White Collar Update: Deputy Attorney General Rod Rosenstein Delivers Address on Corporate Enforcement Policy

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On October 6, 2017, Deputy Attorney General Rod Rosenstein provided remarks at the NYU Program on Corporate Compliance & Enforcement on Department of Justice ("DOJ" or the "Department") corporate prosecution policies. Mr. Rosenstein stated that all existing DOJ policies are currently under review and that "solutions of the past are not necessarily the right solutions today." While he signaled that certain policies would remain in place — such as the Department's continuing focus on rigorous corporate compliance programs, self-disclosure, and the prosecution of individuals responsible for corporate wrongdoing — he also suggested that significant changes may be on the horizon. In particular with respect to corporate penalties, he emphasized that any new policy will make clear that the Department should not be using criminal authority unfairly to extract civil fines and underscored the limited individual deterrent value of corporate settlements.

Mr. Rosenstein's Remarks

Mr. Rosenstein began his remarks by explaining that he was not prepared to announce any new policy on corporate prosecution, because all existing policies were under review, and the Department was being "conscientious about reconsidering our assumptions." For instance, Mr. Rosenstein stated that while he "generally agree[s] with the critique that motivated [former] Deputy Attorney General Yates to issue a new policy" on individual accountability for corporate wrongdoing, the "Yates Memo" is one such policy currently under review.

Mr. Rosenstein discussed a central administrative goal for the Department: making enforcement policies readily accessible to those expected to follow them. Calling "[m]anagement by memo" an "inefficient and often ineffective method of enforcing government policies," he stated a desire to "clearly distinguish binding policies from commentary." To that end, new policies will be primarily in the form of updates to the United States Attorneys' Manual (the "Manual"), which applies to all DOJ components and not just the U.S. Attorney's Offices, and the Department has begun the process of reviewing outstanding policy memoranda in order to determine what, if anything, should be incorporated into the Manual.

Mr. Rosenstein identified four themes that will be reflected in any potential changes to DOJ policy:

- "First, any changes will reflect our resolve to hold individuals accountable for corporate wrongdoing."
- "Second, they will affirm that 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 they will reflect input from stakeholders inside and outside the Department of Justice."

Mr. Rosenstein's speech highlighted areas where corporate fraud overlaps with other Department priorities like violent crime, specifically mentioning money laundering, tax, and export controls. He made

clear, however, that the Department is still committed to protecting the integrity of the market through the prosecution of corporate fraud that results in solely economic harm.

Mr. Rosenstein next described steps the Department is taking to improve its own "training and culture" in the area of corporate prosecution. First, he discussed plans to increase and improve training of the attorneys and agents who investigate and prosecute corporate fraud. Second, he announced the establishment of a working group to assess and track "the Department's long-term effectiveness in promoting individual accountability and deterring fraud." Third, he enumerated a set of Department practices currently under review: corporate monitors, the FCPA pilot program, corporate investigation training programs, and the mandate of the Financial Fraud Enforcement Task Force. And finally, Mr. Rosenstein re-emphasized the Department's interest in collaborating with the private sector in order to combat crime. He particularly noted that cybercrime, hacking, financial fraud schemes, price-fixing conspiracies, and bribery are areas ripe for such collaboration.

Turning to the role of corporate compliance programs, Mr. Rosenstein commended the efforts of many corporations in creating "robust" compliance programs, noting that "[t]he sophistication of compliance measures and tools that we see today regularly exceeds the measures that were in place ten years ago." While recognizing that compliance officers face "difficult judgment[s]" about self-disclosure, Mr. Rosenstein expressed his view that "[h]onesty is usually the best policy."

And finally, consistent with current DOJ policy, Mr. Rosenstein emphasized the deterrent value of individual prosecutions. Mr. Rosenstein acknowledged that "[c]orporate settlements do not necessarily directly deter individual wrongdoers" because "at the level of each individual decision-maker, the deterrent effect of a potential corporate penalty is muted and diffused." While the Department "will seek appropriate corporate penalties when justified by the facts and the law," Mr. Rosenstein explained, investigations will continue to focus on "[w]ho made the decision to set the company on a course of criminal conduct."

Potential Practical Impact on Enforcement

While Mr. Rosenstein was careful to make clear he was not announcing any new policies in his speech, there is no doubt that all existing corporate prosecution policies are now under review. Indeed, he began his remarks by making the points that "[c]ircumstances change," "solutions of the past are not necessarily the right solutions today," "[w]e should not blindly accept past practices," and "'[w]e should be conscientious about reconsidering our assumptions." It is safe to assume that the Department will not be discarding all current corporate prosecution policies, but the current review may very well result in fundamental changes to policy with real impact on pending and future corporate enforcement matters.

Mr. Rosenstein's acknowledgements of the limited individual deterrent value of corporate settlements and the fact that criminal authority should not be used to extract civil fines are also noteworthy. To the extent prior large corporate resolutions have been premised in part on an individual deterrence theory, Mr. Rosenstein's comments provide a potential opening to argue for reduced monetary penalties in future cases where large potential penalties would not punish individual wrongdoers.

The results of the current policy review and the impact of Mr. Rosenstein's comments remain to be seen, and corporations should continue to prioritize the establishment and maintenance of robust compliance programs and appreciate the value the Department places on self-disclosure and cooperation, but Mr. Rosenstein's remarks suggest that significant changes to corporate prosecution policies may be on the horizon.

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