

Deputy Attorney General Rosenstein Announces New Policy to Avoid “Piling On” in Corporate Enforcement Actions

May 11, 2018

On May 9, 2018, in remarks to the New York City Bar Association’s Seventh Annual White Collar Crime Institute, Deputy Attorney General Rod Rosenstein announced a new Department of Justice (“DOJ”) policy encouraging coordination among DOJ components and enforcement agencies in reaching corporate resolutions.

The policy – entitled “Coordination of Corporate Resolution Penalties in Parallel and/or Joint Investigations and Proceedings Arising from the Same Misconduct” – addresses “piling on” of multiple penalties by enforcement authorities in the context of corporate resolutions. It instructs DOJ attorneys to consider “the totality of fines, penalties, and/or forfeiture imposed by all Department components as well as other law enforcement agencies and regulators in an effort to achieve an equitable result” in corporate resolutions.¹ The new policy will be incorporated into the U.S. Attorneys’ Manual.

In announcing the policy, Deputy Attorney General Rosenstein noted that it was designed to discourage “disproportionate enforcement of laws by multiple authorities” and to achieve “reasonable and proportionate outcomes” in corporate investigations. He highlighted the risk of “repeated punishments” that “may exceed what is necessary to rectify the harm and deter future violations,” particularly in highly regulated industries, and noted that “piling on” “can deprive a company of the benefits of certainty and finality ordinarily available through a full and final settlement.” The Deputy Attorney General touted the new policy as a tool to “encourage companies to report suspected wrongdoing to law enforcement and to resolve liability expeditiously.”

The new policy has four key features to guide DOJ’s decision making in any given case:

- First, the policy affirms that DOJ should not wield its criminal law enforcement authority for purposes unrelated to dealing with a potential crime, meaning that it should not “employ the threat of criminal prosecution solely to persuade a company to pay a larger settlement in a civil case.” Mr. Rosenstein noted that this was not a policy change, but a reminder of DOJ’s commitment to fairness.
- Second, the policy directs DOJ components to “coordinate with one another [to] achieve an overall equitable result,” including “crediting and apportionment of financial penalties, fines, and forfeitures, and other means of avoiding disproportionate punishment.”
- Third, the policy encourages DOJ attorneys “when possible, to coordinate with other federal, state, local, and foreign enforcement authorities seeking to resolve a case with a company” based on the same conduct giving rise to civil or criminal liability.

¹ Office of the Deputy Attorney General, *Policy on Coordination of Corporate Resolution Penalties* (May 9, 2018), <https://www.justice.gov/opa/speech/file/1061186/download>.

- Fourth, the policy puts forth a list of factors that DOJ attorneys may use to evaluate whether multiple penalties against a company will “serve the interests of justice in a particular case.” These factors include: (1) “the egregiousness of the wrongdoing”; (2) “statutory mandates regarding penalties”; (3) “the risk of delay in finalizing a resolution”; and (4) “the adequacy and timeliness of a company’s disclosures and cooperation with the Department.”

Mr. Rosenstein acknowledged the challenges inherent in coordination among agencies, pointing specifically to “timing of other agency actions, limits on information sharing across borders, and diplomatic relations between countries.” He also cautioned that cooperating with foreign governments and non-DOJ agencies is “not a substitute for cooperating with the Department of Justice.”

The Deputy Attorney General took the opportunity, while introducing the new policy, to reiterate DOJ’s focus on promoting individual accountability. He noted specifically that coordination will help DOJ “to identify culpable individuals and hold them accountable.” Mr. Rosenstein emphasized that investigations should focus on the individuals who “set the company on a course of criminal conduct,” and said that DOJ’s “goal in every case should be to make the next violation less likely to occur by punishing individual wrongdoers.”

Mr. Rosenstein also announced a new Working Group on Corporate Enforcement and Accountability, which includes DOJ leaders and senior officials from the FBI, the Criminal Division, the Civil Division, and U.S. Attorneys’ Offices. According to Mr. Rosenstein, the Working Group will make internal recommendations about corporate compliance, white collar crime, and related issues.

While it remains to be seen how the new policy will be implemented, it will likely prove beneficial to institutional clients in highly regulated industries, many of which frequently face simultaneous investigations by multiple agencies and potentially duplicative penalties.

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