

## Deputy Attorney General Announces Comprehensive Review of DOJ Corporate Enforcement Policies

### Key Points:

- DOJ is reviewing and reevaluating numerous corporate enforcement policies, including the “Yates Memo,” the FCPA Pilot Program, and policies on corporate monitors.
- Policies will be codified in official sources like the US Attorneys’ Manual, rather than as guidance issued in memoranda, speeches, and other soft formats.
- The review is already underway, but does not have a specified timetable for completion.
- Meanwhile, there will be a period of uncertainty for those interacting with DOJ in the corporate enforcement context.

On October 6, 2017, Deputy Attorney General of the United States Rod J. Rosenstein announced that the Department of Justice (DOJ) is actively reviewing a wide range of existing corporate enforcement policies. In a speech<sup>1</sup> delivered at New York University School of Law’s Program on Corporate Compliance and Enforcement, Rosenstein unveiled a plan to review and reconsider existing DOJ policies, and to consolidate policies in official sources like the US Attorneys’ Manual, which provides formal guidance to all DOJ prosecutors. This represents a departure from DOJ’s approach in recent years, and may result in significant changes to DOJ policy in a number of areas. This *Client Alert* summarizes Rosenstein’s remarks, notes related DOJ developments, and discusses possible implications for corporate enforcement.

### A Shift From Past Practice

Rosenstein began by noting that past practices may not always be the best approach for present situations, and that we should therefore “be conscientious about reconsidering our assumptions.” Focusing on DOJ’s longstanding practice of issuing guidance via memoranda — including, in particular, the guidance issued by past Deputy Attorneys General in the area of corporate enforcement — Rosenstein stated that “[m]anagement-by-memo is an inefficient and often ineffective method of enforcing government policies.” He added that “[t]he Deputy Attorney General should not be known for writing memos.”

Based on that principle, Rosenstein articulated a view that existing DOJ policies take too many forms — from speeches and FAQ documents to memoranda and US Attorneys’ Manual guidance — with varying degrees of authority and formality. He noted that this diverse collection makes DOJ policies less readily accessible and its guidance less clear to those whom it intends to influence. In this view, the Department needs to “clearly distinguish binding policies from commentary.” He cautioned that DOJ guidance articulated in speeches, FAQ documents, and web pages may not constitute official policies, adding that

“unless the statements are incorporated into the U.S. Attorneys’ Manual or issued through a formal Department memorandum, they are not necessarily policies that govern Department employees.”

Although Rosenstein stated that he was not announcing any new policy, this initiative represents a marked shift in DOJ practice, with potentially significant consequences for the guidance promulgated over many years in less formal instruments, such as memoranda and speeches. While characterized as an “administrative goal,” the initiative’s implications could be far-reaching, as it will include a review of the substance of the policies and not merely their collection.

Also, because changes to the US Attorneys’ Manual require more internal DOJ review and approvals than pronouncements in speeches and memoranda, this process may be a lengthy one. Rosenstein’s announcement thus ushers in a period of uncertainty for DOJ corporate enforcement policy, requiring corporations and individuals engaging with DOJ to be cognizant of the potential for changes. Once new policies are issued, it will also take time to understand how they will be implemented in practice by DOJ prosecutors, which include 94 US Attorneys’ Offices and more than 600 lawyers in the Criminal Division.

The forum for Rosenstein’s remarks on this topic was noteworthy, as NYU School of Law’s Program on Corporate Compliance and Enforcement has served as a platform for significant policy announcements by DOJ officials and leaders of other enforcement agencies in recent years. These announcements have included former Deputy Attorney General Sally Q. Yates’ introduction of DOJ’s policy on “Individual Accountability for Corporate Wrongdoing”<sup>2</sup> (the Yates Memo) in September 2015, which itself represented a shift in DOJ’s criminal and civil enforcement focus in the corporate sphere. Former Attorney General Eric H. Holder also presented there in September 2014, speaking about financial fraud prosecutions.<sup>3</sup> Rosenstein’s speech in this forum evokes those prior events while announcing DOJ’s intention to review and consolidate its prior policy statements.

## **DOJ Policies Under Review**

The scope of DOJ’s undertaking appears to be comprehensive, as Rosenstein did not describe any restrictions on the policies subject to review. He also cited no time limit for completing the review. Rosenstein did, however, identify one policy that will be incorporated into the US Attorneys’ Manual and several others that will be part of the review.

First, Rosenstein noted that Attorney General Jeff Sessions’ May 10, 2017 “Department Charging and Sentencing Policy” memorandum will be incorporated into the US Attorneys’ Manual.<sup>4</sup> That memorandum directs federal prosecutors to “charge and pursue the most serious, readily provable offense,” representing a prescriptive approach to federal charging and sentencing that departs from earlier guidance adopted during the Obama administration.

Rosenstein said that DOJ will review several significant corporate enforcement policies, with the Yates Memo among them. The Yates Memo outlined principles for enhancing DOJ’s enforcement efforts against individual wrongdoers in the corporate context, including conditioning corporate cooperation credit on companies’ willingness to turn over relevant information about such individuals.<sup>5</sup> Rosenstein stated that he agreed with an overarching principle of the Yates Memo — that prosecutors should avoid resolving investigations by corporate settlement without pursuing individual offenders. But he questioned whether “existing memos, talking points, and ‘F.A.Q.’ documents got it exactly right.”

Without specifying the changes DOJ might make to the Yates Memo, Rosenstein noted that any modifications would be likely to reflect certain “common themes.” First, any modifications “will reflect [DOJ’s] resolve to hold individuals accountable for corporate wrongdoing.” Second, “the government

should not use criminal authority unfairly to extract civil payments.” Third, “any changes will make the policy more clear and more concise.” And finally, any modifications will “reflect input from stakeholders inside and outside the Department of Justice.”

Rosenstein also said that DOJ’s Foreign Corrupt Practices Act (FCPA) Pilot Program will be up for review. DOJ created the FCPA Pilot Program in April 2016 “to promote greater accountability for individuals and companies that engage in corporate crime by motivating companies to voluntarily self-disclose FCPA-related misconduct, fully cooperate with the Fraud Section, and, where appropriate, remediate flaws in their controls and compliance programs.”<sup>6</sup> Announced by then-Assistant Attorney General and current Latham & Watkins partner Leslie Caldwell, the one-year Pilot Program established criteria for self-disclosure, cooperation, and remediation efforts that, if satisfied, could earn a corporation substantial reductions in fines or penalties, or even a declination. In March 2017, DOJ announced that it would temporarily extend the Pilot Program while it continued to assess the Program’s effectiveness.<sup>7</sup> With Rosenstein’s remarks, the continued long-term viability of the Pilot Program is uncertain.

Rosenstein also previewed that DOJ would re-examine the mandate of the Financial Fraud Enforcement Task Force, a body established during the Obama administration to coordinate federal and state resources for combatting financial crimes, including mortgage and securities fraud.<sup>8</sup> Likewise, Rosenstein stated that DOJ will review its policies regarding corporate compliance monitors appointed as part of deferred prosecution or non-prosecution agreements. The policies were set forth in a May 2010 memorandum from then-Acting Deputy Attorney General Gary G. Grindler (“Additional Guidance on the Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations”),<sup>9</sup> and a March 2008 memorandum by then-Acting Deputy Attorney General Craig S. Morford (“Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations”).<sup>10</sup>

## **Other DOJ Initiatives**

In addition to the policy review, Rosenstein announced that DOJ intends to provide prosecutors and agents with enhanced training on corporate fraud and strategies for prosecuting individuals, as well as training on corporate governance. He also announced that DOJ is creating a “working group” to “evaluate and monitor the Department’s long-term effectiveness in promoting individual accountability and deterring fraud.” Relatedly, it remains to be seen whether DOJ will continue the prior administration’s initiative to bring compliance expertise into the Department by retaining an experienced compliance counsel within the Criminal Division’s Fraud Section.

Rosenstein said that DOJ welcomes suggestions from all stakeholders on ways to foster “better public-private cooperation” in combatting crime, including in particular as to cybercrime, hacking, financial fraud, price-fixing conspiracies, and bribery, all of which he characterized as “susceptible to detection by good corporate citizens.” Rosenstein expressed a positive view of companies developing “truly robust corporate compliance programs” and of “prompt disclosure of wrongdoing,” advising that if corporate officers are unsure whether to report suspected violations of the law, “[h]onesty is usually the best policy.” In the same vein, he continued the Department’s emphasis on corporate compliance, and encouraged corporations to promote a “culture of integrity, a reputation for encouraging employees to do the right thing and to report suspicious conduct.” Rosenstein said that DOJ is looking to “incentivize, reward, and even partner with” corporations that show dedication to fighting corporate fraud, describing various forms of cooperation and citing whistleblower programs favorably. How this will be codified in any new policies of course remains to be seen.

Rosenstein closed with comments about the importance of predictable enforcement as a mechanism for deterrence, noting that “[t]he rules that matter most are the ones that carry expected penalties that decision-makers are unwilling to pay.”

## **Potential Implications of DOJ’s New Policy Approach**

As discussed above, the policy review announced by Deputy Attorney General Rosenstein raises certain questions and creates some uncertainty in the corporate enforcement sphere. A wide array of corporate enforcement policies apparently are up for review, and it remains to be seen which policies may become part of the US Attorneys’ Manual or other formal resources, and in what form. Rosenstein’s stated intention to question past assumptions and take a fresh look at DOJ’s practices may indicate that some changes will be significant. A stated preference for formal directives that bind prosecutors, rather than less formal guidance, will itself impact DOJ’s approach to fulfilling its enforcement mission.

In light of Rosenstein’s remarks, observers should not expect to see a “Rosenstein Memo” supplementing prior policy guidance in memoranda from his predecessors. Further, the procedure for issuing and altering DOJ policies may change. Because modifying the US Attorneys’ Manual involves more procedural hurdles than issuing guidance by memorandum or speech, policy updates may become more difficult and less frequent after DOJ completes its current review.

During this period of potential uncertainty, however, Rosenstein noted that DOJ will continue to focus on prosecuting financial fraud and pursuing individual wrongdoers in the corporate context. With the Yates Memo and related aspects of DOJ policy under review, decisions about reporting possible wrongdoing and cooperating in investigations may become even more challenging. Corporations and individuals alike will need to navigate the evolving enforcement landscape with care.

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## Endnotes

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- <sup>1</sup> Deputy Attorney General Rod J. Rosenstein Keynote Address, NYU Program on Corporate Compliance & Enforcement, New York University Law School, (Oct. 6, 2017), available at [http://www.law.nyu.edu/sites/default/files/upload\\_documents/Rosenstein%2C%20Rod%20J.%20Keynote%20Address\\_2017.10.6.pdf](http://www.law.nyu.edu/sites/default/files/upload_documents/Rosenstein%2C%20Rod%20J.%20Keynote%20Address_2017.10.6.pdf).
- <sup>2</sup> US Department of Justice, "Individual Accountability for Corporate Wrongdoing," (Sept. 9, 2015), available at <https://www.justice.gov/archives/dag/file/769036/download>.
- <sup>3</sup> US Department of Justice, "Attorney General Holder Remarks on Financial Fraud Prosecutions at NYU School of Law," (Sept. 17, 2014) available at <https://www.justice.gov/opa/speech/attorney-general-holder-remarks-financial-fraud-prosecutions-nyu-school-law>.
- <sup>4</sup> Office of the Attorney General, "Department Charging and Sentencing Policy," (May 10, 2017), available at <https://www.justice.gov/opa/press-release/file/965896/download>.
- <sup>5</sup> US Department of Justice, "Individual Accountability for Corporate Wrongdoing," (Sept. 9, 2015), available at <https://www.justice.gov/archives/dag/file/769036/download>.
- <sup>6</sup> US Department of Justice, "The Fraud Section's Foreign Corrupt Practices Act Enforcement Plan and Guidance," (Apr. 5, 2016), available at <https://www.justice.gov/archives/opa/blog-entry/file/838386/download>.
- <sup>7</sup> Jonathan Sack, "DOJ Announces It Will Extend FCPA 'Pilot Program'," *Forbes* (Mar. 13, 2017), available at <https://www.forbes.com/sites/insider/2017/03/13/doj-announces-it-will-extend-fcpa-pilot-program/#35aa85621d3e>.
- <sup>8</sup> US Department of Justice, "President Obama Establishes Interagency Financial Fraud Enforcement Task Force," (Nov. 17, 2009), available at <https://www.justice.gov/opa/pr/president-obama-establishes-interagency-financial-fraud-enforcement-task-force>.
- <sup>9</sup> US Department of Justice, "Additional Guidance on the Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations," (May 25, 2010), available at <https://www.justice.gov/archives/dag/memorandum-heads-department-components-united-states-attorneys>.
- <sup>10</sup> US Department of Justice, "Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations," (Mar. 7, 2008) available at <https://www.justice.gov/sites/default/files/dag/legacy/2008/03/20/morford-useofmonitorsmemo-03072008.pdf>.