

DOJ's New Policy on Coordination of Corporate Resolutions Aims to Reduce "Piling On"

May 11, 2018

The U.S. Department of Justice ("DOJ") has announced a new policy regarding the coordination of corporate resolution penalties (the "Policy").¹ Deputy Attorney General Rod Rosenstein said that the Policy sought to address "piling on," where different enforcement authorities penalize a company for the same conduct. As we have discussed previously, this is a serious issue.² The rise in global enforcement has increased the risk that companies face competing, sometimes uncoordinated enforcement actions and overlapping penalties for the same underlying conduct.

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DOJ officials had recently acknowledged this problem.³ The new Policy is DOJ's proposed response, providing expressly that DOJ should consider, "as appropriate," penalties imposed by other enforcement authorities.

The Policy itself is light on detail and contains few surprises. It largely mirrors DOJ's recent efforts in the arena of the U.S. Foreign Corrupt Practices Act, where DOJ has reached a number of coordinated settlements crediting companies' payments to other enforcement agencies against fine amounts calculated under the U.S. Sentencing Guidelines. Recent coordinated settlements that our firm has negotiated (one of which Deputy Attorney General Rosenstein referenced) are notable examples of navigating the "piling on" problem. It is significant that DOJ has codified the Policy in the U.S. Attorneys' Manual, extending its reach within Main Justice and beyond to the U.S. Attorneys' Offices.

The Policy has four main components:

- **First**, the Policy affirms that the federal government should not use its criminal enforcement authority to extort larger fines in civil cases;

¹ U.S. Department of Justice, "Policy on Coordination of Corporate Resolution Penalties" (May 9, 2018), www.justice.gov/opa/speech/file/1061186/download.

² See, e.g., "Anti-Corruption Enforcement in 2017: A Return to Normalcy," FCPA Update, Vol. 9, No. 6 (Jan. 2018), www.debevoise.com/insights/publications/2018/01/fcpa-update-jan-2018-vol-9-no-6, at 19-20.

³ See, e.g., Deputy Attorney General Rod Rosenstein, Remarks at the Clearing House's 2017 Annual Conference (Nov. 8, 2017), www.justice.gov/opa/speech/deputy-attorney-general-rostenstein-delivers-remarks-clearing-house-s-2017-annual.

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- **Second**, the Policy requires different divisions within DOJ to coordinate with one another to avoid duplicative penalties;
 - **Third**, the Policy encourages DOJ to coordinate with other federal, state, local, and foreign enforcement authorities in resolving related matters; and
 - **Last**, the Policy sets forth factors DOJ may consider in determining whether multiple penalties are appropriate, including the egregiousness of the misconduct, statutory mandates regarding penalties, the risk of delay in reaching a resolution, and the adequacy and timeliness of a company's disclosure and cooperation.

DOJ's intention to improve coordination, reflected in the Policy, is laudable. Better coordination among U.S. authorities and with foreign counterparts would represent a significant step forward, offering benefits to both prosecutors and the companies in their crosshairs, and increasing the overall fairness of the process. When announcing the Policy, Deputy Attorney General Rosenstein stated that "piling on" can deprive a company of some of the key benefits of a settlement, namely finality and certainty.

As with many such policies, DOJ continues to have wide discretion, and the benefits will depend on how the Policy is implemented. It remains to be seen whether the Policy will provide the type of finality that companies understandably seek, as well as how authorities will better coordinate and apportion penalties. Indeed, in many situations, DOJ is dependent on the decisions of other enforcement authorities, which have their own agendas and approaches. In certain instances, DOJ has seemed to enjoy greater success coordinating with foreign authorities than with other U.S. federal, state, and local authorities. Especially to the extent the Policy encourages and ultimately causes authorities in both the United States and other jurisdictions to step aside when misconduct is already being addressed appropriately by another authority, the Policy could provide some welcome relief.

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Please do not hesitate to contact us with any questions.

NEW YORK

Andrew J. Ceresney
ajceresney@debevoise.com

Sean Hecker
shecker@debevoise.com

Andrew M. Levine
amlevine@debevoise.com

Bruce E. Yannett
beyannett@debevoise.com

Erich O. Grosz
eogrosz@debevoise.com

WASHINGTON, D.C.

Kara Brockmeyer
kbrockmeyer@debevoise.com

David A. O'Neil
daoneil@debevoise.com