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by **JOHN F. WOOD**

What Will the Appointment of Jeff Sessions as Attorney General Mean for Corporate Criminal Prosecutions?

What should corporate America expect from Jeff Sessions as attorney general?

THE REPUBLICAN PRESIDENT-ELECT, who lost the popular vote but won the electoral college, appointed a conservative member of the Senate Judiciary Committee to serve as his attorney general, thus pleasing the conservative base while prompting objections from civil rights and civil liberties groups.

These are not the headlines of 2016, but of 2000, when President-Elect George W. Bush announced that he would nominate John Ashcroft to serve as attorney general. While the business community may have hoped that President Bush and Attorney General Ashcroft would take a more lenient approach to corporate criminal prosecutions, the next few years brought anything but that.

Corporate criminal prosecutions reached a new high

following scandals involving Enron, Worldcom, and the bursting of the dot-com bubble. Perhaps most notably, the Department of Justice under Attorney General Ashcroft obtained an indictment of Arthur Andersen, resulting in the accounting firm's demise. The Ashcroft Justice Department also ushered in the modern era of aggressive Foreign Corrupt Practices Act ("FCPA") prosecutions.

Should corporate America expect the same from Jeff Sessions

as attorney general? The answer is probably "yes."

As an initial matter, it is important to recognize that the Department of Justice consists mostly of career prosecutors and agents, with only a very small layer of political appointees above them on the organization chart. Thus it is unlikely that much will change, except in a few areas that Sessions and other political appointees will identify for transformation.

For example, Sessions will surely enhance the Department's



immigration enforcement, which could mean more investigations and prosecutions of companies that employ illegal workers. But it is unlikely that Sessions will dramatically change white collar criminal enforcement generally. Indeed, to the extent that Senator Sessions has a record on white collar crime issues, it is generally consistent with his overall aggressive approach to law enforcement. Thus corporate America should not expect a weakening of corporate criminal prosecutions.

Senator Sessions worked at the Department of Justice for 14 years – two years as an Assistant U.S. Attorney for the Southern District of Alabama (1975-1977) and 12 years as U.S. Attorney for the same district (1981-1993). Because there were relatively few major corporations based in his district, it is difficult to glean much from his prior record at the Department.

But Senator Sessions does appear to take great pride in the Savings and Loan fraud prosecutions that occurred under his supervision as U.S. Attorney. He explained during a 2002 Senate Judiciary Committee hearing that “[m]y office prosecuted those cases that I supervised, and I am going to tell you there is a lot better behavior in banking today because people

went to jail over those cases in the past. They lost everything they had, their families were embarrassed, and a lot of people started checking to make sure they were doing their banking correctly.” He thus concluded that “[h]arsh sentencing does deter.”

During his 20-year tenure in the U.S. Senate, and as a member of the Judiciary Committee in particular, Sessions has had several opportunities to address corporate criminal issues. For example, during the June 2010 hearing on James Cole’s nomination to serve as deputy attorney general, Senator Sessions

“[Y]ou have to be strong... a prosecutor cannot be a weak-kneed person going up against a major corporation in a fraud case.” -- *Sen. Jeff Sessions.* ”

questioned Cole regarding the Department’s treatment of BP for its role in the Gulf Oil Spill.

Sessions stated, “I have said repeatedly that BP is liable and should be held liable for their responsibilities to the extent of their existence. In other words, they are not too big to fail.” This suggests that Senator Sessions may believe that large corporations should be prosecuted for criminal activity, regardless of how such a prosecution will

impact the corporation’s shareholders and employees.

It is possible that some of Sessions’ comments were motivated in part by the impact of the BP oil spill on his home state of Alabama. But there is reason to view his comments as reflective of more than a desire to appeal to the local concerns of his constituents. At the same hearing, Sessions also questioned Cole regarding a speech that Cole gave about the impact of the Arthur Andersen prosecution.

Senator Sessions suggested that Cole’s focus on the Arthur Andersen prosecution’s impact on employees “seems to go beyond strict enforcement of the law and try to preserve corporations who perhaps should be charged and suffer whatever consequences might result from their criminal acts.” Sessions described the “too big to fail” approach as “a dangerous philosophy. Normally, I was taught, if they violated the law, you charge them. If they did not violate the law, you do not charge them.”

Sessions’ previous comments at Judiciary Committee hearings are generally consistent with the views he espoused during the Cole confirmation hearings. During a 2007 hearing regarding the Department of Justice’s approach to requesting waivers

of the attorney-client privilege under the “McNulty Memorandum,” Senator Sessions explained his view that “Corporate fraud is an important thing, and millions of people have lost their whole life savings as a result of fraud by corporate officers.”

He explained that because corporations often have the best lawyers, prosecutors “need to be strong” and that “a prosecutor cannot be a weak-kneed person when going up against a major corporation in a fraud case.”

With regard to the attorney-client privilege in particular, Sessions expressed his disagreement with those who proposed barring the Department of Justice from requesting corporate waivers of the privilege:

I am not inclined to believe that a corporation—that a prosecutor cannot discuss with a corporation whether or not they want to waive their right and provide information. I do not want to be in a position in which a board, a corporate board finds out there is wrongdoing in the corporation, conducts an investigation, and cannot be – a discussion cannot be entertained as to whether or not they might benefit from turning that over, that the crooks in the corporation be sent to jail, where

they ought to be sent, and the corporation perhaps survive the prosecution.

Sessions further explained, “it is just nothing unusual in my view that a prosecutor who has in her hand evidence of corporate guilt on a number of different matters would use that as leverage to find out the full scope of all the criminal activity by providing some sort of leniency of a form in exchange for cooperation by the defendant.”

The dispute over the attorney-client privilege under the McNulty Memorandum was ultimately resolved by a subsequent Department of Justice Memorandum that prohibits prosecutors from requesting waivers of the privilege and that provides that cooperation credit will be given based on the value of the information provided by a company, regardless of whether the information is privileged or non-privileged.

It is unlikely that Sessions would seek to revisit this issue as attorney general, as that would upset a carefully crafted balance that has reduced criticism of the Department while allowing prosecutors the tools that they need to investigate corporate wrongdoing. But Sessions’ comments on the privilege issue

suggest, at the very least, that he is not going to go easy on corporate wrongdoing.

Likewise, his Justice Department is likely to seek harsh sentences for white collar criminals and to maintain, at least in some form, the Department’s “Yates Memorandum,” which increased the Department’s focus on prosecuting corporate executives.

In sum, Sessions will likely usher in an aggressive approach to criminal law enforcement if he is confirmed as attorney general. His approach to corporate criminal enforcement will likely be consistent with that overall approach. Companies and corporate executives therefore should not expect any lightening of the scrutiny they receive from the Department of Justice and should continue to maintain or enhance corporate compliance efforts to avoid finding themselves in the Department’s crosshairs.

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