

The Trump Administration's Shifting Priorities Away from White Collar Crimes

By Nina Marino and Jennifer Lieser

INTRODUCTION

The radical shift in focus of the Department of Justice compounded by the Trump administration's 2018 budget cuts indicates drastic changes for the prosecution of white collar crimes.

Fighting corporate fraud and other misconduct became a top priority for the Department of Justice ("DOJ") in the final two years of the Obama administration.¹ During her tenure, Deputy Attorney General Sally Yates focused her efforts on the implementation of a strategy to protect the nation's financial system in the aftermath of the financial crisis. Individual accountability for corporate wrongdoing was prioritized – with the DOJ concentrating both its civil and criminal investigations on the individuals within the corporations who actually perpetrated the wrongdoing as opposed to the corporations themselves.² The goal was to incentivize a change in corporate behavior and ensure the proper parties were held responsible.³

DOJ SHIFT AWAY FROM WHITE COLLAR CRIMES

The DOJ's prosecutorial focus, however, was drastically redirected with the appointment of Jeff Sessions as Attorney General in February. In March, Sessions sent a memo to all federal prosecutors directing the DOJ's efforts to the prosecution of violent crimes. In

this memo, Sessions asserted that "federal prosecutors should use the substantial tools at their disposal to hold [violent criminals] accountable and ensure an appropriate sanction under federal law."⁴

Sessions sent a follow-up memo on May 10th to all federal prosecutors laying out the DOJ's charging and sentencing policies. In this memo, Sessions specifically outlined two directives for federal prosecutors. First, prosecutors must charge defendants with most serious crimes, those "that carry the most substantial guidelines sentence, including mandatory minimum sentences." If prosecutors feel such charges are unwarranted, such exceptions must be documented and approved by a United States Attorney, Assistant Attorney General, or designated supervisor. Second, prosecutors must disclose "all facts that impact the sentencing guidelines or mandatory minimum sentences" to sentencing courts, with the same supervisory approval requirements for any variances in sentencing. At its essence, Sessions' new charging policy appears to mandate that prosecutors charge suspects with the most serious offenses they can prove, reinforced by the mandate to disclose all information that could impact a sentence.

Many believe this new policy will limit prosecutorial discretion, especially at the plea stage; "[the] Attorney General has taken away the discretion of professional prosecutors to determine what sentences serves justice in any given case" said National Association of Criminal Defense

Lawyers (NACDL) President Barry J. Pollack.⁵ “Instead, prosecutors are now required in every case mindlessly to seek the maximum possible penalty.”⁶ Others are more skeptical of the immediate effect Sessions’ new charging policy will have on prosecutors, waiting instead to see how frequently and easily United States Attorneys and other supervisors will approve exceptions and variances to heightened charging requirements.⁷ Moreover, prosecutors will still have discretion in pursuing the charges they believe will be most successful in front of juries in their own jurisdictions.⁸

What is readily evident, however, is that Sessions’ directives veer away from the Obama Administrations’ focus on white collar crime and the protection of the financial system. Sessions has historically been concerned with narcotics and street crime, writing in 2013 that the legal system “must ensure that our most severe mandatory minimum penalties are reserved for serious, high level, or violent drug traffickers.”⁹ His new charging policy reflects this prioritization, signaling changes where “the effects...are likely to be felt most immediately in the narcotics context, where federal mandatory minimums established by Congress can be harsh for even first-time offenders because the sentences are dictated based on drug type and quantity.”¹⁰ In contrast, considerations in white collar crime sentencing are “keyed to the amount of money [white collar criminals] take from the business rather than the weight of the drugs at issue.”¹¹

The effect on the prosecution of white collar crimes, in which mandatory minimum sentencing plays a markedly smaller role and punishments are a “mix of regulatory

strategies, civil remedies, and criminal sanctions,”¹² will likely be less severe. However, the de-emphasis on white collar crimes may very well mean a shift away from their prosecution - and this deregulation may ultimately lead to an increase in the commission of these crimes.

REALLOCATION OF RESOURCES AND 2018 BUDGET

Further, the reallocation of financial resources and personnel to implement Sessions’ new agenda, in addition to the 2018 budget cuts, are likely to have a substantial impact on the prosecution of white collar crimes.

In response to an executive order from President Trump, Sessions has already established a Task Force on Crime Reduction and Public Safety to effectively combat violent crime in partnership with local, state, and tribal law enforcement agencies.¹³ An increase in monetary funding and time devoted to violent crimes means those same finite resources will have to be pulled from elsewhere, including those departments and agencies focusing on white collar crime.¹⁴

This is additionally compounded by the budgets cuts for 2018,¹⁵ further highlighting the focus and priorities of the administration. The budget for the DOJ is being cut by \$1.1B, or four percent.¹⁶ Other agencies which refer cases of corporate misconduct to the DOJ have also experienced significant cuts. The Environmental Protection Agency (“EPA”), for example - who alerted the DOJ of the Volkswagen emissions scandal back in 2015 - is now seeing its budget cut by \$2.5B, a 31 percent decrease in funding.¹⁷ Such budget

cuts will almost certainly affect the prosecution of individuals involved in corporate misconduct, which is both time and labor intensive and requires cooperation among different government agencies.

CONCLUSION

While it remains uncertain exactly how Sessions' latest directives will impact the

prosecution of white collar crimes, the 2018 budget cuts to various agencies and the reallocation of personnel expected to follow will, most definitely, impact this arena.

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¹ See Deepali Srivastava, *With Top Obama-Era Federal Prosecutors Gone, What Will Happen to the War on White-Collar Criminals?*, FORBES (Mar. 21, 2017),

<https://www.forbes.com/sites/forbesleadershipforum/2017/03/21/with-top-obama-era-federal-prosecutors-gone-what-will-happen-to-the-war-on-white-collar-criminals/#16d3229a5ef5>.

² Memorandum from Deputy Attorney General Sally Yates to All United States Attorneys (Sept. 9, 2015).

³ See Srivastava, *With Top Obama-Era Federal Prosecutors Gone, What Will Happen to the War on White-Collar Criminals?*.

⁴ Memorandum from Attorney General Jeff Sessions for All Federal Prosecutors (Mar. 8, 2017).

⁵ Press Release, Nat'l Ass'n Crim. Defense Lawyers, U.S. Attorney General Jeff Sessions Issues Retrograde Charging Policy; Seeks Return to 20th Century's So-Called 'War on Drugs' and the Age of Mass Incarceration, (May 12, 2017),

<https://www.nacdl.org/Sessions-Charging-Policy/>.

⁶ *Id.*

⁷ Tom McParland, *US Attorneys, Defense Bar Criticize Sessions Directive*, NAT'L L.J., (May 12, 2017),

<http://www.nationallawjournal.com/id=1202786085672/US-Attorneys-Defense-Bar-Criticize-Sessions-Directive?mcode=1202617074964&curindex=0&curpage=ALL>.

⁸ *Id.*

⁹ Rebecca R. Ruiz, *Sessions to Toughen Rules on Prosecuting Drug Crimes*, N.Y. TIMES (May 9, 2017),

https://www.nytimes.com/2017/05/09/us/politics/jeff-sessions-sentencing-criminal-justice.html?_r=0.

¹⁰ Laura Jarrett & Eugene Scott, *AG Sessions Paves Way for Stricter Sentencing in Criminal Cases*, CNN

(May 12, 2017),

<http://www.cnn.com/2017/05/12/politics/sessions-criminal-charging-memo/>.

¹¹ Mark Osler & Thea Johnson, *Why Not Treat Drug Crimes as White Collar Crimes?*, 61 WAYNE L.J. 1, 3 (2015).

¹² Darryl K. Brown, *Street Crime, Corporate Crime, and the Contingency of Criminal Liability*, 149 U. PA. L. REV. 1295, 1298 (2001).

¹³ See Press Release, Department of Justice, Attorney General Announces Crime Reduction and Public Safety Task Force (Feb. 28, 2017), <https://www.justice.gov/opa/pr/attorney-general-announces-crime-reduction-and-public-safety-task-force>.

¹⁴ See Sari Horwitz, *The DOJ's \$27.7 Billion Budget Reflects Jeff Sessions' Priorities*, WASH. POST, (Mar. 16, 2017),

https://www.washingtonpost.com/world/national-security/more-justice-department-funds-proposed-to-crack-down-on-violent-crime-and-illegal-immigration/2017/03/15/bf4f25f6-09ab-11e7-b77c-0047d15a24e0_story.html?utm_term=.6f7daa241c5e.

¹⁵ Kim Soffen & Denise Lu, *What Trump Cut in His Budget*, WASH. POST (Apr. 30, 2017),

https://www.washingtonpost.com/graphics/politics/trump-presidential-budget-2018-proposal/?utm_term=.fc92dd96ff17.

¹⁶ *Id.*; Bethany McLean, *Why White-Collar Crooks May be Cheering This Jeff Sessions Memo*, YAHOO FINANCE (Mar. 21, 2017),

<https://finance.yahoo.com/news/why-white-collar-crooks-may-be-cheering-this-jeff-sessions-memo-133115487.html>.

¹⁷ Soffen & Lu, *What Trump Cut in His Budget*.