

**MARCH 26, 2021**

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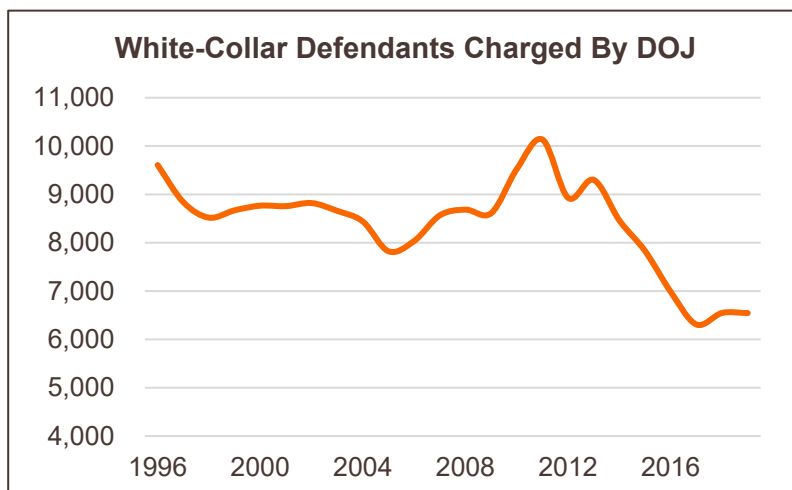
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## What's in Store for White-Collar Enforcement in 2021 and Beyond

Federal white-collar prosecutions declined considerably from 2010 to 2019, and likely fell even further last year after courts and government offices closed. But given the impending end of the pandemic, another surge of Covid-related government spending, and early signals of the Biden administration's priorities, companies should expect the trend to reverse in 2021 and beyond. This is a good time to analyze white-collar enforcement trends, review corporate risk profiles, and evaluate the effectiveness of existing compliance programs.<sup>1</sup>

### BACKDROP

From the 1990s through 2014, the number of federal white-collar defendants charged each year stayed reliably between 8,000 and 10,000.<sup>2</sup> However, that number fell during President Obama's second term to fewer than 7,000 defendants in 2016. Under President Trump, white-collar enforcement initially stabilized at around 6,500 defendants each year from 2017 to 2019. But based on preliminary statistics for 2020 and the figures presented in the Department of Justice Fraud Section's annual report, the number of white-collar defendants dropped dramatically last year, presumably as a consequence of the pandemic.<sup>3</sup>





The decline in white-collar enforcement over the past decade may be partly a function of the increasing complexity of fraud cases that entail large volumes of electronic data. But given the greater number of prosecutors, the impending end of the pandemic, the surge of Covid-related government spending, and the new priorities of the Biden administration, we expect a substantial increase in white-collar enforcement in the years ahead.

## 2020 FRAUD SECTION HIGHLIGHTS

Most white-collar cases are prosecuted by the 94 U.S. Attorney's Offices with little or no involvement by Main Justice, but the Criminal Division's Fraud Section handles or assists with some complex or high-priority matters. The Fraud Section includes three litigating units: Foreign Corrupt Practices Act (FCPA), Health Care Fraud, and Market Integrity and Major Frauds (MIMF).

During 2020 – a year marked by several months of pandemic stay-at-home policies – individual prosecutions handled by the Fraud Section fell to 326, a drop of almost one-third from the 478 prosecutions in 2019.<sup>4</sup> Trial convictions of individuals also fell precipitously, from 37 in 2019 to 16 in 2020. But now that investigators, lawyers, and judges are more accustomed to working virtually and the pandemic is starting to wane, we expect individual prosecutions to return to previous levels.

The Health Care Fraud Unit charged only 167 individuals in 2020, less than half of the 344 defendants prosecuted in 2019. The FCPA Unit charged 28 individuals, down from 34 in 2019. In contrast, the MIMF Unit charged 131 individuals in 2020, up from 100 in 2019. This was largely because the MIMF Unit participated in prosecuting fraud cases related to the Paycheck Protection Program – the nearly \$1 trillion relief program in the CARES Act – and charged 97 individuals as part of the initiative, representing attempted losses of over \$260 million.

Notwithstanding the steep reduction in individual prosecutions, the Fraud Section set a new record for corporate resolutions in 2020, concluding 13 matters with a total of nearly \$2.9 billion in criminal penalties paid to the United States. That was slightly fewer than the 15 cases resolved in 2019, but the cases involved a staggering \$1 billion more in penalties.

The effect of the pandemic is especially visible in the report's timeline chart. After an [FCPA settlement](#) on January 31 that involved nearly \$4 billion in combined global penalties, there was no other corporate resolution until June 10. The Section finished the second half of the year strongly, however, including an [FCPA settlement](#) with a major US investment bank that imposed \$1.26 billion in US criminal penalties.

The Fraud Section has increasingly cooperated with international partners in investigating foreign corruption. Despite the pandemic curtailing international travel, the Section managed to conclude the largest settlement in history while coordinating with authorities in the United Kingdom, Switzerland, Luxembourg, Malaysia, and Singapore, as well as domestic enforcement agencies. As borders begin to reopen to international travel in the coming months, we expect the DOJ and its foreign partners to continue their close cooperation. Indeed, Fraud Section Acting Chief Dan Kahn recently foreshadowed a significant increase in cross-border investigations and coordinated resolutions, including with foreign partners that have not previously worked with the DOJ.<sup>5</sup>

## 2021 AND BEYOND

### 1. Personnel and Pipeline

There are several reasons to expect a sustained increase in white-collar enforcement. For starters, President Biden probably will focus on filling senior DOJ leadership positions. Although Republicans controlled the Senate for the entire Trump presidency, the administration was slow in filling Senate-confirmed DOJ positions. Two key jobs – the



leaders of the Criminal Division and the Civil Division – remained vacant for more than eighteen months,<sup>6</sup> and only 34% of key positions were filled when President Trump left office.<sup>7</sup> We expect that nominating, confirming, and retaining political appointees will be a higher priority for the Biden administration. In any event, given the additions to the DOJ's career staff, productivity in 2021 should grow considerably. The Fraud Section added 16 prosecutors in 2020, bringing its total to 161 prosecutors. With an 11% increase in the number of prosecutors, we should see a corresponding increase in the number of cases brought.

White-collar fraud did not stop during the pandemic – quite the opposite – so we expect the Fraud Section to work through its backlog of cases and make up for lost time in 2021. Kahn said on March 15, 2021, that, despite the pandemic, fraud prosecutions are being initiated at the same rate as before, if not faster, and that the “pipeline of cases has never been stronger.” Kahn specifically cited the increase in voluntary disclosures from companies and of referrals from other U.S. and foreign enforcement authorities.<sup>8</sup>

Early pandemic-related fraud cases included blatant violations of the law, the sort of “low-hanging fruit” matters that generate dramatic headlines but usually do not require sophisticated investigations.<sup>9</sup> Many fraud investigations are challenging, however, and most span many years, so the return to pre-pandemic levels won't happen overnight. Nonetheless, with the increase in staff and emphasis on recovering fraud proceeds, the next few years should be especially busy. In addition, as Congress distributes the additional \$1.9 trillion in coronavirus-related funds, the number of health care fraud cases can be expected to increase and remain high for years to come.

## 2. Enforcement Priorities

In any transition between attorneys general, and especially with a new president of a different political party, a change in enforcement priorities is to be expected. Under the Trump administration, the DOJ revived the Bush-era Corporate Fraud Task Force framework but gave it a new name – the Task Force on Market Integrity and Consumer Fraud – signaling the administration's focus on consumer welfare rather than corporate fraud in and of itself. The Biden administration, on the other hand, is expected to focus more readily on corporate liability.

President Biden has begun filling out the leadership ranks of the Department of Justice, and all indications are that prosecuting fraud and corruption will be a major emphasis. During his confirmation process, Attorney General Merrick Garland committed to “vigorous enforcement of the Foreign Corrupt Practices Act and other federal anti-corruption laws.”<sup>10</sup> The incoming Deputy Attorney General, Lisa Monaco, stated that she would ensure that DOJ prosecutors focus on everything from “consumer protection to combating environmental degradation” and have the tools and resources they need to do their job.<sup>11</sup> Monaco served on the Enron Task Force as a prosecutor and returns to the DOJ after working as a white-collar partner at a major law firm and overseeing the firm's coronavirus task force, so we expect her to play an active role in driving the Fraud Section's enforcement priorities.<sup>12</sup>

President Biden has not yet nominated an Assistant Attorney General for the Criminal Division. When he does, the confirmation process may provide more clarity about the Fraud Section's priorities in the new administration.

## 3. Consistency

While the volume of cases is likely to increase, companies can expect some degree of continuity in the DOJ's approach to corporate prosecutions. The DOJ in recent years has made a concerted, institutional effort to update guidance for companies and improve transparency in its charging decisions. In particular, the FCPA Resource Guide, the Evaluation of Corporate Compliance Programs Guidance, the Corporate Enforcement Policy, and the Anti-Piling On Policy have been well-received by prosecutors, defense attorneys, and in-house counsel alike. These policies are focused on transparency and efficiency, enjoy bipartisan support and were highlighted in the Fraud



Section's first annual report of the new administration. They are likely to continue under the Biden administration, although it is probable that the new administration will issue additional guidance on specific issues such as individual liability and corporate monitors. During the confirmation process, both Attorney General Garland and Deputy Attorney General nominee Monaco committed to working to "foster compliance and cooperation with the Department" and to "identifying ways in which such efforts might be further supported or improved."<sup>13</sup>

The new administration also probably will continue the practice of publishing concise guidance in the Justice Manual instead of promulgating prolix policies through speeches and lengthy memoranda.<sup>14</sup> Such guidance informs companies about what the government expects of them, incentivizes compliance, facilitates prompt case resolutions, and promotes the reality and appearance of consistency in federal enforcement.

## CONCLUSION

There is still much to learn about the white-collar agenda of the Biden administration, but one thing is certain: companies should prepare for a more aggressive enforcement environment. Now is the time to work with compliance experts and counsel to pressure test internal controls, reassess corporate risk profiles in light of past and impending changes, evaluate how federal funds were acquired and spent during the chaotic early months of the pandemic, and update policies and procedures to conform with the DOJ's latest guidance.

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- <sup>1</sup> An abbreviated version of this client alert was published in *The Hill*. See Rod J. Rosenstein & Scott Hiers, *The Trends to Watch in White Collar Enforcement This Year and Beyond*, THE HILL (Mar. 16, 2021), <https://thehill.com/opinion/criminal-justice/543359-the-trends-to-watch-in-white-collar-enforcement-this-year-and-beyond>.
- <sup>2</sup> *Annual Statistical Reports*, Dep't of Justice (last updated June 16, 2020), <https://www.justice.gov/usao/resources/annual-statistical-reports>. The DOJ began reporting aggregated white-collar prosecution figures in 1996.
- <sup>3</sup> See *Corporate and White-Collar Prosecutions At All-Time Lows*, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE (Mar. 3, 2020), <https://trac.syr.edu/tracreports/crim/597/>.
- <sup>4</sup> U.S. Dep't of Justice, *Fraud Section Year In Review 2020* (February 2021), <https://www.justice.gov/criminal-fraud/file/1370171/download>.
- <sup>5</sup> Ines Kagubare, *FCPA Enforcement Officials Share Top Priorities for 2021*, GLOBAL INVESTIGATIONS REVIEW (Mar. 9, 2021), <https://globalinvestigationsreview.com/just-anti-corruption/anti-corruption/fcpa-enforcement-officials-share-top-priorities-2021>.
- <sup>6</sup> See Rod Rosenstein, Deputy Att'y Gen., Dep't of Justice, Remarks at the Bloomberg Law Leadership Forum (May 23, 2018), <https://www.justice.gov/opa/speech/deputy-attorney-general-rod-rosenstein-delivers-remarks-bloomberg-law-leadership-forum>.
- <sup>7</sup> *The Nominees Donald Trump Tapped for Key Roles During His Term*, WASHINGTON POST POWER POST BLOG (last updated Jan. 15, 2021), <https://www.washingtonpost.com/graphics/politics/trump-administration-appointee-tracker/database/?tid=tracker-nav-database>.
- <sup>8</sup> Clara Hudson, *Dan Kahn: "Our pipeline of cases has never been stronger,"* GLOBAL INVESTIGATIONS REVIEW (Mar. 15, 2021), <https://globalinvestigationsreview.com/just-anti-corruption/dan-kahn-our-pipeline-of-cases-has-never-been-stronger>.
- <sup>9</sup> See, e.g., Press Release, Dep't of Justice, *Two Oregon Men Face Federal Charges for Pocketing Millions in Covid-Relief Fraud Scheme* (Jan. 7, 2021), <https://www.justice.gov/usao-or/pr/two-oregon-men-face-federal-charges-pocketing-millions-covid-relief-fraud-scheme>.
- <sup>10</sup> *Nomination of the Hon. Merrick Brian Garland to be Attorney General of the US Before the Senate Judiciary Committee*, 117th Cong. (Feb. 22, 2021) (response to written questions from Sens. Cornyn and Tillis), <https://www.judiciary.senate.gov/imo/media/doc/QFR%20Responses%202-28.pdf>.
- <sup>11</sup> *Nomination of Lisa Monaco to be Deputy Attorney General of the US Before the Senate Judiciary Committee*, 117th Cong. (Mar. 9, 2021).
- <sup>12</sup> Dan Packel, *Deputy AG Nominee Monaco's O'Melveny Tenure Was Brief but Consequential*, LAW360 (Jan. 8, 2021), <https://www.law.com/americanlawyer/2021/01/08/deputy-ag-nominee-monacos-omelveny-tenure-was-brief-but-consequential/>.
- <sup>13</sup> *Nomination of the Hon. Merrick Brian Garland to be Attorney General of the US Before the Senate Judiciary Committee*, 117th Cong. (Feb. 22, 2021) (response to written questions from Sens. Cornyn and Tillis), <https://www.judiciary.senate.gov/imo/media/doc/QFR%20Responses%202-28.pdf>; *Nomination of Lisa Monaco to be Deputy Attorney General of the US Before the Senate Judiciary Committee*, 117th Cong. (Mar. 9, 2021) (response to written questions from Sen. Tillis), <https://www.judiciary.senate.gov/imo/media/doc/Monaco%20Combined.pdf>.
- <sup>14</sup> Rod Rosenstein, Deputy Att'y Gen., Dep't of Justice, Keynote Address at N.Y.U. School of Law's Program on Corporate Compliance and Enforcement (Oct. 6, 2017), [https://wp.nyu.edu/compliance\\_enforcement/2017/10/06/nyu-program-on-corporate-compliance-enforcement-keynote-address-october-6-2017/](https://wp.nyu.edu/compliance_enforcement/2017/10/06/nyu-program-on-corporate-compliance-enforcement-keynote-address-october-6-2017/).