
DOJ Announces Revisions to Policy on Corporate Cooperation

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Overview

In a November 29, 2018 speech,¹ Deputy Attorney General Rod Rosenstein announced a softening of the US Department of Justice's (DOJ) policy on giving credit for cooperation in corporate prosecutions.

As memorialized in the 2015 memo titled Individual Accountability for Corporate Wrongdoing (known as the "Yates Memorandum"),² DOJ had followed an "all or nothing" policy that barred corporate defendants from receiving cooperation credit if they failed to provide information on *all* employees who were involved in criminal conduct.

But that strict cooperation credit requirement has now given way to a regime that allows prosecutors to give credit even where companies provide information only on those employees who were "substantially involved in or responsible for the misconduct at issue" and "provide . . . all relevant facts relating to that misconduct." (JM 9-28.700—The Value of Cooperation.)³

According to Rosenstein, DOJ's aim is to have a policy that works in the real world of limited investigative resources. Rosenstein acknowledged in his speech that the prior policy was "not strictly enforced" in certain cases,⁴ echoing previous comments where he cited frustration among private sector attorneys at the inconsistent application of the cooperation requirements.⁵

DOJ has adopted a similar approach on both criminal and civil matters, although the guidance on civil matters is explicit that companies must disclose any involvement of senior management or the board of directors or risk receiving no cooperation credit.⁶ the new policy "prohibits our attorneys from awarding any credit whatsoever to any corporation that conceals misconduct by members of senior management or the board of directors, or otherwise demonstrates a lack of good faith in its representations."⁷

These revisions were made to the Justice Manual, as the US Attorneys' Manual has recently been renamed.⁸ Over the course of the past year, DOJ has revisited all its policies and revised a significant number of them, based on the Department's view that the US Attorney's Manual "no longer reflected current law and Department practice."⁹ This also marks a shift away from the use of memos to denote shifts and changes in Department policy. Though guidance memos in the past

were sometimes eventually incorporated into the US Attorneys' Manual, Rosenstein has stated that he dislikes "management by memo," and the compilation and revision of the Justice Manual aims to create a more useful, complete and transparent document.

Impact on Corporate Defendants

Although the ultimate impact of the policy change remains to be seen, the new approach marks a recognition that criminal and civil investigations are a significant burden on corporate defendants. The new policy may alleviate that burden by allowing a company to conduct a more focused, less resource-intensive investigation—not turning over every rock, but instead looking closely at the conduct and key individuals at issue.

Nevertheless, because "substantially involved in or responsible for" is not defined, corporations conducting investigations and seeking cooperation credit face continuing uncertainty under the new policy. Corporations act at their peril if they scope investigations more narrowly than DOJ would expect—an issue that already has resulted in some corporations not getting "full" cooperation credit in resolutions over the past few years.

The policy shift may also hasten the resolution of protracted criminal investigations. Rosenstein acknowledged the tension between pursuing every individual who may have been involved and the limited resources available to the government. He argued, however, that the prior policy may have impeded resolution where there was disagreement between the government and the company about the extent of the wrongdoing. "In response to concerns raised about the inefficiency of requiring companies to identify every employee involved regardless of relative culpability, however, we now make clear 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."¹⁰ This seems to be an acknowledgment that DOJ is interested in and motivated to resolve cases with corporate defendants in an efficient manner and may not require the same level of disclosure as before in order to do so.

Other Notes

During his November 29 speech, Rosenstein announced that the Department has revised other policies to continue focusing on prosecuting individuals: "Under our revised policy, pursuing individuals responsible for wrongdoing will be a top priority in every corporate investigation." Despite this, Rosenstein's speech and the corresponding revision to the Justice Manual actually reflects a more permissive approach to treatment of individuals after a corresponding corporate resolution. For example, the new policy states that, "absent extraordinary circumstances, a corporate resolution *should* not protect individuals from criminal liability,"¹¹ where the Yates memo stated that "*no* corporate resolution *will* provide protection from criminal or civil liability for any individuals."¹²

As noted above, Rosenstein made it a point in his speech that pursuing individuals will remain a top priority for DOJ. But the change in policy will almost certainly have the effect of informing law enforcement about fewer individuals who may have been involved in wrongdoing. More peripherally involved individuals would not typically be prosecuted anyway, and so it is unclear what practical effect the new policy may actually have for individuals.

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1. <https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-remarks-american-conference-institute-0>
 2. <https://www.justice.gov/archives/dag/file/769036/download>
 3. https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations?utm_medium=email&utm_source=govdelivery#9-28.210
 4. <https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-remarks-american-conference-institute-0>
 5. <https://www.c-span.org/video/?441660-1/deputy-attorney-general-rosenstein-discusses-federal-law-enforcement&start=712>;
<https://globalinvestigationsreview.com/article/jac/1166160/doj-looking-to-clarify-yates-memo-ambiguities>
 6. <https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-remarks-american-conference-institute-0>
 7. <https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-remarks-american-conference-institute-0>
 8. <https://www.justice.gov/opa/pr/departments-justice-announces-rollout-updated-united-states-attorneys-manual>
 9. <https://www.justice.gov/opa/pr/departments-justice-announces-rollout-updated-united-states-attorneys-manual>
 10. <https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-remarks-american-conference-institute-0>
 11. https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations?utm_medium=email&utm_source=govdelivery#9-28.210 (emphasis added).
 12. <https://www.justice.gov/archives/dag/file/769036/download> (emphasis added).
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