congress to help U.S. businesses suffering from the impact of the COVID-19 pandemic.

Fraud Section prosecutors charged 97 individuals in PPP-related cases in 2020 and seized over $64 million in allegedly illegal proceeds in cases involving attempted losses of more than $260 million in 20 different districts, according to the report. In one such case spearheaded by the Market Integrity and Major Frauds Unit, 14 individuals were charged for their alleged involvement in a scheme to submit at least 90 fraudulent PPP loan applications for a total of more than $24 million.

"They were doing that stuff in the middle of the pandemic. They were still out arresting people and getting charges," said James Koukios, a former senior deputy chief of the Fraud Section. "It's pretty impressive."

As for FCPA cases, the Fraud Section in 2020 brought charges or unsealed them against 28 individuals and secured 15 convictions, compared with 34 individuals charged and 30 convicted in 2019.

The FCPA unit also reached eight corporate resolutions in 2020, involving over $2.3 billion in U.S. criminal monetary penalties. In 2019, the unit reached seven corporate resolutions involving more than $1.6 billion in financial penalties, as well as two declinations under the DOJ's FCPA Corporate Enforcement Policy resulting in about $37.7 million in disgorgement, prejudgment interest and penalties to the DOJ and the U.S. Securities and Exchange Commission.

Miller said that FCPA cases, like other complex financial fraud cases, take a long time to develop, investigate and prosecute.

"So there were a number of FCPA cases already in the pipeline and perhaps close to resolution when the pandemic hit. But it is notable that even during the pandemic there were a large number of corporate resolutions with substantial penalties associated with them," he said.

Koukios, now the global co-head of Morrison & Foerster LLP's FCPA and anti-corruption practice, said the relative stability of the FCPA unit's results for the past two years isn't surprising given that such cases tend to be long-term affairs, taking an average of three to four years to resolve. He said the question is whether or not the Fraud Section's corporate cases will be impacted by the pandemic going forward.

"We may see a down year this year or the year after, because those cases that were resolved in 2020, [the Fraud Section] had been working on those for years," Koukios said. "I do have a feeling that even the corporate side was eventually impacted by the pandemic, in terms of generating new corporate cases."

What bodes well for the Fraud Section is the fact that staffing is at record levels. Koukios noted that when he left the Fraud Section in 2015, they had about 125 attorneys, while today that number is around 166.

In addition, much of the current leadership of the Fraud Section — helmed by acting Chief Daniel Kahn — has been on the job for several years, and the office has recently been promoting from within.

"We'll have to see how much investigations were impeded by the pandemic, but I think they've got all the resources in place to come roaring back," Koukios said. "And the people who are there now are very dedicated, hard-working and really pursuing a lot of cases."

--Editing by Orlando Lorenzo.