

## JUSTICE NEWS

### **Deputy Attorney General Rod J. Rosenstein Delivers Remarks at the American Conference Institute's 20th Anniversary New York Conference on the Foreign Corrupt Practices Act**

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#### **Remarks as prepared for delivery**

Thank you, Leslie, for that kind introduction. I am grateful for your many years of service in U.S. Attorney's Offices and in Main Justice.

I am very happy to be with you in New York today. You may have heard that I have been kind of busy in Washington.

Earlier this morning, I spoke at the annual White Collar Crime Institute here in Manhattan. Then I crossed Times Square to join you.

I did not intend to deliver two speeches about white collar crime today. When I received the invitations a few months ago, I hoped to delegate one of them to a Senate-confirmed Assistant Attorney General for the Justice Department's Criminal Division.

The President nominated a highly qualified lawyer named Brian Benczkowski to serve in that position almost one year ago. But Brian is still awaiting a confirmation vote, as are Jeffrey Clark, our nominee for the Environment and Natural Resources Division; Eric Dreiband for the Civil Rights Division; and Jody Hunt for the Civil Division.

Each nominee meets or exceeds the qualifications normally required for those important jobs. President Trump deserves great credit for nominating champions of the rule of law to serve in the Department of Justice. But one year later, too many of them are still waiting in the wings.

There are seven litigating components in Main Justice. Only two of them have Senate-confirmed nominees.

When the founders drafted the Constitution in 1787, this is probably not what they had in mind.

It used to take only a few days to secure the Senate's advice and consent for presidential nominations.

Fortunately, we assembled a superb team to serve as acting leaders of the Justice Department's key components, and we will keep moving forward.

My first litigation job was with the Public Integrity Section of the Justice Department's Criminal Division. Public corruption offenses involving federal, state, and local government officials differ from bribery and other offenses under the Foreign Corrupt Practices Act. But they are similar in how they erode public trust in government and stifle competition, efficiency, and innovation.

Capital markets operate only because of rules and regulations promulgated and enforced by lawyers and government officials.

In Shakespeare's play about Henry VI, a character named Dick the Butcher proclaims: "The first thing we do, let's kill all the lawyers."

Some people mistakenly assume that Shakespeare was poking fun at lawyers. But Dick the butcher is not a businessman upset about overregulation. He is a villain scheming to take over the government.

Shakespeare's point is that without lawyers, nobody would need to follow the law.

That would be good for criminals. But it would be very bad for business!

The rule of law is essential to commerce. It allows people to enter contracts, make investments and project revenue with some assurance about the future. It establishes a mechanism to resolve disputes, and it provides a degree of protection from arbitrary government action.

Foreign Corrupt Practices Act enforcement focuses on the global marketplace, because the world is interconnected. Economic problems in distant places affect American businesses and financial markets. So too does foreign corruption.

Foreigners who avail themselves of the American marketplace need to abide by our rules and standards. And our citizens, whether doing business here or overseas, remain accountable to the statutes and regulations of this great and prosperous nation.

Paying bribes to government officials is destructive because it impels leaders to advance their personal interests instead of the interests of their citizens.

Thomas Jefferson famously stated: "On matters of style, swim with the current. On matters of principle, stand like a rock." We must always stand for the principle that government exists to serve the interests of the citizens.

Before the FCPA was enacted in 1977, paying bribes was viewed as an ordinary aspect of doing business overseas. Some businesses believed that prohibiting corrupt payments would put them at a competitive disadvantage. But Congress passed the FCPA with bipartisan support, and the marketplace adapted to America's effort to establish and enforce anti-bribery laws.

The Organization for Economic Co-operation and Development (OECD) adopted an Anti-Bribery Convention in 1997. The Convention established legally binding standards to prohibit bribery of public officials in international business transactions. Forty-three countries are now signatories to the Anti-Bribery Convention.

The United States was one of the first. Our leadership through the years encouraged other major world powers to commit to doing business with integrity.

Last November, the Department co-hosted a conference with the Securities and Exchange Commission and the OECD. The conference focused on strengthening international anti-bribery initiatives and improving coordination across borders.

Federal prosecutors and investigators recently secured a number of convictions and other resolutions

against companies and individuals in major FCPA-related cases. The FCPA Unit has announced eight guilty pleas since the start of 2018 alone. Our FCPA Unit Chief, Dan Kahn, is hard at work, along with the excellent Assistant U.S. Attorneys from the Eastern and Southern Districts of New York who participated in this conference.

We also benefit from the exceptional assistance of the Securities and Exchange Commission and other federal agencies, as well as law enforcement partners around the world.

The Department works closely with counterparts in the United Kingdom, France, Germany, Switzerland, the Netherlands, Brazil, and many other nations.

Last December, we announced the first coordinated resolution with enforcement authorities in Singapore. That investigation secured a \$400 million corporate resolution involving a deferred prosecution agreement, a related guilty plea by a subsidiary, and a guilty plea by an individual executive.

Corruption is often a tool for companies that are unable to keep up with competitors through innovation, quality, and efficiency. When we speak of leveling the playing field for businesses, we mean leveling up to higher standards, not down.

Law enforcement efforts are most effective when we build bridges with law-abiding members of the business community.

One of America's best crime-fighting weapons is the ingenuity and integrity of its people. Good corporate citizens play a critical role in upholding the rule of law.

So the Department should reward companies that try in good faith to deter crime. That means developing corporate compliance programs that help to prevent problems in the first instance, and that detect problems early and stop them from spreading. It also means investigating misconduct, voluntarily reporting it, cooperating fully in investigations, and implementing appropriate remedies.

When I started my first supervisory job in 2001, one of the most popular management books was "Who Moved My Cheese?" If you are about my age, you probably are familiar with it. It is a fable about how to manage change.

The story involves two men who live in a maze. There is a place in the maze where they can always find cheese, which represents success.

But one day, the cheese stops showing up in the usual spot. In the face of this new challenge, one man decides to adapt. He ventures through the maze looking for more cheese. The other man sticks with his old routine and refuses to change.

The adaptable man realizes that the cheese is always moving. He constantly monitors his cheese supply and explores the maze to prevent complacency from setting in.

The complacent man goes hungry.

That simple lesson is a reminder about the need to evolve to meet changing circumstances.

The Department announced our FCPA Corporate Enforcement Policy last November, with the aim of encouraging responsible corporate behavior. The policy authorizes benefits to companies that meet

rigorous requirements of disclosure, cooperation, and remediation, including disgorgement of ill-gotten gains.

The Corporate Enforcement Policy is not an offer of immunity, and it contains no guarantees, but it provides companies with greater predictability to inform their decision-making.

For example, we instituted a new “presumption” in favor of a declination for eligible companies that satisfy relevant standards.

In addition, we incorporated the policy into the U.S. Attorneys’ Manual, the central resource manual for Department policies. The manual does not create a private right of action and is not enforceable in court. I need to be careful to emphasize that point in a room filled with defense lawyers!

For many decades, former Deputy Attorneys General have lived on through corporate fraud memoranda bearing their names. We followed the Holder Memo, the Thompson Memo, the Filip Memo and the Yates Memo, to name a few. One of my goals in taking this job was to make sure there would be no Rosenstein memo!

It is difficult to keep track of all the memos, particularly for busy prosecutors. By incorporating the FCPA Corporate Enforcement Policy in our manual, we make it clear that the policy extends to prosecutors beyond the Fraud Section, we make it more accessible to employees, we provide greater transparency for stakeholders, and we promote greater consistency in FCPA investigations around the country.

We are applying a similar approach to Department policies and memos across the board. The U.S. Attorneys’ Manual was designed to be a quick and ready source of internal Department policies and procedures for our 115,000 personnel, but its utility diminished over the years as it became bloated with unnecessary rhetoric in some areas and failed to keep up with new policies in other areas.

As part of the effort to consolidate and streamline our policies, we initiated a comprehensive review and update to the manual, for the first time in at least 20 years. We are reviewing the entire manual, a total of approximately 11,000 pages. Our goals are to identify redundancies, clarify ambiguities, eliminate surplusage, and incorporate constructive additions.

I hope these efforts will encourage future Department leaders to write fewer memos, and instead to put policy changes directly into the manual.

The manual helps to guide our exercise of prosecutorial discretion. That is important because the rule of law is about applying neutral principles and basing our decisions on the truth.

Two weeks ago, we announced the first corporate declination under our new FCPA Policy. The company engaged in responsible corporate conduct after discovering of a violation and satisfied the rigorous requirements of the policy. The Department gave the company credit for its disgorgement as part of a \$9 million payment in a related SEC administrative proceeding.

So I hope you will advise your clients to work more closely with the Department when FCPA issues arise. It is the right thing to do, and it makes strategic sense.

One of the things companies worry about is the risk of facing multiple enforcement actions for the same conduct. It is important for us to be aggressive in pursuing wrongdoers, but we should discourage disproportionate enforcement of corruption laws by multiple authorities. In football, the term “piling on” refers

to a player jumping on a pile of other players after the opponent is already tackled.

"Piling on" is the subject of a new Department policy that we are announcing today. The policy instructs Department components to appropriately coordinate with one another and with other enforcement agencies in imposing multiple penalties on a company for the same conduct.

In highly regulated industries, a company may be accountable to multiple regulatory bodies. That creates a risk of repeated punishment that goes beyond what is necessary to rectify the harm and deter future violations.

Business operations regularly span jurisdictions and borders. Whistleblowers routinely report allegations to multiple enforcement authorities, which may investigate the claims jointly or through their own separate and independent proceedings.

By working with agencies such as the SEC, CFTC, Federal Reserve, FDIC, OCC, and OFAC, our Department is better able to detect sophisticated financial fraud schemes and deploy adequate penalties and remedies.

The Department also works closely with many foreign partners to uncover and redress violations that occur overseas.

But the rule of law compels us to ensure that corporate resolutions that flow from parallel or joint investigations into the same conduct are reasonable and proportionate to that conduct.

"Piling on" can deprive a company of the benefits of certainty and finality ordinarily available through a full and final settlement. We need to consider the impact on innocent employees, customers, and investors who seek to resolve problems and move on. We need to think about whether it would be preferable to address a new scheme instead of devoting additional enforcement resources to an old violation.

Our new policy is directed internally at Department personnel. It provides no private right of action and is not enforceable in court, but it will be incorporated into the U.S. Attorneys' Manual and will guide our decisions.

This is another step towards greater transparency and consistency in corporate enforcement. In our fight against white collar crime and corporate wrongdoing, we want companies and their counsel to promptly report suspected crimes, and we want them to expeditiously negotiate reasonable resolutions.

There are four core features of the new policy.

First, the policy reaffirms that the federal government's criminal enforcement authority should not be used against a company for purposes unrelated to the investigation and prosecution of a possible crime. Department attorneys may not invoke the threat of criminal prosecution solely to persuade a company to pay a larger settlement in a civil case.

That is not a policy change. It is a reminder of and commitment by the Department to principles of fairness and the rule of law.

Second, the policy addresses situations in which Department attorneys in different components and offices may be seeking to resolve a corporate case based on the same misconduct.

The new policy directs Department components to coordinate with one another, and achieve an overall equitable result. The coordination may include crediting and apportionment of financial fines, forfeitures, and penalties, and other means of avoiding disproportionate punishment.

Third, the policy encourages Department attorneys, when possible, to coordinate with other federal, state, local, or foreign enforcement authorities seeking to resolve a case with a company for the same misconduct.

The Department's cooperation with agency and enforcement partners here and abroad is stronger than ever. Together, we are rooting out sophisticated financial schemes and sharing investigative techniques.

Finally, the new policy sets forth some factors that Department attorneys may evaluate in determining whether multiple penalties serve the interests of justice in a particular case.

Sometimes, penalties that may seem duplicative really are essential to achieve justice and protect the public. In those cases, we will not hesitate to pursue complete remedies, and to assist our law enforcement partners in doing the same.

Factors identified in the policy that may guide this determination include the egregiousness of the wrongdoing; statutory mandates regarding penalties; the risk of delay in finalizing a resolution; and the adequacy and timeliness of a company's disclosures and cooperation with the Department.

Cooperating with a different agency or a foreign government is not a substitute for cooperating with the Department of Justice. And we will not look kindly on companies that come to us after making inadequate disclosures to secure lenient penalties with other agencies or foreign governments. In those instances, the Department will act without hesitation to fully vindicate the interests of the United States.

The Department's ability to coordinate outcomes in joint and parallel proceedings is also constrained by more practical concerns. The timing of other agency actions, limits on information sharing across borders, and diplomatic relations between countries are just a few issues we confront that do not always lend themselves to easy solutions.

But all of our Department components should seek to coordinate with domestic and foreign authorities, when consistent with their enforcement mission.

In order to promote consistency, we established a new Working Group on Corporate Enforcement and Accountability within the Justice Department. The working group includes Department leaders and senior officials from the FBI, the Criminal Division, the Civil Division, other litigating divisions involved in significant corporate investigations, and the U.S. Attorney's Offices.

The working group will make internal recommendations about white collar crime, corporate compliance, and related issues.

We look forward to collaborating with other agencies in implementation efforts. And we welcome input from stakeholders who share our commitment to uphold the rule of law.

Most American companies are serious about engaging in lawful business practices. They want to do the right thing. They need and deserve our support to help protect them from criminals who seek unfair advantages.

Corporate America should regard law enforcement as an ally. In turn, the government should provide incentives for companies to engage in ethical corporate behavior and to assist in federal investigations.

That is the best way to deter crime and maintain the rule of law.

Companies can help protect themselves by using caution when choosing business associates and by ensuring appropriate oversight of their activities.

An ancient proverb counsels that if you want to know a person's character, you should consider his friends.

My advice to corporate officers is to make sure that you can stand proudly with the company you keep. If you and your associates respect the law, the Department of Justice will stand with you.

And may we always follow Thomas Jefferson's advice to stand like a rock on matters of principle.

Thank you very much.

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**Speaker:**

Deputy Attorney General Rod J. Rosenstein

**Component(s):**

Office of the Deputy Attorney General

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