

Inside the New DOJ Policy on Coordinated Enforcement and its Practical Implications

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Deputy Attorney General Rod Rosenstein recently announced at the New York City Bar Association's White Collar Crime Institute and at the American Conference Institute's New York Conference on the FCPA, a new DOJ policy that "encourages coordination among [DOJ] components and other enforcement agencies when imposing multiple penalties for the same conduct." Rosenstein noted that where a company is accountable to multiple regulatory bodies, there is "a risk of repeated punishments that may exceed what is necessary to rectify the harm and deter future violations." The policy is aimed at discouraging "disproportionate enforcement of laws by multiple authorities," which Rosenstein likened to "piling on" in football. It encourages coordination among multiple authorities to achieve "an overall equitable result."

Although presented as a "new policy," Rosenstein made clear that "coordination is not new" for the DOJ. He noted that while "[s]ometimes government authorities coordinate well . . . [o]ther times, joint or parallel investigations by multiple agencies sound less like singing in harmony, and more like competing attempts to sing a solo." He indicated the policy was intended to provide support to DOJ attorneys "in coordinating internally and with other agencies to achieve reasonable and proportionate outcomes in major corporate investigations" and that he believes that "many federal, state, local and foreign authorities that work with us are interested in joining our efforts to show leadership in this area."

Rosenstein explained that "the new policy discourages 'piling on' by instructing [DOJ] 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."

Rosenstein also advised that agencies should consider whether it is more valuable to allocate resources to "additional enforcement against an old scheme" or other "new" investigations. Rosenstein stated that "piling on" can "deprive a company of the benefits of certainty and finality ordinarily available through a full and final settlement," and further noted the impact on innocent employees, customers, and investors who also "seek to resolve problems and move on."

Key Elements of the New Policy

Consistent with the DOJ's recent corporate enforcement policy announcements, which we previously briefed [here](#) and [here](#), this policy has been incorporated into the U.S. Attorney's Manual. It can be found in Section 1.12-100.

The four key elements of the policy are as follows:

- The Government's "criminal enforcement authority should not be used against a company for purposes unrelated to the investigation and prosecution of a possible crime." In other words, the Government should not use the "threat of criminal prosecution solely to persuade a company to pay a larger settlement in a civil case." Rosenstein noted that this is not a policy change but rather a reminder of the DOJ's commitment to principles of fairness and the rule of law.
- Different DOJ components should coordinate with one another to achieve "an overall equitable result." The coordination should include "crediting and apportionment of financial penalties, fines, and forfeitures, and other means of avoiding disproportionate punishment."
- DOJ attorneys should also coordinate with "other federal, state, local, and foreign enforcement authorities to resolve a case with a company for the same misconduct."
- The DOJ should also consider several factors when determining whether to enforce cumulative penalties. The factors include, but are not limited to, the following:
 - The egregiousness of the wrongdoing;
 - Statutory mandates regarding penalties;
 - The risk of delay in finalizing a resolution; and
 - o The adequacy and timeliness of a company's disclosures and cooperation with the DOJ.

Cooperation with the DOJ and Individual Accountability Remain Priorities

Rosenstein warned that cooperating with an agency other than the DOJ or cooperating with a foreign government "is not a substitute for cooperating with the [DOJ]" and added that the DOJ "will not look kindly" on companies that come to it only after making inadequate disclosures to other agencies or foreign governments in an attempt to secure lenient penalties. If confronted with such a scenario, Rosenstein stated that the DOJ will act "without hesitation to fully vindicate the interests of the United States."

Moreover, Rosenstein highlighted that in order to reduce white collar crime, the DOJ needs to "encourage companies to report suspected wrongdoing to law enforcement and to resolve liability expeditiously." While Rosenstein acknowledged that corporate enforcement actions may only indirectly deter individual actors by incentivizing companies to develop and enforce internal compliance programs, the DOJ's goal in every case should be to make the next violation less likely to occur by punishing wrongdoers. Thus, the new policy is aimed at encouraging companies to cooperate and identify the individuals responsible for the violations. The DOJ's continued focus on individual accountability and deterrence echoes previous policy announcements from both former Deputy Attorney General Sally Q. Yates and Rosenstein in connection with obtaining cooperation credit in FCPA actions.

In addition to placing this new policy within the United States Attorney's Manual, the DOJ has also established what was described as a new Working Group on Corporate Enforcement and Accountability in order to promote consistency in the DOJ's efforts to combat white collar crime.

Key Takeaways

- The new policy appears to be an express acknowledgement by DOJ of the need to mitigate the disproportionate and harmful consequences that can result when multiple enforcement authorities seek to investigate and punish

the same conduct.

- In announcing the new policy, the DOJ highlights the benefits that coordination among enforcement authorities will have for the company, as well as its employees, customers, and investors, while still emphasizing the DOJ's continued focus on vindicating the interests of the United States, increasing deterrence, and holding individuals accountable.
- The new policy suggests a recognition by DOJ that the lack of certainty resulting from the failure of multiple enforcement authorities to work in coordination with each other creates disincentives for companies to cooperate with those authorities.
- In view of this new policy, a company under investigation and its counsel should consider whether, in the particular circumstances presented, it would serve the company's best interests to open discussions regarding other enforcement authorities that may be investigating the same conduct.
- Where a company is aware that it is being investigated by multiple enforcement authorities with respect to the same conduct, counsel should consider raising with DOJ the need to coordinate with the other authorities in order to achieve a resolution that will provide the benefits of a full and final resolution.
- Companies and their counsel should carefully consider the guidance that DOJ provided in connection with announcing this new policy when discussing potential resolutions. In particular, companies may be more likely to achieve a favorable resolution of investigations by multiple enforcement authorities, including a reduction in penalties, where they can demonstrate, among other things, that they made a timely and complete disclosure to the DOJ, and other authorities; and that there would be undue delay of a final settlement resulting from multiple, concurrent enforcement actions and uncoordinated settlement discussions.
- The new policy suggests that a company and its counsel should consider the benefits of appointing a lead counsel to coordinate the representation of the company on multiple enforcement fronts at once. Such coordination on the company's side is likely to enhance the ability of the company to achieve any potential benefits of the increased coordination by the enforcement agencies.

In sum, a company and its counsel should consider a strategic reliance on the new DOJ policy when faced with an investigation by multiple authorities, so as to ensure that they are reaping the intended benefits of the new policy, including the avoidance of "piling on," and the achievement of an "overall equitable result" that would provide the company, along with its employees, customers, and investors, the certainty of a full and final resolution.

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