

## CLIENT ALERT

### New DOJ Policy Encourages Coordination Among Regulators To Limit "Piling On" Corporate Penalties

May.10.2018

Multinational corporations operating across jurisdictions are often subject to simultaneous investigations by any number of domestic (and foreign) enforcement agencies. Corporations and their counsel not only navigate cumbersome and varied regulator requests during the course of an investigation, but regulators often require an entity to pay multiple fines and penalties to resolve the individual regulator's investigation for the same underlying misconduct. This phenomenon may result in duplicative penalties against businesses for the same misconduct—an issue recognized by both corporate America and Department of Justice personnel. Enhanced coordination among enforcement agencies—DOJ, SEC, CFTC, FINRA, Federal Reserve, FDIC, OCC, FinCEN, and OFAC, and their foreign counterparts—is the only solution to this problem.

During remarks at the New York City Bar White Collar Crime Institute on May 9, Deputy Attorney General Rod Rosenstein unveiled a new DOJ Policy encouraging coordination among DOJ components and other regulators. The newly announced policy aims to limit the “piling on” of monetary fines by enforcement agencies investigating the same misconduct. The new policy adds structure and force to existing practice, and better enables prosecutors and civil enforcement attorneys to “achieve reasonable and proportionate outcomes in major corporate investigations.” Whether the heightened emphasis on inter-agency coordination announced in the Deputy Attorney General's remarks will ameliorate the duplicative penalty problem remains to be seen.

The coordination policy, which will be incorporated into the U.S. Attorney's Manual, has four key elements:

- The policy reiterates the long-standing prohibition on leveraging the federal government's criminal enforcement authority “for purposes unrelated to the investigation and prosecution of a possible crime.”
- Second, it directs attorneys working for different DOJ components to coordinate with one another on matters involving the same corporate misconduct. This can include crediting and apportionment of financial penalties and forfeitures among the components in order to avoid disproportionate punishment.
- Third, the policy encourages DOJ attorneys to coordinate with other U.S. and foreign enforcement authorities—an already routine practice for the Criminal Division's Fraud Section and many U.S. Attorney's Offices—to resolve cases with a company for the same misconduct.
- Finally, the policy includes multiple factors DOJ attorneys should consider in evaluating whether, in a particular case, the imposition of multiple penalties truly serves “the interests of justice.” Among those factors are the egregiousness of the wrongdoing, as well as the adequacy and timeliness of a company's disclosures and cooperation with DOJ.

Mr. Rosenstein pointedly tied the coordination policy to DOJ's focus on prosecuting individuals responsible for corporate crime. Echoing the themes of the 2015 Yates Memo, the Deputy Attorney General emphasized that proper coordination within DOJ and with other enforcement agencies assists in the effort to identify and hold to account individual actors responsible for corporate misconduct. Although DOJ will continue to seek “appropriate corporate penalties” in white collar investigations, Mr. Rosenstein

noted that the key inquiry will be determining the parties who “made the decision to set the company on a course of criminal conduct.” The Deputy Attorney General considers the new policy as a next step in DOJ’s ongoing effort to promote transparency and encourage corporations to self-report and cooperate, by fostering a climate in which corporations are more fairly and predictably treated when they report misconduct.

Recognizing the global nature of many DOJ investigations, Deputy Attorney General Rosenstein highlighted the DOJ’s commitment to enhancing international coordination—a practice already reflected in DOJ’s efforts in the FCPA context where it has sought to apportion penalties between the U.S. and various foreign authorities. A high profile anti-corruption case in 2017, for example, resulted in a \$2.6 billion-dollar settlement with fines coordinated among the United States, Brazil, and Switzerland.

Although DOJ’s emphasis on coordination across agencies represents a step towards greater transparency and consistency, the impact of the policy depends on similar efforts by other enforcement and regulatory agencies, both domestic and foreign. Although the Deputy Attorney General noted his interest in collaborating with those stakeholders, time will tell whether those efforts will result in a true coordinated effort among enforcement agencies. It will be something to watch for in the coming weeks and months.

In addition to the coordination policy, Mr. Rosenstein announced the formation of a new Working Group on Corporate Enforcement and Accountability, which will include DOJ leaders and senior officials from the FBI, the Criminal Division, the Civil Division, and other litigating divisions. The Group will make internal recommendations about white collar crime, corporate compliance, and other related issues. Like the coordination policy, the new Working Group aims to streamline internal DOJ efforts and promote consistency in relation to corporate investigations and enforcement.

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