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Deputy Attorney General Rod Rosenstein Announces Revisions to Yates Memo

During a speech delivered Thursday at the International Conference on the Foreign Corrupt Practices Act (“FCPA”) in Oxon Hill, Maryland, Deputy Attorney General Rod Rosenstein announced revisions to certain of the Justice Manual’s corporate enforcement policies regarding individual accountability. Those changes modify Department of Justice (“Department”) policies originally announced in a September 9, 2015 memorandum from then-Deputy Attorney General Sally Yates (the “Yates Memo”). The principal impact of the modifications is to amend the approach set out in the Yates Memo that “[t]o be eligible for any cooperation credit, corporations must provide to the Department all relevant facts about the individuals involved in corporate misconduct.” This policy was frequently considered to constitute a binary arrangement, under which any cooperation credit required identification and disclosure of all participants and partial credit was unavailable or elusive.

Under the revised policy, a corporate wrongdoer will be eligible for cooperation credit if it identifies to the Department the individuals whom the company has found to be “substantially involved” in the misconduct. Rosenstein explained that the revisions do not reflect a reduction in the Justice Department’s focus on individual culpability, but instead result from an effort to target that focus on individuals with substantial involvement in wrongdoing. According to Rosenstein, the revisions had two principal objectives: (1) streamlining the Department’s focus on individuals and thereby increasing the efficiency and likely the pace of corporate investigations and Department resolutions; and (2) providing increased discretion to the Department’s civil litigators both as to the scope of investigations, especially with respect to individual conduct, and to award partial cooperation credit to companies that make reasonable efforts to cooperate with Department investigations.

According to Rosenstein, “[u]nder our revised policy, pursuing individuals responsible for wrongdoing will be a top priority in every corporate investigation.” The revised policy provides that companies may receive cooperation credit in criminal investigations by making good-faith efforts to identify individuals

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who were substantially involved in the criminal conduct, even if, despite those good-faith efforts, a company is unable to identify *all* relevant individuals or provide complete factual information. As set forth in the revised Justice Manual, “[t]here may be circumstances where, despite its best efforts to conduct a thorough investigation, a company genuinely cannot get access to certain evidence or is legally prohibited from disclosing it to the government. Under such circumstances, the company seeking cooperation will bear the burden of explaining the restrictions it is facing to the prosecutor.” Moreover, according to Rosenstein, investigations should not be delayed “merely to collect information about individuals whose involvement was not substantial, and who are not likely to be prosecuted.” As a result, companies should not be required to locate and report to the government “every person involved in alleged misconduct in any way, regardless of their role,” in order to receive cooperation credit.

Further, under the revised policy, corporate cooperation credit in civil investigations is not an “all-or-nothing” question. The revised policy seeks to restore discretion to civil litigators to provide partial cooperation credit when a company “meaningfully assist[s]” in the government’s investigation. In civil cases, the Department will no longer require companies to identify all individual wrongdoers. Rather, according to Rosenstein, the “most important aspect” of the policy “is that a company must identify all wrongdoing by senior officials” in order to earn any credit for cooperation, and must “identify every individual person who was substantially involved in or responsible for the misconduct” to earn maximum credit.

The revised policy also enhances civil attorneys’ discretion in two other key ways: (1) civil attorneys may, in corporate resolutions, negotiate civil releases for individuals who do not warrant additional investigation, and (2) civil attorneys may consider an individual’s ability to pay when deciding whether to pursue a civil judgment. According to Rosenstein, these changes are intended to allow civil attorneys to focus their resources on pursuing substantial wrongdoers and increase the likelihood of recovery for civil fines and penalties.

The modified policy is intended to provide more flexibility and expedition in conducting criminal investigations and negotiating their resolutions. It remains to be seen how the new policy will be implemented in practice and the effects that the policy will have on the scope, pace and outcomes of corporate and Department investigations. In that regard, it is notable that Rosenstein did not indicate in his speech how the revised policy accords with the requirement set out in Section 3.a. of the Department’s FCPA Corporate Enforcement Policy (included as Section 9-45.120 of the U.S. Attorneys Manual) that “[t]he company disclose[] all relevant facts known to it, including all relevant facts about all individuals involved in the violation of law.” It is clear, however, that Rosenstein’s remarks in announcing

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the new policies and corresponding changes to the Justice Manual confirm that although the Department is seeking to provide greater flexibility to prosecutors in corporate investigations, the prosecution of culpable individuals in such cases remains a top priority.

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