

Investigations, Compliance and Defense

What's in a Name? That Which We Now Call the Justice Manual Has a Familiar, But Distinctive, Scent

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On September 25, 2018, Deputy Attorney General Rod Rosenstein announced the rollout of the “Justice Manual” – a revised and renamed version of the U.S. Attorneys’ Manual, a long-used reference for Department of Justice (DOJ) policies and procedures.^[1] The most significant changes appear to be confined to anticipated codifications of well-publicized new policies (although one such policy was, puzzlingly, omitted). But some other changes have not been previously addressed by Department leadership, and may provide insight into the Department’s mindset in light of recent events.

The recent rollout was the culmination of a yearlong review and overhaul of the Manual, the first in more than 20 years.^[2] This initiative to streamline DOJ policies and revamp the U.S. Attorneys’ Manual was announced by Deputy AG Rosenstein last October in a speech at NYU. Rosenstein explained in his initial announcement that the project would work to identify redundancies, clarify ambiguities, eliminate surplus language, and update the Manual to reflect current law and DOJ practice, including through the incorporation of outstanding policy memoranda.^[3] According to DOJ’s recent announcement, the name change from “U.S. Attorneys’ Manual” to “Justice Manual” not only reflects this significant undertaking by DOJ employees, but also emphasizes the applicability of the Manual to the entire Department, beyond the U.S. Attorneys’ Offices.^[4]

Several DOJ Policy Memoranda Codified in the Justice Manual, But With a Key Omission

Several policy memoranda announced in the last eighteen months have now been officially incorporated into the new Justice Manual:

- **Charging & Sentencing:** In May 2017, Attorney General Jeff Sessions announced a new charging and sentencing policy, which has now been incorporated into the Manual, generally directing prosecutors to “charge and pursue the most serious, readily provable offenses” – *i.e.*, “those that carry the most substantial guidelines sentence, including mandatory minimum sentences.”^[5] Previously, prosecutors were directed to conduct an “individualized assessment” and select charges based on “the extent to which particular charges fit the specific facts and circumstances of the case, are consistent with the purposes of the federal criminal code, and maximize the impact of federal resources on crime.”^[6] The Sessions policy proceeds in the opposite direction: it requires prosecutors to begin their analysis with the most serious provable offenses, and then permits making an “exception” where justified. It will likely be difficult to disaggregate any incremental effect on charging decisions attributable to this change to the Manual as opposed to the natural consequence of changed leadership in the U.S. Attorneys’ Offices.
- **Piling On:** In May 2018, Deputy AG Rosenstein announced a new “piling-on” policy, designed to discourage the assessment of duplicative penalties by different investigators for the same misconduct – for example, by encouraging coordination with, and consideration of the penalties imposed by, other federal, state, local, or foreign enforcement authorities.^[7] The new Justice Manual provision closely mirrors the language of the memorandum announcing the policy. The need to avoid “piling on” of this kind has been a DOJ talking point for several years,^[8] and the incorporation of this provision into the Manual, along with the incorporation of the FCPA Corporate Enforcement Policy into the Manual in November 2017, and the lack of substantive change to the “Yates Memo,” previously incorporated into the Manual in 2015, all signal general continuity with key

corporate criminal enforcement principles of the prior Administration.^[9] It remains to be seen whether DOJ's review of those principles will lead to change in the future.

- **Qui Tam Actions:** One potentially notable addition to the Manual is a memorandum from the Director of the Civil Fraud Section regarding qui tam actions that leaked to the press in early January 2018. The memo directed prosecutors to consider seeking dismissal of meritless qui tam actions, and set forth a list of factors they should consider in deciding whether to seek dismissal, such as preserving government resources, controlling litigation, or protecting DOJ's litigation prerogatives.^[10] When the memo was initially leaked it was characterized by the Department as an effort at consistency rather than a policy change,^[11] but its inclusion in the Justice Manual formalizes its application to the decision-making process.^[12] This section will likely be frequently cited back to the Department by False Claims Act practitioners.
- **Third-Party Settlements:** In June 2017, Attorney General Sessions announced a new policy prohibiting DOJ attorneys from entering into settlements that direct or provide for payments to non-governmental third parties not directly harmed by the conduct at issue – a response to Obama-era settlements in some cases requiring settling parties, particularly banks, to make donations to third-party groups like nonprofits and community organizations to offset damages caused by the alleged offenders.^[13] As with the piling-on policy, the new section of the Manual closely follows the previously-announced policy.
- **Religious Liberty:** In October 2017, Attorney General Sessions set forth twenty principles protecting religious liberty, which have been incorporated into a new section of the Manual regarding "Respect for Religious Liberty."^[14] For example, one principle reminds prosecutors that government may not target religious individuals or entities through discriminatory enforcement of neutral, generally applicable laws.^[15] Another new section instructs DOJ and U.S. Attorneys' Offices to reasonably accommodate religious observance and practice in all activities, including litigation,^[16] with a religious liberty litigation coordinator to be assigned to implement this mandate in each litigating division.^[17]

One notable exception to the incorporation of major policy memos, however, is the new policy announced in January 2018 by former Associate Attorney General Rachel Brand, prohibiting DOJ civil litigators and U.S. Attorneys from using guidance documents issued by federal agencies (or noncompliance with these documents) to establish violations of law in affirmative civil enforcement actions.^[18] This policy memo followed a November 2017 announcement by Attorney General Sessions ending what the Attorney General described as a DOJ practice of issuing its own guidance documents that would have the effect of adopting new regulatory requirements or amending the law without going through the notice-and-comment rulemaking process.^[19] It is unclear why the Brand Memo was not incorporated into the Justice Manual, as Department leadership has made no other suggestion that the policy no longer applies.

Other New Provisions Hint at the Challenges of a Changed World

Other provisions added over the past eighteen months appear to reflect the moment: a new imperative to combat foreign influence; tweaks to the investigative process relating to political corruption; and a new policy regarding DOJ employees' use of social media:

- **Foreign Influence Operations:** In its July 2018 report assessing DOJ's work in the cyber arena and identifying how federal law enforcement can more effectively combat cybercrime and cyber-enabled threats, the Attorney General's Cyber-Digital Task Force announced a new policy regarding disclosure of foreign influence operations.^[20] This policy has been incorporated (in language closely mirroring the Task Force report) into the Justice Manual in a new provision addressing the investigation and prosecution of foreign influence activities, including covert actions by foreign governments.^[21] It sets forth specific circumstances under which such operations may be disclosed, emphasizing that partisan politics should not play a role in disclosure decisions.^[22] Notably, this is the first iteration of the Manual to explicitly advise that DOJ employees, whether attorneys or agents, be mindful of internal policies governing the timing of charges or overt investigative steps during election cycles – surely a response to the inevitably fraught politics of the

Department appearing to referee the authenticity of statements designed to promote certain parties or candidates, and a reaction to the criticism of the Department's statements during the 2016 Presidential elections.[23]

- **Investigations of Government Officials:** Other updates are noteworthy given recent indictments of Congressmen Chris Collins (for insider trading)[24] and Duncan Hunter (for misusing campaign funds).[25] Investigations involving members of Congress or their staff now require consultation with the Public Integrity Section.[26] And warrantless monitoring of oral communications regarding suspected misconduct by members of Congress, federal judges, or Executive Branch officials (that is, through consensual recordings by an undercover agent or cooperating source) must now be approved by a Deputy Assistant Attorney General of the Criminal Division – a higher level than required in the prior version of the manual.[27] Congressmen Hunter in particular has criticized DOJ for what he deemed a politically-motivated attack, given his support of President Trump's campaign.[28]
- **Social Media:** In line with the goal of protecting DOJ from outside criticism in the current political climate, the Department's policy regarding personal use of social media by employees – first announced in a March 2014 memorandum from then-Deputy Attorney General James Cole[29] – has also now been formally incorporated into the Justice Manual.[30] The provision requires employees to adhere to government-wide standards and rules of professional conduct applicable to online communications at all times, including when off duty, counseling that they should be particularly careful to safeguard confidential information, avoid public comments that could influence trial outcomes, avoid false or reckless statements regarding judges, and avoid statements that could be perceived as showing prejudice based on any protected basis.[31] DOJ attorneys are also advised to be aware of, and compliant with, any applicable rules of professional conduct related to social media, and to consider whether statements posted on social media may be subject to the Government's discovery obligations.[32]

What Comes Next?

One unaddressed deficiency, particularly evident following this comprehensive set of revisions, is the absence of an easily-searchable index of changes. Although the Manual has actually been changed piecemeal over time, including the numerous changes made since the 2017 transition, the Manual's Archive Page links back only to the U.S. Attorneys' Manual as it existed in 1988 (and earlier), not the 1997 version. The individual sections list the dates when they were last edited, but neither the sections themselves nor the Archive identifies which text had been changed, and when. By comparison, the U.S. Sentencing Commission provides both an archive of prior versions of the Sentencing Guidelines, as well as a detailed version history for each provision of the Guidelines, enabling readers to quickly discern key changes and when they were made.

The Department of Justice is not immune to changing administrations, and each subsequent administration has sought to provide attorneys on the front lines with guidance as to how they should approach litigation and investigations. The incorporation of various policies into the Manual itself provides increased coherence that will hopefully lead to more uniform application of DOJ policy in future cases. The creation of official policy via incorporation into the Manual rather than through freestanding memoranda does not free the process from political demands – see, for example, the new religious liberty provisions – but rather shifts the focus from the author of a policy to its substance and impact. Ultimately, it remains to be seen whether the new Justice Manual will end up meaningfully impacting DOJ practice.

[1] U.S. Dep't of Justice, *Department of Justice Announces the Rollout of An Updated United States Attorneys' Manual*, Sept. 25, 2018, <https://www.justice.gov/opa/pr/departments-justice-announces-rollout-updated-united-states-attorneys-manual>.

[2] U.S. Dep't of Justice, *Department of Justice Announces the Rollout of An Updated United*

States Attorneys' Manual, Sept. 25, 2018, <https://www.justice.gov/opa/pr/department-justice-announces-rollout-updated-united-states-attorneys-manual>.

[3] Deputy Att'y General Rod J. Rosenstein, *NYU Program on Corporate Compliance & Enforcement Keynote Address*, Oct. 6, 2017, https://wp.nyu.edu/compliance_enforcement/2017/10/06/nyu-program-on-corporate-compliance-enforcement-keynote-address-october-6-2017/.

[4] U.S. Dep't of Justice, *Department of Justice Announces the Rollout of An Updated United States Attorneys' Manual*, Sept. 25, 2018, <https://www.justice.gov/opa/pr/department-justice-announces-rollout-updated-united-states-attorneys-manual>.

[5] U.S. Dep't of Justice, Justice Manual § 9-27.300 (2018); U.S. Dep't of Justice, *Attorney General Sessions Issues Charging and Sentencing Guidelines to Federal Prosecutors*, May 12, 2017, <https://www.justice.gov/opa/pr/attorney-general-sessions-issues-charging-and-sentencing-guidelines-federal-prosecutors>; Memorandum from Att'y General Jefferson Sessions, *Department Charging and Sentencing Policy*, May 10, 2017, <https://www.justice.gov/opa/press-release/file/965896/download>.

[6] U.S. Dep't of Justice, U.S. Attorneys' Manual § 9-27.300 (2017), <https://web.archive.org/web/20171207140014/https://www.justice.gov/usam/usam-9-27000-principles-federal-prosecution#9-27.300>.

[7] U.S. Dep't of Justice, Justice Manual § 1-12.100 (2018); U.S. Dep't of Justice, *Deputy Attorney General Rod Rosenstein Delivers Remarks to the New York City Bar White Collar Crime Institute*, May 9, 2018, <https://www.justice.gov/opa/speech/deputy-attorney-general-rod-rosenstein-delivers-remarks-new-york-city-bar-white-collar>; Memorandum from Deputy Att'y General Rod J. Rosenstein, *Policy on Coordination of Corporate Resolution Penalties*, May 9, 2018, <https://www.justice.gov/opa/speech/file/1061186/download>.

[8] See, e.g., U.S. Dep't of Justice, *Assistant Attorney General Leslie R. Caldwell Delivers Remarks at the New York City Bar Association's Fourth Annual White Collar Crime Institute*, May 12, 2015, <https://www.justice.gov/opa/speech/assistant-attorney-general-leslie-r-caldwell-delivers-remarks-new-york-city-bar-0>.

[9] Nicholas R. Barnaby, Katya Jestin, Anne Cortina Perry, and Ravi Ramanathan, *DOJ Announces New Policy to Avoid "Piling On" of Duplicative Corporate Penalties*, May 11, 2018, <https://jenner.com/library/publications/18003>; David Bitkower, Gayle E. Littleton, Nicholas R. Barnaby, Keisha N. Stanford, and Natalie K. Orpett, *DOJ Formalizes FCPA Enforcement Policy – Reinforcing Incentives for Disclosure and Cooperation Under the FCPA Pilot Program and Creating a "Presumption" in Favor of a Declination of Prosecution for Companies that Voluntarily Disclose Misconduct*, Nov. 30, 2017, <https://jenner.com/library/publications/17586>; Anthony S. Barkow and Anne Cortina Perry, *The Value of Separate Employee Counsel After Yates Memo*, Law360, Dec. 9, 2015, <https://www.law360.com/articles/734845/the-value-of-separate-employee-counsel-after-yates-memo>.

[10] Memorandum from Director of the Civil Fraud Section Michael Granston, *Factors for Evaluating Dismissal Pursuant to 31 U.S.C. 3730(c)(2)(A)*, Jan. 10, 2018, <https://assets.documentcloud.org/documents/4358602/Memo-for-Evaluating-Dismissal-Pursuant-to-31-U-S.pdf>.

[11] See Cogan Schneier, *DOJ Memo Urges Government Lawyers to Dismiss 'Meritless' FCA Cases*, The National Law Journal, Jan. 24, 2018, <https://www.law.com/nationallawjournal/sites/nationallawjournal/2018/01/24/new-doj-memo-urges-govt-lawyers-to-dismiss-meritless-fca-cases/>.

[12] U.S. Dep't of Justice, Justice Manual § 4-4.111 (2018).

[13] U.S. Dep't of Justice, Justice Manual § 1-17.000 (2018); U.S. Dep't of Justice, *Attorney General Jeff*

Sessions Ends Third Party Settlement Practice, June 7, 2017, <https://www.justice.gov/opa/pr/attorney-general-jeff-sessions-ends-third-party-settlement-practice>; Memorandum from Att'y General Jefferson Sessions, *Prohibition on Settlement Payments to Third Parties*, June 5, 2017, <https://www.justice.gov/opa/press-release/file/971826/download>.

[14] Memorandum from Att'y General Jefferson Sessions, *Federal Law Protections for Religious Liberty*, Oct. 6, 2017, <https://www.justice.gov/opa/press-release/file/1001891/download>; U.S. Dep't of Justice, Justice Manual § 1-15.300 (2018); see also *id.* § 1-15.100 (2018).

[15] U.S. Dep't of Justice, Justice Manual § 1-15.300 (2018).

[16] U.S. Dep't of Justice, Justice Manual § 1-15.100 (2018).

[17] U.S. Dep't of Justice, Justice Manual § 1-15.200 (2018).

[18] Memorandum from Associate Att'y General Rachel Brand, *Limiting Use of Agency Guidance Documents in Affirmative Civil Enforcement Cases*, Jan. 25, 2018, <https://www.justice.gov/file/1028756/download>.

[19] U.S. Dep't of Justice, *Attorney General Jeff Sessions Ends the Department's Practice of Regulation by Guidance*, Nov. 17, 2017, <https://www.justice.gov/opa/pr/attorney-general-jeff-sessions-ends-department-s-practice-regulation-guidance>; Memorandum from Att'y General Jefferson Sessions, *Prohibition on Improper Guidance Documents*, Nov. 16, 2017, <https://www.justice.gov/opa/press-release/file/1012271/download>.

[20] U.S. Dep't of Justice, *Report of the Attorney General's Cyber Digital Task Force*, at 16-17, July 2, 2018, <https://www.justice.gov/ag/page/file/1076696/download>; see also U.S. Dep't of Justice, *Deputy Attorney General Rod J. Rosenstein Delivers Remarks at the Aspen Security Forum*, July 19, 2018, <https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-remarks-aspen-security-forum>.

[21] U.S. Dep't of Justice, Justice Manual § 9-90.730 (2018).

[22] U.S. Dep't of Justice, Justice Manual § 9-90.730 (2018).

[23] U.S. Dep't of Justice, Justice Manual § 9-90.730 (2018).

[24] U.S. Dep't of Justice, *Congressman Christopher Collins And Others Charged in Manhattan Federal Court With Insider Trading and Lying to Federal Law Enforcement Agents*, Aug. 8, 2018, <https://www.justice.gov/usao-sdny/pr/congressman-christopher-collins-and-others-charged-manhattan-federal-court-insider>.

[25] Liam Stack, *The Indictment of Duncan Hunter, Explained*, N.Y. Times, Aug. 22, 2018, <https://www.nytimes.com/2018/08/22/us/politics/duncan-hunter-indictment.html>.

[26] U.S. Dep't of Justice, Justice Manual § 9-85.110 (2018).

[27] U.S. Dep't of Justice, Justice Manual § 9-7.302 (2018); U.S. Dep't of Justice, U.S. Attorneys' Manual § 9-7.302 (2017), <https://web.archive.org/web/20171207140014/https://www.justice.gov/usam/usam-9-27000-principles-federal-prosecution#9-27.300>.

[28] Liam Stack, *The Indictment of Duncan Hunter, Explained*, N.Y. Times, Aug. 22, 2018, <https://www.nytimes.com/2018/08/22/us/politics/duncan-hunter-indictment.html>.

[29] Memorandum from Deputy Attorney General James M. Cole, *Guidance on the Personal Use of Social Media by Department Employees*, Mar. 24, 2014, <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/dag-memo-personal-use-social->

[media.pdf](#).

[30] U.S. Dep't of Justice, Justice Manual § 1-9.000 (2018).

[31] U.S. Dep't of Justice, Justice Manual § 1-9.000 (2018).

[32] U.S. Dep't of Justice, Justice Manual § 1-9.000 (2018).

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