

Enforcing white collar criminal law during the Trump administration

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Introduction

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How will cooperation in the prosecution of white collar crime be incentivised?

How will the Justice Department ensure it is prosecuting the right cases?

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As the Senate prepares to confirm Senator Jeff Sessions as the new attorney general and to consider nominations for other high-level positions in the Justice Department, there are many questions – and few answers – about how the new leadership in the Justice Department will approach the prosecution of white collar criminal cases during the Trump administration:

- Will the Justice Department be aggressive or conservative in enforcing federal criminal law in white collar cases during the Trump administration?
- Will it focus on the prosecution of corporations, individuals or both (or neither)?
- What new enforcement policies or innovations will the Justice Department adopt?
- How effectively will the Justice Department exercise its prosecutorial discretion in deciding which cases to bring?

It is tempting to examine the past actions of the nominees to predict how they may act in the future. Others may want to parse through statements made during confirmation hearings. But these are generally not the most reliable guides to predict future behaviour. It is more instructive to observe how the Justice Department in the Trump era approaches four fundamental issues that every administration must confront in deciding how it will prosecute white collar criminal cases.

Will the prosecution of white collar crime be emphasised?

White collar crime received relatively little attention during the confirmation hearings of the new attorney general. But it is far more important to listen to what he and other top officials say and do not say after they take office. If the attorney general, the deputy attorney general and other senior officials are not speaking frequently and pointedly on issues of white collar crime, that is usually a significant indicator that the Justice Department is not focused on issues of white collar crime.

Even if the attention of the Justice Department's leadership is focused elsewhere, it does not mean that no cases will be brought. Even in that scenario the department will prosecute white collar cases that present themselves or that are naturally developed by its line prosecutors in their day-to-day activities. The Justice Department has thousands of prosecutors and there will always be many who try to bring difficult cases regardless of the message being received from leadership. But if these cases are not prioritised by the senior leadership, it is a good bet that fewer cases will be brought.

Will substantial resources be devoted to the prosecution of white collar crime?

The budget is often a good predictor of the Justice Department's commitment to prosecuting white collar crime. If the Justice Department is not vigilant about providing funding for both prosecutors

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and agents and assigning them specifically to investigate and prosecute white collar crime, it becomes far more likely that fewer cases will be brought.

As President Trump takes office, there are questions about his commitment to devoting substantial resources to the Justice Department. He has promised to freeze federal hiring in his first 100 days in office – and this is only the beginning.

Almost every administration experiences some surprise that requires substantial changes in funding. Whether terrorism, financial crises, cyber-attacks, wars, natural disasters or something wholly unforeseen, the Justice Department is always competing for funding with other pressing needs. Will the Trump administration invest the funding necessary to undertake time-consuming white collar investigations, particularly when there may be no prospect of immediate returns?

How will cooperation in the prosecution of white collar crime be incentivised?

The Justice Department has traditionally tried to incentivise third parties to assist in the prosecution of white collar crime:

- It offers more leniency to corporations that self-report potential violations, identify culpable executives and fully cooperate with government investigations.
- It asks for reduced sentences for individuals who plead guilty and provide substantial assistance to the government in prosecuting others.
- Through the Dodd-Frank Act, whistleblowers can win substantial financial awards by offering new information that leads to a substantial enforcement action.
- It has tried to strengthen its relationships with foreign regulators in the hopes of increasing its enforcement power.

There is always a delicate balancing in these efforts. The Justice Department must encourage this kind of cooperation while preserving its ability to enforce the law.

Will the Justice Department in the Trump administration find the right balance? If it finds the right balance and can leverage the efforts of third parties both fairly and effectively, more cases will be brought by the Justice Department; if it does not, it will be less effective, fewer cases will be brought and/or there will be less public confidence in the Justice Department.

How will the Justice Department ensure it is prosecuting the right cases?

What safeguards will the Justice Department put in place to ensure that it is exercising its prosecutorial discretion wisely? Early in the Trump administration, the public's attention should be focused on those who are appointed to the important positions responsible for supervising the day-to-day activities of the Justice Department – and in particular, on the following:

- Who will lead the Criminal Division?
- Who will lead the Fraud Section?
- Who will lead the Antitrust, Tax and National Security Divisions?
- Who will become the US attorneys in the most important jurisdictions?
- What kinds of judgment have these nominees illustrated in the past?
- What kind of environment are these individuals likely to create in the Justice Department?

While these appointments will not be front-page news, they will go a long way in deciding whether the Justice Department is exercising its discretion skilfully and enforcing the law fairly.

As with any administration, it will take years to determine whether the Justice Department in the Trump administration is effective and fair. The election was very contentious and not much is truly known about what will happen next. When evaluating the future of white collar law enforcement in the Trump administration, one should start by trying to answer these questions.

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