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White Collar Trend Report Finds Prosecutions At Record Low

By **Emilie Ruscoe**

Law360 (March 3, 2020, 10:31 PM EST) -- A Syracuse University data organization analyzed U.S. Department of Justice case data and concluded that case records for January 2020 show white collar prosecutions have reached their lowest numbers since tracking began in 1986 during the Reagan administration.

Syracuse's Transactional Records Access Clearinghouse said Tuesday that DOJ records show only 359 defendants were prosecuted in the first month of 2020 in cases that the department identified as white collar matters.

That figure represents an 8% decline in prosecutions since the same time last year, the organization said, and a 25% decline from five years ago.

If January prosecutions set the pace for the year, the organization said, the number of 2020 prosecutions total would be half as high as such prosecutions were during a peak after the financial crisis in 2011.

Susan Long, a co-director of TRAC and an associate professor of managerial statistics at the university, told Law360 that the white-collar designation her organization scrutinized "is the classification [that] the DOJ itself assigns the case."

According to a statement by TRAC, that DOJ designation typically involves "some form of fraud or antitrust violations involving financial, insurance or mortgage institutions; health care providers; securities and commodities firms; or frauds committed in tax, federal procurement or federal programs among others."

The vast majority of the DOJ's white collar cases involve individuals as opposed to institutions such as corporations, TRAC noted.

Long told Law360 on Tuesday that trends in white collar enforcement often reflect shifts in priority as DOJ leadership changes.

"There's a great deal of discretion exercised on the part of the Department of Justice and federal prosecutors," she said. "They have to select what cases they're going to prosecute, because there's just not enough resources, at the investigation stage or the prosecution stage, to look into everything," noting that guidance from a new administration and its attorney general and U.S. attorneys can indicate what those trends may be.

“We’re not suggesting that the only factor involved is the administration, but it is obviously a factor,” she added.

Attorneys who viewed the report Tuesday said the TRAC data may reflect the impact of a wide range of developments in federal law enforcement and the economy.

Mary Hansen, a partner at Faegre Drinker who co-leads the firm’s white collar defense & investigations practice team, told Law360 on Tuesday that "I’m not shocked to see the trend downward."

She noted that the DOJ diverted resources toward anti-terrorism efforts after 2001, and that an upward tick in white collar prosecutions that TRAC analysts charted around 2011 might represent federal efforts to react to the underlying causes of the financial crisis.

Those financial crisis efforts subsequently died down as the economy stabilized, she said, adding that in particular, post-financial crisis litigation may reflect that regulators made an effort to prosecute individuals, and not just settle with corporate entities.

More recently, she said, the numbers may reflect that opioid-related prosecutions have been a high priority.

Hansen also cautioned that it was not clear from the TRAC report whether the numbers cited represented settlements, or trials, or guilty pleas, and noted that trends in non-prosecution or deferred-prosecution agreements would likely have an impact on such numbers.

Brian Michael, a former federal prosecutor and a partner in King & Spalding's special matters & government Investigations group in the firm’s Los Angeles office, said that the commitment of DOJ and FBI resources to anti-terrorism efforts in the wake of Sept. 11 “has had a lasting impact on the number of white collar investigations.”

He also noted that the opioid crisis appears to be a high priority for the current justice department, and said that he’s recently observed more interest in “immigration matters and more traditional street crime and narcotics cases.”

Companies today have also learned from the financial crisis, he said, and “have a more sophisticated understanding of the value of compliance controls and working proactively themselves to avoid the types of issues that put them in the crosshairs of the government.”

And when corporations find themselves subject to government scrutiny, he added, there’s often recognition that “cooperation [with the government] is in the best interests of the company’s shareholders and its business.”

Such attempts to work with the government are more likely to result in resolution short of formal indictment, he said — which may factor into totals in the TRAC data.

He also said that in the wake of some high-profile enforcement efforts that went sideways at trial or on appeal, DOJ prosecutors may now be more cautious in assessing whether to bring a case.

He cited as an example theories of honest services fraud and insider trading that have largely been rejected by the appellate courts.

“Prosecutors have to be mindful that the law has evolved in certain areas,” he said. “The DOJ wants to bring cases that it believes it can win and that are consistent with the current state of the law.”

He described the wake of the financial crisis as “a target-rich environment” for federal prosecutors. The downturn “exposed a lot of fraudulent activity, a lot of wrongdoing, that may not have been otherwise exposed but for the collapse of the economy,” he noted.

Another economic downturn could have the same effect, he noted, referencing market turbulence related to coronavirus.

Enforcement since the financial crisis has also taken a wider range of forms beyond federal criminal prosecutions, he said: the SEC, the U.S. Commodities Future Trading Commission and the Consumer Finance Protection Bureau are active in enforcement, as are state regulators.

With that in mind, he cautioned that a decline in white collar prosecution numbers doesn’t mean that crime is down, or that enforcement is down.

“The risk of enforcement action and the incentive for corporate entities and white collar executives to conduct business lawfully ... are the same as they always were,” he said.

The DOJ itself cautioned that it couldn’t vouch for the accuracy of TRAC’s work.

Peter Carr, a DOJ spokesman, told Law360 on Tuesday that “TRAC uses its own methodologies in interpreting the data it receives, resulting in conclusions that we cannot verify.”

“Data provided by TRAC routinely differs from data and statistics reflected in the Executive Office of United States Attorneys' published annual reports, DOJ's main litigating division reports, U.S. Sentencing Commission data and U.S. Courts data,” Carr added.

Annual statistical reports by the Justice Department illustrate such a discrepancy: for 2018, the most recent year of data available from the agency, the justice department said 6,547 defendants were subject to DOJ white collar enforcement. TRAC’s data indicates 5,887 defendants faced federal white collar prosecution in 2018.

--Editing by Emily Kokoll.