

May 10, 2018

DOJ Announces New Policy to Encourage Coordination Among DOJ and Agencies Imposing Penalties for the Same Conduct

New Policy Discourages “Piling On” of Penalties by Multiple Agencies

During a speech on Wednesday, Deputy Attorney General Rod Rosenstein announced a new Department of Justice policy to discourage the “piling on” of multiple penalties by the DOJ and foreign and domestic agencies, in relation to the investigation of the same corporate misconduct.

According to Rosenstein, DOJ personnel had expressed concerns about the phenomenon of “piling on” in corporate investigations. The new policy, he said, is aimed at enhancing relationships among enforcement agencies and avoiding unfair duplicative penalties.

Rosenstein said that the policy, which has since been incorporated into the U.S. Attorneys’ Manual at Section 1-12.100, will guide the DOJ’s decisions as to the size of financial penalties in future investigations. He laid out four key features of the new policy.

The first principle, which Rosenstein described as a reminder and reaffirmation of existing policy, holds that the federal government should not use its criminal enforcement authority for any reason other than the investigation and prosecution of a possible crime. Rosenstein specifically pointed to the impermissibility of using the threat of criminal prosecution solely as leverage over a company in negotiating a civil settlement.

Second, the policy calls for internal coordination among DOJ components when those components are investigating the same corporate misconduct. According to Rosenstein, such coordination should be directed toward avoiding disproportionate punishment and achieving an overall equitable result, and may include the crediting and apportionment of the financial consequences of the resolutions.

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Third, the policy calls for coordination between DOJ attorneys and other federal, state, local, and foreign enforcement authorities when the DOJ and other entities are investigating the same corporate misconduct. Rosenstein noted that the DOJ's most common corporate enforcement partners include the U.S. Securities and Exchange Commission, Commodity Futures Trading Commission, Federal Reserve, Federal Deposit Insurance Corporation, Office of the Comptroller of the Currency, and Office of Foreign Assets Control.

Finally, the new policy articulates certain factors to be used in determining whether the imposition of multiple penalties would serve the interests of justice. Those factors include: (i) the egregiousness of the wrongdoing; (ii) statutory mandates regarding penalties; (iii) the risk of delay in finalizing a resolution; and (iv) the adequacy and timeliness of a company's disclosures and cooperation with the DOJ. With respect to the fourth factor, the policy makes clear that disclosure to, or cooperation with, other relevant enforcement agencies or foreign governments does not satisfy a company's obligations—such cooperation must be with the DOJ itself.

Rosenstein also noted that practical obstacles—such as the timing of other agency actions, limits on cross-border information sharing, and diplomatic considerations—may constrain effective coordination in some cases. He pointed to several domestic and international coordination projects, however, as examples of successful collaborative efforts.

Rosenstein characterized the new policy as in line with the DOJ's efforts to combat white-collar crime by promoting the transparent, consistent, and efficient investigation and resolution of cases. Improved coordination, Rosenstein said, will incentivize companies to self-report wrongdoing and advance the DOJ's goal of deterring corporate misconduct by holding culpable individuals accountable.

Rosenstein announced that, in furtherance of these goals, the DOJ has established a Working Group on Corporate Enforcement and Accountability. The Group, which will make recommendations on white-collar crime, corporate compliance, and related issues, will include leaders and senior officials from the DOJ, the Federal Bureau of Investigation, DOJ litigating divisions involved in corporate enforcement, and the U.S. Attorneys' Offices.

IMPLICATIONS

The potential for “piling on” in corporate resolutions has been a long-standing concern. The DOJ's recognition of the issue and creation of a policy to address it appear to be a step in the right direction. At the same time, the practical import of this new policy remains to be seen. A number of key questions include: *First*, in light of the policy, will the DOJ begin seeking lesser financial penalties, or will it continue to seek the same penalties but offer more credit to offset settlements with other enforcement agencies? *Second*, how will prosecutors decide the appropriate amount of any offset or discount where other agencies impose penalties for the same conduct? *Third*, will other agencies reciprocally adhere to

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the policy so that penalties are proportionally reduced across agencies, or will the DOJ unilaterally reduce its own penalties? *Fourth*, will the DOJ take steps to bring other domestic agencies and international partners into the Working Group, which is currently specific to the DOJ and its investigative agencies?

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CONTACTS

New York

Nicolas Bourtin	+1-212-558-3920	bourtinn@sullcrom.com
David H. Braff	+1-212-558-4705	braffd@sullcrom.com
H. Rodgin Cohen	+1-212-558-3534	cohenhr@sullcrom.com
Justin J. DeCamp	+1-212-558-1688	decampj@sullcrom.com
Theodore Edelman	+1-212-558-3436	edelmant@sullcrom.com
Mitchell S. Eitel	+1-212-558-4960	eitelm@sullcrom.com
Nicole Friedlander	+1-212-558-4332	friedlandern@sullcrom.com
Robert J. Giuffra Jr.	+1-212-558-3121	giuffrar@sullcrom.com
Bradley A. Harsch	+1-212-558-3946	harschb@sullcrom.com
Shari D. Leventhal	+1-212-558-4354	leventhals@sullcrom.com
Kathleen S. McArthur	+1-212-558-4321	mcarthurk@sullcrom.com
Sharon L. Nelles	+1-212-558-4976	nelless@sullcrom.com
Richard C. Pepperman II	+1-212-558-3493	peppermanr@sullcrom.com
Matthew J. Porpora	+1-212-558-4028	porporam@sullcrom.com
Kenneth M. Raisler	+1-212-558-4675	raislerk@sullcrom.com
Jeffrey T. Scott	+1-212-558-3082	scottj@sullcrom.com
Samuel W. Seymour	+1-212-558-3156	seymours@sullcrom.com
Katherine J. Stoller	+1-212-558-4327	stollerk@sullcrom.com
Stephanie G. Wheeler	+1-212-558-7384	wheelers@sullcrom.com
Alexander J. Willscher	+1-212-558-4104	willschera@sullcrom.com

SULLIVAN & CROMWELL LLP

Washington, D.C.

Julia M. Jordan	+1-202-956-7535	jordanjm@sullcrom.com
Daryl A. Libow	+1-202-956-7650	libowd@sullcrom.com
Stephen H. Meyer	+1-202-956-7605	meyerst@sullcrom.com
Aisling O'Shea	+1-202-956-7595	osheaa@sullcrom.com
Christopher Michael Viapiano	+1-202-956-6985	viapianoc@sullcrom.com

Palo Alto

Brendan P. Cullen	+1-650-461-5650	cullenb@sullcrom.com
Laura Kabler Oswell	+1-650-461-5679	oswelll@sullcrom.com
