Investigations, Compliance and Defense

DOJ Announces New Policy to Avoid "Piling On" of Duplicative Corporate Penalties

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On May 9, 2018, Deputy Attorney General Rod Rosenstein announced a new US Department of Justice (DOJ) policy to encourage coordination among DOJ units and other law enforcement agencies when imposing multiple penalties for the same conduct. In his speech, Rosenstein observed that "'[p]iling on' can deprive a company of the benefits of certainty and finality ordinarily available through a full and final settlement." As he described it, the aim of the new policy is to "enhance relationships with our law enforcement partners in the United States and abroad, while avoiding unfair duplicative practices."

The new policy has four key provisions, each of which is incorporated into the US Attorneys' Manual as DOJ policy:

- The Obligation Not to Use Criminal Enforcement Authority to Extract Civil Penalties. The policy reaffirms that DOJ attorneys should not to use their criminal enforcement authority to "extract, or to attempt to extract, additional civil monetary payments." Rosenstein emphasized that DOJ "should not employ the threat of criminal prosecution solely to persuade a company to pay a larger settlement in a civil case."
- Internal DOJ Coordination. The policy states that where multiple DOJ components are investigating the same misconduct, DOJ attorneys "should coordinate with one another to avoid the unnecessary imposition of duplicative fines, penalties, and/or forfeiture against the company" for the same misconduct. In his speech, Rosenstein stated that this provision directs DOJ components to "coordinate with one another, and achieve an overall equitable result."
- Coordination with Other Enforcement Authorities. The policy provides that DOJ attorneys should, when possible, "coordinate with and consider the amount of fines, penalties, and/or forfeitures paid to other federal, state, local, or foreign enforcement authorities that are seeking to resolve a case with a company for the same misconduct."
- Factors for Multiple Penalties. The policy states that DOJ attorneys "should consider all relevant factors" to determine whether coordination or apportionment of penalties "allows the interests of justice to be fully vindicated." Those factors may include:
  - The "egregiousness of a company's misconduct";
  - "statutory mandates regarding penalties, fines, and/or forfeitures";
  - "the risk of unwarranted delay in achieving a final resolution";
  - and "the adequacy and timeliness of a company's disclosures and its cooperation" with DOJ, separate from disclosures and cooperation with other enforcement authorities.
  - This provision, however, "does not prevent Department attorneys from considering additional remedies in appropriate circumstances," such as remedies designed to recover lost government money or provide restitution to victims.

Although the policy underscores that DOJ should take into account penalties paid to other enforcement authorities, it came with a warning to corporate defendants not to try to game the system. Rosenstein emphasized that "coordination with a different agency or foreign government is not a substitute for cooperating with the Department of Justice," and that DOJ "will not look kindly" on companies that come to DOJ "only after making inadequate disclosures to secure lenient penalties with other agencies or foreign governments."

The approach codifies and expands what DOJ criminal division officials have said several times over the last few years in the context of coordination with foreign enforcement authorities: where a company cooperates with DOJ and otherwise demonstrates itself to be a responsible corporate actor, DOJ will take into account fines or penalties paid for the same misconduct to other enforcement

authorities. Recent major Foreign Corrupt Practices Act (FCPA) cases have included such apportionment between the US and foreign authorities, including last year's settlement with Telia Company AB, which included total global penalties of $965 million and an offset of approximately $500 million for penalties paid to Swedish and Dutch authorities.

Beyond the FCPA context, the new policy could also be relevant where a corporate scandal or major emergent issue, such as the opioid crisis, attracts broad enforcement attention; or in other circumstances where state and federal authorities enjoy overlapping enforcement jurisdiction, such as consumer protection, mortgage lending or certain banking operations.

Whether the new policy will result in less "piling on" is too soon to tell. Each of the four core components of the new policy have been, to some degree, part of DOJ practice for some time already. Moreover, as has been made clear in the context of the large multinational corruption investigations, reaching a "global settlement" requires significant coordination among the different enforcement authorities involved. And although the policy reflects DOJ's intent not to pile on, that does not bind other independent enforcement authorities, such as state attorneys general or foreign prosecutors, who have their own incentives and priorities. Nor does the calculation of appropriate fines expressly consider what can be significant sums paid to private parties in civil litigation.

Finally, the policy continues a sharp focus on individual prosecutions. Rosenstein articulated the "goal in every case" as "mak[ing] the next violation less likely to occur by punishing individual wrongdoers." Thus, even to the extent corporate entities are able to mitigate fines through the new policy, its management and employees are unlikely to experience any relief.

Rosenstein's speech can be found here and the new policy here.

If you have a questions about this new DOJ policy or its implications, please contact any of the lawyers listed below.

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