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DOJ Deputy Attorney General Outlines Key Policy Revisions Focusing on Individual Accountability, Softening Yates Memo

On November 29, 2018, Deputy Attorney General Rod J. Rosenstein delivered remarks at the American Conference Institute’s 35th International Conference on the Foreign Corrupt Practices Act. In keeping with the DOJ’s more recent themes, Rosenstein emphasized the importance of coordination between agencies, including but not limited to the SEC, as well as international cooperation with agencies located abroad. To that end, Rosenstein emphasized that such collaboration in enforcement is consistent with the DOJ’s more recent policy of avoiding “piling on” with duplicative prosecutions and penalties. While noting the FCPA program’s successes and highlighting the fact that the DOJ has increased the number of prosecutions in all priority areas last year, much of what Rosenstein discussed focused on ensuring that investigations are run in a more efficient, predictable, and practical manner and encouraging cases to be resolved more quickly. In that regard, Rosenstein specifically announced revisions to the DOJ’s policy regarding individual accountability in corporate cases, a review of which was originally initiated in 2017. Rosenstein emphasized holding “individuals responsible for wrongdoing,” thereby increasing the deterrent effect of prosecutions, an effect that he noted is often lost in corporate-level prosecutions, as well as creating policies that work in “the real world of limited investigative resources.”

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In keeping the focus on individual accountability, Rosenstein noted that the revised policy will offer corporations cooperation credit in civil corporate investigations, stating “the ‘all or nothing’ approach to cooperation introduced a few years ago was counterproductive in civil cases.” As such, Rosenstein noted that a corporation “must identify all wrongdoing by senior officials, including members of senior management or the board of directors, if it wants to earn any credit for cooperating in a civil case.” By the same token, he announced that a corporation can earn maximum cooperation credit, if it identifies “every individual person who was *substantially involved* in or responsible for the misconduct.” [emphasis added]. Rosenstein revealed that prosecutors will also have permission and discretion to negotiate *some* amount of credit, even where maximum credit is not available to the corporation, providing the possibility for credit where a corporation meaningfully assists the government in its investigation and eliminating, in his words, a “binary choice” that could “delay[] the resolution of some cases while providing little or no benefit.” At the same time, Rosenstein made clear that no credit would be available in cases where it is revealed that a corporation concealed misconduct or wrongdoing “by members of senior management or the board of directors.” In addition, he announced that prosecutors will have discretion to “negotiate civil releases for individuals who do not warrant additional investigation in corporate civil settlement agreements” and to “consider an individual’s ability to pay in deciding whether to pursue a civil judgment.” At all points, Rosenstein’s remarks focused on a common-sense approach to re-instituting the discretion that DOJ prosecutors once had in civil cases so that cases could be resolved more efficiently, while also ensuring a strong deterrent effect.

In addition to the policy revisions in civil cases, Rosenstein also addressed individual accountability in criminal cases. Specifically, he stated that “absent extraordinary circumstances, a corporate resolution should not protect individuals from criminal liability.” As such, the revised policy instructs prosecutors that “any company seeking cooperation credit in criminal cases must identify every individual who was substantially involved in or responsible for the criminal conduct.” However, Rosenstein also emphasized that investigations should not be “delayed merely to collect information about individuals whose involvement was not substantial, and who are not likely to be prosecuted.” Importantly, Rosenstein stated that the new policy would focus on those at the top, including individuals “who play significant roles in setting a company on a course of criminal conduct” or “who authorized” such conduct. Finally, the revised policy eliminates any cooperation credit that a company would otherwise receive if the DOJ finds that a company is not “operating in good faith to identify individuals who were substantially involved in or responsible for wrongdoing[.]”

The policy revisions announced by Rosenstein are consistent with his remarks on this day last year at the 34th International Conference on the Foreign Corrupt Practices Act, where he emphasized the importance of prosecuting culpable individuals to achieve effective deterrence of corporate corruption. While maintaining this spirit, it is also important to note that the announced revisions effectively modify the DOJ's Yates Memo. While it is yet to be seen how extensive those changes will prove to be in practice or whether the desired deterrent effect will be realized, there are several key takeaways from Rosenstein's remarks that can provide some guidance to companies focused on what may lie ahead:

- **The spirit of the Yates Memo lives.**
 - Under the Trump administration, the DOJ will continue to focus on individual accountability in investigations and prosecutions.
- **Cooperation is key.**
 - The revised policy's potential for maximum cooperation credit could be significant in high-stakes cases where individual culpability is well-documented. In consequence, corporate cooperation may prove crucial in evaluating exposure to potential penalties.
- **In criminal cases, it's all or nothing.**
 - Rosenstein's remarks regarding prosecutorial discretion to negotiate cooperation credit in civil cases should not be interpreted as applying in the criminal context. If criminal conduct is alleged, corporations must cooperate if they are seeking credit.
- **Implement policies that encourage internal self-reporting.**
 - If a corporation wishes to effectively identify individual wrongdoing, it should ensure that effective policies are implemented that encourage employees to whistle blow and self-report suspected misconduct.
- **Ignorance is not bliss.**
 - In Rosenstein's words: "Companies that self-report, cooperate, and remediate the harm they caused will be rewarded. Companies that condone or ignore misconduct will pay the price."

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