

Client Alert

May 2018

DOJ Announces New Policy to Prevent Duplication of Corporate Penalties

In a speech to the New York City Bar White Collar Crime Institute on May 9, 2018, Deputy Attorney General Rod Rosenstein announced a new Department of Justice policy intended to ensure coordination among DOJ departments and other enforcement agencies when pursuing penalties against corporations for violations arising out of the same conduct. The policy, incorporated into the US Attorneys' Manual at § 1-12.100, seeks to avoid imposition of duplicative penalties by "instructing Department components to appropriately coordinate with one another and with other enforcement agencies in imposing multiple penalties on a company in relation to investigations of the same misconduct."

I. The New "Piling On" Policy

The new policy is an attempt to minimize instances of what Rosenstein called "piling on," which he described as the "disproportionate enforcement of laws by multiple authorities." In doing so, Rosenstein expressed a desire for "transparency and consistency in corporate enforcement," such that companies feel encouraged to self-report suspected wrongdoing.

The new policy has four elements:

1. Prohibition of using criminal prosecution as leverage: The federal government's criminal enforcement authority should not be used against a corporation for purposes unrelated to the investigation and prosecution of a possible crime, and the government "should not employ the threat of criminal prosecution solely to persuade a company to pay a larger settlement in a civil case."
2. Intra-DOJ coordination: DOJ components are "to coordinate with one another, and achieve an overall equitable result." Such coordination may result in crediting and apportionment of financial penalties, fines and forfeitures among the components to avoid disproportionate punishment.
3. Interagency coordination: DOJ lawyers should, when possible, coordinate with other federal, state, local and foreign enforcement authorities that are working to resolve a case with a company for the same misconduct.
4. Unified resolutions: The new policy sets out factors the DOJ attorneys can evaluate to determine whether multiple penalties "serve the interests of justice in a particular case." Because multiple, seemingly duplicative penalties may in fact be necessary to achieve justice, the new policy provides relevant factors for DOJ attorneys to consider, to include:
 - a. egregiousness of the wrongdoing;
 - b. statutory mandates regarding penalties;
 - c. risk of delay in finalizing a resolution; and
 - d. adequacy and timeliness of a company's disclosures and cooperation with the DOJ.

The new policy is intended to standardize what has been until now an ad hoc principle of coordination among DOJ components and other regulatory and law enforcement agencies. Rosenstein emphasized that “[c]ooperating with a different agency or a foreign government is not a substitute for cooperating with [DOJ]” and cautioned against making inadequate disclosures to secure lenient penalties with other agencies or foreign governments. Consistent with DOJ’s emphasis on identifying culpable individuals, Rosenstein noted that increased coordination will allow DOJ to focus on the question, “Who made the decision to set the company on a course of criminal conduct?”

II. Impact on Global Resolutions

The announcement of the formalized “piling on” policy highlights increased opportunity for defense counsel to seek global resolutions in corporate criminal and regulatory investigations. Counsel should monitor compliance with the new policy, and push comprehensive settlements to resolve civil, criminal and administrative liability, rather than negotiate in a piecemeal manner with multiple enforcement authorities. It is crucial to identify parallel proceedings early so that companies can seek a global resolution that best advances their interests and possibly reduces cost.

The ability to invoke the new “piling on” policy during negotiations should make it easier for corporations to make the case for just and equitable global resolutions that avoid duplicative penalties. In addition to reduced penalties, coordinated resolutions have the potential to provide closure for the company, enhance legal certainty, minimize burdens of disclosure and streamline release of information. The new DOJ policy will provide an effective tool for defense counsel to reach effective settlements and prevent excessive, cumulative or unnecessary monetary penalties, continuing obligations and collateral consequences.

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