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DOJ Guidance Is Dead, Long Live DOJ Guidance

By **David Chaiken**

Comments in a recent speech by U.S. Attorney General Jeff Sessions may appear to kill much-needed U.S. Department of Justice guidance commonly relied upon by government investigations and enforcement lawyers, in-house chief legal officers and regulatory lawyers, and compliance professionals at companies in heavily regulated industries or that regularly deal with the federal government. These consist primarily of publicly traded companies, financial institutions, health care companies and providers, and government contractors. For those of us who work in this area, our corporate and individual clients almost always want more guidance and transparency from the DOJ, not less. But it is probably premature and inaccurate to declare DOJ guidance dead.



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In a Nov. 17, 2017, speech given by Attorney General Sessions to a conservative lawyers group, the Federalist Society, the attorney general stated that “too often, rather than going through the long, slow regulatory process provided in statute, agencies make new rules through guidance documents — by simply sending a letter,” that “[w]e have prohibited all Department of Justice components from issuing any guidance that purports to impose new obligations on any party outside the Executive Branch,” and that “[w]e will review and repeal existing guidance documents that violate this common sense principle.”[1]

Not surprisingly, writers for Law360 and other commentators have interpreted these statements to mean that the U.S. Department of Justice may no longer issue guidance to companies — and may repeal or disavow existing guidance — that could help them evaluate their internal compliance and anti-corruption programs, whether to self-report misconduct to the DOJ, how or whether to resolve criminal and civil DOJ investigations short of a trial, and how to seek leniency or even a declination of charges. This is big news, as it would seem to encompass the DOJ’s 2017 corporate compliance guidance, the 2016 Foreign Corrupt Practices Act pilot program, the 2015 Yates memorandum, the 2012 DOJ and U.S. Securities and Exchange Commission FCPA resource guide, the 2008 Filip memorandum, and other key policies set forth in the U.S. Attorney’s Manual and elsewhere.

But a closer look reveals that this interpretation is more likely a misunderstanding based on a somewhat confusing rollout by the attorney general and his staff. The DOJ issued a related press release the same day, titled, “Attorney General Jeff Sessions Ends the Department’s Practice of Regulation by Guidance.”[2] Attorney General Sessions’ speech did not reference or link to this release. The release indicates that the attorney general issued a memorandum announcing his new policy, which of course his speech also did not mention.

But a copy of the memorandum is linked to the release, and the memorandum is enlightening. Buried at the end of the memorandum, dated the previous day, Nov. 16, 2017, is the caveat that “[t]his memorandum ... does not address documents informing the public of the Department’s enforcement priorities or factors the Department considers in exercising its prosecutorial discretion.”[3]

If this memorandum means what it says, then the new policy may not impact most, if not all, of the key policies referenced above (i.e., the Yates memorandum, the FCPA resource guide, etc.), because, in large part, those policies merely describe and elucidate the factors that federal prosecutors are required to consider in exercising prosecutorial discretion, including in making charging and declination decisions, crediting cooperation, and resolving investigations.

It is always difficult to read the tea leaves, and only time will tell how Attorney General Sessions’ new policy will be implemented. But this statement — buried at the end of a memorandum that itself is linked to a press release that no one would find unless he or she went looking for it — appears to render the attorney general’s Nov. 17 announcement much ado about nothing in the context of government investigations, enforcement actions and corporate compliance.

The announcement and accompanying rollout are also ironic in light of recent comments by Deputy Attorney General Rod Rosenstein criticizing as frustrating the need for federal prosecutors to “search for policies and guidelines scattered in various places,” noting that “[m]aking policies readily accessible is Management 101,” and stating that “[m]emos generally should be brief cover memos and commentary, not freestanding policy statements”[4] like the memorandum issued by the attorney general on Nov. 16, 2017.

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[1] Attorney General Sessions Delivers Remarks at the Federalist Society 2017 National Lawyers Convention, U.S. Dep’t of Justice (Nov. 17, 2017) (available at <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-federalist-society-2017-national-lawyers>) (visited on Nov. 20, 2017).

[2] See <https://www.justice.gov/opa/pr/attorney-general-jeff-sessions-ends-department-s-practice-regulation-guidance> (visited on Nov. 20, 2017).

[3] Memorandum from Jefferson B. Sessions III, Attorney General, Re: Prohibition on Improper Guidance Documents (Nov. 16, 2016), at 2 (available at <https://www.justice.gov/opa/press-release/file/1012271/download>) (visited on Nov. 20, 2017).

[4] Deputy Attorney General Rod Rosenstein Keynote Address on Corporate Enforcement Policy, NYU Program on Corporate Compliance & Enforcement (Oct. 6, 2017) (available at https://wp.nyu.edu/compliance_enforcement/2017/10/06/nyu-program-on-corporate-compliance-enforcement-keynote-address-october-6-2017/) (visited on Nov. 20, 2017).
