

Deputy Attorney General Rod J. Rosenstein
Keynote Address
NYU Program on Corporate Compliance & Enforcement
New York University Law School
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(4:30 – 5:30 p.m.)

Thank you, Dean Morrison. I appreciate your thoughtful introduction. I am honored to be here with so many distinguished enforcement officials, corporate practitioners, and scholars from around the world.

One of my favorite management parables is about a child who watches her mother prepare a roast beef. The mother cuts the ends off the roast before she puts it in the oven. The child asks why. The mother says that she learned it from her mother. So the child asks her grandmother. The grandmother explains, “When your mother was a child, I cut the ends off because my pan was too small to fit the whole roast beef.”

The moral of the story is that the solutions of the past are not necessarily the right solutions today. Circumstances change. We should not blindly accept past practices. We should be conscientious about reconsidering our assumptions.

My talk today will focus on the Department of Justice’s corporate prosecution policies, but first I want to share some thoughts about Department policies in general.

I served as a United States Attorney for twelve years. When I wanted to find Department guidance about corporate investigations, drug enforcement or most other policies, I would turn to my computer, and search for it on the public internet.

In some cases, policies were modified in successive memos, so it required some historical research and reconstruction to determine what we were supposed to do.

Management-by-memo is an inefficient and often ineffective method of enforcing government policies. Our policies should be readily accessible to the people we expect to follow them.

That is one of the administrative goals I hope to achieve. If the Department’s leadership issues a specific instruction or directive and intends it to serve as policy guidance for the future, in most cases we should incorporate it formally into an official compilation of policies.

Most of you are familiar with the most significant official compilation of Department policies, the United States Attorneys’ Manual. The name is misleading: The U.S. Attorneys’ Manual applies to all components of the Department of Justice, not just the U.S. Attorney’s Offices.

To offer some historical context for that anomaly, the first United States Attorneys took office in 1789. The Department did not open for business until nearly a century later in 1870.

The name of the manual has stuck, although the expansion of “Main Justice” and its components has outpaced the growth of the U.S. Attorney’s Offices.

The upshot is that our U.S. Attorneys’ Manual is really the Department of Justice Manual. If a policy is not in our Manual, then it should be in one of the internal databases that are accessible to Department personnel, much like the corporate intranet portals familiar to many of you.

This is not just a trivial paperwork issue. It matters, for several reasons.

I remember my days as a line prosecutor in Baltimore, twenty years ago. I spent many hours working on cases, with the U.S. Attorneys’ Manual nearby. It was in a three-ring binder in those days, not on a computer screen. We received policy updates on blue sheets of paper that went into the binders.

It would have been frustrating if I needed to search for policies and guidelines scattered in various places.

Making policies readily accessible is Management 101. One of President Trump’s goals is to improve our government’s efficiency in serving the American people. If we save our attorneys and agents time searching for policies, they can spend that time fighting crime.

Our internal operating policies create no private rights. They are not enforceable in court. But it is important to have clear policies in order to promote consistency across the Department’s many offices and tens of thousands of decision-making employees. Consistency promotes fairness and enhances respect for the rule of law.

Predictability and consistency also are important because they facilitate good business decisions and promote the confidence of investors and consumers.

The Department’s policies about corporate investigations are spread among various sources. We have the U.S. Attorneys’ Manual. We have various memoranda named for former Deputy Attorneys General. We have other memoranda, speeches, and articles restating and interpreting the policies.

And every time a Department official speaks about the issue of corporate liability – as I am doing today – it generates speculation and commentary about how the remarks affect the policies. How will it impact decisions made by prosecutors? What effect should it have on businesses and individuals who may be the subjects or targets of federal investigations?

Speeches (like the one I am delivering right now), informal correspondence, “F.A.Q.” documents, and web pages offer useful ways to emphasize and explain the Department’s enforcement efforts. It is prudent to pay attention to them. But 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.

Another challenge is that there are many outdated policy memos floating around. Their status as guiding policy is not always clear, particularly to people outside the Department.

And too often, Department policy statements use three sentences to say what could be said in one. To paraphrase an observation attributed to many a great author: It often takes more time to write a shorter memo.

A man once asked Woodrow Wilson, “How long does it take you to prepare a ten-minute speech?” He replied, “Two weeks.”

“What about a one-hour speech?” the man queried. Wilson said, “One week.” The man then asked, “How long would it take you to prepare a two-hour speech?” Wilson answered, “I am ready now!”

I hasten to assure you that I did not fail to prepare today.

On the issue of memos, I regret that it has become a hallmark of expertise in the white-collar arena to know the name of every former Deputy Attorney General who issued a memo about the prosecution of corporate fraud.

The Deputy Attorney General should not be known for writing memos.

Of course, the Department will not stop issuing written guidance. My Office is leading efforts to develop guidance about certain issues, and we support the efforts of other Department leaders to do so, as well. Written guidance is a critical vehicle for ensuring that the Department’s work faithfully and consistently upholds American values and the rule of law. But we need to clearly distinguish binding policies from commentary.

My Office is working on a project to collect outstanding Department policy memoranda and to incorporate them, where appropriate, into the Manual. Department attorneys across the country have been identifying and collecting old policy memoranda and related guidance, with the goal of reviewing them and making recommendations about the policies they contain.

In the future, we should guide our employees through policies identified by section numbers in the Manual or another reference source, instead of by memos named for former Department officials and identified by dates.

If people remember any memo that I write, I hope it will be a memo that calls for fewer memos, and shorter memos.

When we issue new policies, they will be primarily in the form of updates to the Manual. Memos generally should be brief cover memos and commentary, not freestanding policy statements.

I hope this initiative will encourage future Department leaders to issue more concise policy statements. Historical background and commentary can go in a cover memo or press release; the

substance of a policy should be in a Manual, and authors should craft it to be readily understood and easily applied.

Attorney General Sessions used that approach in May, when he issued a new general criminal charging policy. It was crafted to fit on one page – although the letterhead caused it to carry over to page two. And it will be incorporated into the Manual.

Now let me turn to the topic of corporate crime.

The individual accountability policy issued by former Deputy Attorney General Yates is one of the policy memos under review. I will not announce any new “policy” today, but I will discuss some concrete steps that we are taking to enhance federal prosecutions and civil actions that target corporate fraud.

Of course, every time we mention that an existing policy is under review, defenders of the status quo emerge to proclaim that the current version of the policy is exactly right, as if it were written on stone tablets by the hand of God.

Maybe so. Maybe every current Department policy is exactly right. But in many cases, as with the roast beef I mentioned at the beginning of my remarks, we should evaluate whether the existing policy accomplishes its goals and best meets our current needs.

I generally agree with the critique that motivated Deputy Attorney General Yates to issue a new policy. Federal prosecutors should be cautious about closing investigations in return for corporate payments, without pursuing individuals who broke the law.

In some cases, that practice created the appearance that personal criminal immunity could be exchanged for corporate cash, through settlement agreements in which the United States committed not to prosecute individuals. And some critics contended that prosecutors lacked the expertise, resources, or will to pursue individuals.

I am not certain that the existing memos, talking points, and “F.A.Q.” documents got it exactly right. But any adjustments or changes we make will reflect several common themes.

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.

Corporate enforcement is an important focus of our Department. Investigations of corporate fraud and corruption are essential to the rule of law. People who do business in America need to know our laws will be enforced.

All enforcement priorities at the Department flow from a common principle – the rule of law. Our duty as public servants, and particularly as members of the law enforcement community, is to uphold the Constitution and the laws of the United States. Attorney General Sessions and I emphasize that mission daily, in the Department’s leadership offices and with attorneys and agents on the front lines.

It is important to note that some corporate fraud cases also involve violent crime and other Department priorities. In recent cases, corporations and financial institutions have been caught violating the anti-money laundering laws, tax laws, and export control restrictions to engage in transactions with hostile foreign powers and transnational organized crime groups. In January, a large public company entered into a deferred prosecution agreement involving millions of dollars funneled to human smugglers in China. Even small companies can inflict significant harm to our safety and security. This summer, small businesses in Atlanta were charged with laundering \$40 million on behalf of Mexican drug cartels.

We also prosecute corporate fraud that causes only economic harm, because investors need to know that they can rely on corporate representations. Customers need to know that they will not be cheated. Competitors need to know that businesses that follow the rules will not be disadvantaged.

Those principles are essential to the integrity of the financial markets, and to American economic security.

Rooting out corporate fraud levels the playing field for competitors and protects honest American workers and businesses. Law-abiding people should not have to choose between being cheated and becoming corrupt themselves. We are dedicated to protecting people who build their businesses, and their bank accounts, through lawful activities.

The Department’s commitment to those values shines brightly in recent accomplishments of our attorneys and agents.

Earlier this week, I met with members of our Criminal and Civil Fraud Sections. I also have talked with other Main Justice prosecutors and Assistant U.S. Attorneys throughout the country, and with leaders of our investigative agency partners. Many of their cases involve sophisticated fraud schemes and complex investigative techniques.

We aim to set the right tone about white-collar crime throughout the Department. The cases can be challenging and time-consuming. We are fostering a culture that supports and promotes the investigation and prosecution of individual perpetrators of corporate fraud.

In addition to policies that encourage the investigation of individual wrongdoers, we are also taking steps to enhance our training and culture.

First, we are going to do an even better job of training our prosecutors and agents about corporate fraud, including in how to build and prosecute cases against culpable individuals. We plan to schedule new seminars at the Department's training facility to educate our attorneys about corporate governance and strategies to investigate and prosecute corporate offenses.

Second, we are establishing a working group to evaluate and monitor the Department's long-term effectiveness in promoting individual accountability and deterring fraud. The working group will include members of my Office, the Associate Attorney General's Office, the Criminal Division, the Civil Division, U.S. Attorney's Offices, the FBI, and other Divisions and investigative agencies critical to our efforts. It will draw on a diversity of experience and perspectives in handling major corporate criminal and civil investigations.

We also will review the Department's practices concerning corporate monitors, the FCPA Pilot Program, corporate investigation training programs, and the mandate of the Financial Fraud Enforcement Task Force.

Two members of the working group accompanied me here today, Principal Associate Deputy Attorney General Robert Hur and Counsel Amelia Medina. I invite you to share your suggestions with them, just as I encourage the Department's attorneys and our law enforcement partners to communicate ideas to my staff.

We are also interested in suggestions about how to encourage better public-private cooperation in fighting crime. Cybercrime and hacking are fertile areas for collaboration. Others include financial fraud schemes, price-fixing conspiracies, and bribery. Those activities are susceptible to detection by good corporate citizens.

The Department encourages employers to show leadership in picking up the phone and contacting the FBI or the local U.S. Attorney's Office to report wrongdoing. We are all safer and better off if citizens report concerns to law enforcement.

In discussing the topic of corporate misconduct, it's important to recognize that many companies deserve great credit for taking the initiative to develop truly robust corporate compliance programs. The sophistication of compliance measures and tools that we see today regularly exceeds the measures that were in place ten years ago.

Compliance programs promote our primary goal, which is to deter wrongdoing. They also encourage prompt disclosure of wrongdoing when it comes to your attention.

Sometimes, the conduct disclosed to law enforcement by corporate America involves actions that took place in remote places or were hidden within complex computer networks. In those situations, corporate officers face a difficult judgment about whether to come forward to disclose the issue. They may believe that federal authorities likely will not uncover the problem.

Honesty is usually the best policy, often in the short-term and almost always in the long-run. Albert Einstein said, "Whoever is careless with the truth in small matters cannot be trusted with

important matters.” Attorney General Jackson had a slightly different version, describing reputation as “the shadow cast by one’s daily life.”

Corporations, their leaders, and certainly their lawyers develop reputations. For a corporation, the goal should be to develop a culture of integrity, a reputation for encouraging employees to do the right thing and to report suspicious conduct.

That is what we seek to do at the Department of Justice. We must safeguard our institutional reputation for fairness and impartiality. That does not require everybody to agree. It does require everybody to understand that candor and ethics matter.

The Department of Justice is working to incentivize, reward, and even partner with companies that demonstrate a commitment to combating corporate fraud.

That coordination may occur at the highest levels, when C-suite executives and major law firms engage with the Department. It may also come through the Department’s strong partnerships with international enforcement agencies and with federal and state regulators, some of whom are here today.

It may also come from honest citizens within companies. Our Department, and other federal enforcement agencies, often benefit from whistleblowers. Those programs are one reason why the Department is confident about our ability to uncover and punish corporate misconduct, however well-concealed.

In recent years, experts have debated the question, “Can a company be too big to jail?” That question focuses on the wrong issue. We will seek appropriate corporate penalties when justified by the facts and the law. The primary question should be, “Who made the decision to set the company on a course of criminal conduct?” Our investigations will continue to focus on those people.

We often talk about deterrence as a goal of law enforcement, but what causes deterrence?

Lawyers are relatively easy to deter. We are rule-bound; we are trained to follow rules. We face drastic consequences if we break them. We are deterred by fear of scandal, let alone arrest and conviction. But not everybody is susceptible to that kind of deterrence.

For twelve years, I commuted 40 miles each way from Bethesda to Baltimore, mostly on Interstate 95. The speed limit is 65 miles per hour. Some people take that as a suggestion. They know the enforcement strategy.

During those long drives, I sometimes thought about how well traffic laws illustrate the mission of law enforcement.

Speed limit signs deter law-abiding people. If the rules are clear, most people obey them out of a sense of duty and honor.

But some people are not deterred by rules. If we announce a speed limit, but we do not enforce it, then law-breakers always get ahead of law-abiding people.

What if we post a speed camera? A speed camera deters many law-breakers. They slow down as they approach the camera. Then they speed up again. It is not a complete solution. Nonetheless, it does illustrate deterrence.

But some people do not bother to slow down at all. Those people are thinking one of two things. Either they do not believe the government will enforce the penalty, or they calculate that the likely benefit of breaking the rule outweighs the potential penalty.

The lesson is that deterrence requires enforcement. The rules that matter most are the ones that carry expected penalties that decision-makers are unwilling to pay.

Focusing on deterrence requires us to think carefully about what we can achieve in our enforcement actions. Corporate settlements do not necessarily directly deter individual wrongdoers. They may do so indirectly, by incentivizing companies to develop and enforce internal compliance programs. But at the level of each individual decision-maker, the deterrent effect of a potential corporate penalty is muted and diffused.

Before I conclude, let me take a few minutes to highlight some of the great work our investigators and prosecutors have been doing to fight corporate crime.

According to the United States Sentencing Commission, 132 organizations were convicted of federal offenses during 2016. Nearly one-tenth of those organizations employed 1,000 employees or more.

The statistic does not include non-prosecution and deferred prosecution agreements reached by the Department, nor corporate civil settlements.

More than half of the organizational prosecutions involved the separate conviction of at least one related individual. Forty percent of the convicted individuals were board members or owners of businesses. Others included supervisory or management-level employees.

Many of the cases did not involve well-known companies or America's wealthiest executives. Hopefully, our largest corporations receive good advice about compliance and do not engage in fraud. If they do, we will be prepared to address it. The Department will not relent in seeking to hold corporate executives accountable if they violate the law.

There have been some notable cases this year. The U.S. Attorney's Office for the Eastern District of Michigan, along with the Environmental & Natural Resources Division, the Criminal Division, and other enforcement partners, secured a corporate guilty plea from an automobile manufacturer and charged several former executives with offenses related to a fraudulent scheme involving diesel cars.

Our Foreign Corrupt Practices Act team obtained convictions of individuals related to bribery and money-laundering offenses in three separate jury trials since May. And our Tax Division, working with the U.S. Attorney's Office in the Eastern District of Virginia, obtained a criminal conviction of the CEO of a health care technology company in a major shareholder fraud and employment tax case.

Our Civil Fraud Section has recovered over \$60 million to date in actions in fiscal year 2017 against individual defendants under the False Claims Act, not including recoveries where corporate owners were held jointly and severally liable with the corporate entity.

By effectively combating corporate misconduct and prosecuting individuals when appropriate, we can protect Americans from fraud, and reduce the risk of another corporate-fraud episode that triggers a sell-off or a recession.

That will require us to get the policies right, make the policies clear, continue training our agents and attorneys, and provide appropriate oversight.

The Department's rhetoric gets a lot of attention – the policy memos and speeches. But performance is what matters most.

We will not be satisfied until we are confident that our policies and practices fit the problems we face today.

When we are serious about wanting people to follow rules, it does no good merely to post them. We need to make clear our intent to enforce the rules, with sufficient vigor that people fear the consequences of violating them.

That is the lesson I learned on I-95. I appreciate the opportunity to share it with you tonight.

Thank you very much.