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Commentary

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New DOJ Policy Will Curb "Piling On" Multiple Penalties for Same Corporate Misconduct

Corporate resolution policy will provide greater clarity and predictability for companies that self-report and cooperate with DOJ.

Key Points:

- The new policy requires DOJ civil and criminal prosecutors to coordinate in order to avoid the imposition of multiple penalties for the same corporate misconduct.
- DOJ prosecutors also must, where practicable, coordinate with other federal, state, local, and foreign regulators in determining aggregate penalties for the same corporate misconduct.
- DOJ prosecutors will consider the timeliness and adequacy of a company's disclosures as well as its cooperation, among other factors, when deciding whether a coordinated penalty is warranted.
- While many DOJ prosecutors had been engaging in this type of coordination already, the new policy makes this practice mandatory and should contribute to more predictable and palatable outcomes for companies facing multiple investigations.

Deputy Attorney General Rod Rosenstein announced on May 9 that the Department of Justice (DOJ or the Department) has adopted a new policy for resolution of corporate enforcement cases.[1] Speaking at the New York City Bar White Collar Crime Institute and the American Conference Institute's 20th Anniversary New York Conference on the Foreign Corrupt Practices Act (FCPA), he explained that the new policy will curb the practice of different enforcement and regulatory agencies "piling on" with duplicative financial penalties for the same corporate misconduct. The new policy requires different components of DOJ — including the civil and criminal divisions as well as US Attorneys' Offices — to coordinate with each other to avoid disproportionate fines and penalties in cases against corporate defendants. In addition, the policy directs federal prosecutors to make efforts to coordinate with other federal regulators and, where practicable, with state, local, and foreign enforcement agencies. The policy has been added to the US Attorneys' Manual, which contains the rules by which federal prosecutors must operate.

The New DOJ Policy

The policy should be a welcome development for most companies facing multiple enforcement actions. Piling on, as Rosenstein explained, is a football term used to describe one player jumping onto an existing pile of players who have already successfully tackled the opponent lying at the bottom of the pile.

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Piling on is a violation of the rules on the field, but until now has not been addressed by official DOJ policy in the corporate enforcement sphere.

Rosenstein explained that especially in highly regulated industries, companies are often under the purview of many different regulators, including state, federal, and international authorities. This creates the possibility that a single course of misconduct could give rise to multiple enforcement actions by different governmental bodies and "repeated punishment that goes beyond what is necessary to rectify the harm and deter future violations." For example, a company may face parallel civil and criminal DOJ investigations, or investigations by DOJ and other federal regulators, state prosecutors, or foreign regulators. Just last year, a major European bank paid a total of US$220 million to almost every US state to resolve investigations into the bank's manipulation of Libor rates, after already having paid more than ten times as much just a few years earlier to end investigations into the same conduct by US and UK authorities.

"Piling On"

Piling on has taken at least two forms. Sometimes multiple regulators — each with its own ongoing investigation — have insisted that each investigation into the same corporate misconduct be resolved with a separate monetary penalty. As a result, companies at times have paid duplicative penalties that were, in the aggregate, disproportionate to the misconduct at issue. In other circumstances, after one regulator has invested time and energy investigating and pursuing an enforcement action to the point of settlement, other regulators that may have done little or no investigative work pile on at the eleventh hour and join in the demand for recovery. Piling on can yield unfair outcomes for corporate defendants, and also can significantly delay resolution of investigations as companies reasonably postpone resolution while they assess the universe of their potential exposure. As Rosenstein noted, "piling on" can have the effect of "depriv[ing] a company of the benefits of certainty and finality ordinarily available through a full and final settlement," with additional negative consequences for the company's innocent employees, customers, and investors.

Under DOJ's new policy, DOJ prosecutors will be tasked with trying to ensure that corporate resolutions stemming from parallel or joint investigations of the same underlying conduct are "reasonable and proportionate" to the conduct.

The new corporate resolution directive has four key components. The policy:

- Reaffirms the well-established rule that DOJ's criminal enforcement authority should not be used for purposes unrelated to the investigation and prosecution of a crime. For example, DOJ lawyers cannot threaten criminal prosecution as a means to extract a larger settlement in a civil case.

- Directs Department components to coordinate with each other to "achieve an overall equitable result." This may involve crediting and apportioning financial fines, forfeitures, and penalties, among other options.

- Encourages DOJ lawyers to coordinate with other federal, state, local, or foreign enforcement authorities in connection with efforts to reach financial settlements relating to the same misconduct.

- Lists factors that Department lawyers should consider in determining whether multiple penalties further the interest of justice in a given case. These include egregiousness of wrongdoing, statutory mandates regarding penalties, risk of delay in finalizing a resolution, adequacy and timeliness of a company's disclosures, and cooperation with DOJ.

The new policy includes some caveats. First, Rosenstein warned that to benefit from the new policy companies would be well-advised to self-disclose wrongdoing and cooperate with DOJ, noting “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.” Additionally, Rosenstein emphasized that the new policy carries some practical limitations, such as restrictions on information sharing with foreign jurisdictions, timing of other agency actions, and diplomatic relations with other countries. All of these factors may inhibit DOJ’s ability to devise “easy solutions” in cases involving corporate penalties and multiple regulatory agencies across various state, federal, and overseas jurisdictions.

Analysis

The new policy suggests several changes in the way DOJ likely will approach corporate settlements. Many in the Department already informally have applied the policy’s principles for the last several years, reducing DOJ’s penalty demands by crediting amounts paid to other regulators. And DOJ has shown a willingness to do so even when a company failed to self-report misconduct or cooperate. For instance, in 2014 DOJ negotiated a US$8.9 billion settlement to resolve allegations that a large European bank had violated the US sanctions regime. Rather than insist that it receive the full penalty amount, DOJ coordinated with state and local prosecutors and credited significant amounts paid to those regulators against the $8.9 billion total. Also, in 2017, DOJ and a global manufacturing company agreed to a US$4.3 billion settlement stemming from charges that senior executives conspired to violate US environmental laws. The agreement included a US$2.8 billion criminal penalty as well as a US$1.5 billion civil fine to settle claims brought by other federal enforcement agencies. In 2016, two large Latin American companies that self-reported to and cooperated with DOJ obtained coordinated resolutions of anti-corruption investigations and agreed to pay large penalties and disgorge profits that were apportioned among Brazilian, Swiss, and US authorities.

By mandating coordination within DOJ and with other regulators, the new policy should go a long way toward mitigating the risk of unjust results in corporate cases. Also, by enabling corporations to assess more accurately their potential exposure to multiple regulators, the policy should achieve its goal of expediting the resolution of even the most complex corporate investigations.

The policy does raise some questions. One is whether it will apply in cases involving companies that do not self-report wrongdoing to DOJ, and either fail to cooperate or do so belatedly. Historically, DOJ has at least on an ad hoc basis sought to coordinate financial penalties even in those cases. While the policy does not rule out a coordinated resolution for those companies, it clarifies that self-reporting and cooperation are factors prosecutors will consider when determining whether coordination is appropriate. Rosenstein’s oral comments that the policy is designed to reward good corporate citizenship, taken with his remark that DOJ “will not look kindly” on companies that make inadequate disclosures to secure lenient results from other regulators, also suggests that some companies may receive no help from DOJ and may still find themselves at the bottom of a heavy regulatory pile.

Also, the new policy cannot overcome inherent limits on DOJ’s ability to control the demands of other regulators. The new policy is directed at internal DOJ personnel and is binding only on them. Because the policy requires cooperation and coordination efforts for DOJ components, it presumably should curb excess parallel demands from DOJ criminal and civil components, as well as US Attorneys. But the policy cannot compel other federal agencies, foreign regulators, or state and local enforcement and regulatory agencies to apply the same protocols. While these other bodies may have some incentive to play along and let DOJ take the laboring oar in structuring settlements, the new policy is not guaranteed to stop other regulatory actors from seeking their own separate resolutions, even after a DOJ settlement has

been finalized. Indeed, the new policy may have the unintended effect of emboldening some previously uninvolved regulators to seek eleventh-hour settlements, relying on DOJ to accommodate their claims.

The new policy continues a recent DOJ trend of emphasizing an increased transparency in the treatment of corporations in enforcement actions, a central theme of Rosenstein's speech. He emphasized that most American corporations "are serious about engaging in lawful business practices" and "deserve our support to help protect them from criminals who seek unfair advantages." The policy, he noted, marks "another step towards greater transparency and consistency in corporate enforcement."

Indeed, Rosenstein's speech is the latest in a succession of recent DOJ announcements that collectively aim to bring more clarity and predictability to the corporate enforcement space. On October 6, 2017, Rosenstein announced that DOJ would reexamine and consolidate corporate enforcement guidance issued in myriad informal formats into official sources such as the US Attorneys' Manual.[2] This was followed by the November 29, 2017 announcement of a new FCPA Corporate Enforcement Policy, which includes a presumption that prosecution will be declined if a corporation self-reports wrongdoing and cooperates in the manner laid out in the policy.[3] On January 10, 2018, DOJ civil prosecutors were directed to more seriously consider seeking the dismissal of meritless False Claims Act cases brought by corporate whistleblowers.[4] Collectively, these developments signal DOJ's desire to encourage and reward good corporate citizenship through increased transparency and predictability of outcomes, and to attain more expedited and consistent resolution of corporate investigations.

Conclusion

The new policy certainly is good news for self-disclosing, cooperating corporations facing multiple investigations into the same misconduct, at least so long as DOJ prosecutors are involved. These corporations should be able to better and more quickly assess the full landscape of their exposure to government investigations, and resolve matters more promptly and with greater certainty. Less clear is to what extent the policy will be applied to corporations that opt for a more aggressive posture toward DOJ, and neither self-report nor fully cooperate. Whether DOJ will continue in these circumstances to credit payments to other regulators against DOJ's own demands, as it has at times done in the past, remains unclear. The extent to which other regulators will be emboldened to assert eleventh-hour claims that they might not otherwise have made, knowing that DOJ is now required to consider their demands in reaching its own resolution, also remains to be seen.

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[1] Deputy Attorney General Rod J. Rosenstein Remarks to the New York City Bar White Collar Crime Institute, (May 9, 2018), available at https://www.justice.gov/opa/speech/deputy-attorney-general-rod-rosenstein-delivers-remarks-new-york-city-bar-white-collar; Deputy Attorney General Rod J. Rosenstein, Remarks at the American Conference Institute's 20th Anniversary New York Conference on the Foreign Corrupt Practices Act, (May 9, 2018), available at https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-remarks-american-conference-institutes.

[2] Deputy Attorney General Rod J. Rosenstein Keynote Address, NYU Program on Corporate Compliance & Enforcement, New York University Law School, (Oct. 6, 2017), available at http://www.law.nyu.edu/sites/default/files/upload_documents/Rosenstein%2C%20Rod%20J.%20Keynote%20Address_2017.10.6.pdf.

[3] Deputy Attorney General Rod J. Rosenstein Remarks at the 34th International Conference on the Foreign Corrupt Practices Act (Nov. 29, 2017), available at https://www.justice.gov/opa/speech/deputy-attorney-general-rosenstein-delivers-remarks-34th-international-conference-foreign.

[4] Michael D. Granston, "Factors for Evaluating Dismissal Pursuant to 31 U.S.C. 3730(c)(2)(A)," (Jan. 10, 2018), available at https://assets.documentcloud.org/documents/4358602/Memo-for-Evaluating-Dismissal-Pursuant-to-31-U-S.pdf.