AntitrustConnect Blog

DOJ Announces “Coordination of Corporate Resolution Penalties” Policy

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On May 9, 2018 Deputy Attorney General Rod Rosenstein delivered remarks to the New York City Bar White Collar Crime Institute. He announced a new Department policy that encourages coordination among Department components and other enforcement agencies when imposing multiple penalties for the same conduct.

The full prepared remarks are here. Below is an excerpt:

> Today, we are announcing a new Department policy that encourages coordination among Department components and other enforcement agencies when imposing multiple penalties for the same conduct.
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> The aim is to enhance relationships with our law enforcement partners in the United States and abroad, while avoiding unfair duplicative penalties.
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> It is important for us to be aggressive in pursuing wrongdoers. But we should discourage disproportionate enforcement of laws by multiple authorities. In football, the term “piling on” refers to a player jumping on a pile of other players after the opponent is already tackled.
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> Our new policy discourages “piling on” by instructing Department 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.
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> In highly regulated industries, a company may be accountable to multiple regulatory bodies. That creates a risk of repeated punishments that may exceed what is necessary to rectify the

harm and deter future violations.

Sometimes government authorities coordinate well. They are force multipliers in their respective efforts to punish and deter fraud. They achieve efficiencies and limit unnecessary regulatory burdens.

Other times, joint or parallel investigations by multiple agencies sound less like singing in harmony, and more like competing attempts to sing a solo.

Modern business operations regularly span jurisdictions and borders. Whistleblowers routinely report allegations to multiple enforcement authorities, which may investigate the claims jointly or through their own separate and independent proceedings.

By working with other agencies, including the SEC, CFTC, Federal Reserve, FDIC, OCC, OFAC, and others, our Department is better able to detect sophisticated financial fraud schemes and deploy adequate penalties and remedies to ensure market integrity.

But we have heard concerns about “piling on” from our own Department personnel. Our prosecutors and civil enforcement attorneys prize the Department’s reputation for fairness.

They understand the importance of protecting our brand. They asked for support in coordinating internally and with other agencies to achieve reasonable and proportionate outcomes in major corporate investigations.

And I know many federal, state, local and foreign authorities that work with us are interested in joining our efforts to show leadership in this area.

“Piling on” can deprive a company of the benefits of certainty and finality ordinarily available through a full and final settlement. We need to consider the impact on innocent employees, customers, and investors who seek to resolve problems and move on. We need to think about whether devoting resources to additional enforcement against an old scheme is more valuable than fighting a new one.

Our new policy provides no private right of action and is not enforceable in court, but it will be incorporated into the U.S. Attorneys’ Manual, and it will guide the Department’s decisions.

This is another step towards greater transparency and consistency in corporate enforcement. To reduce white collar crime, we need to encourage companies to report suspected wrongdoing to law enforcement and to resolve liability expeditiously.

There are four key features of the new policy.

First, the policy affirms that the federal government's criminal enforcement authority should not be used against a company for purposes unrelated to the investigation and prosecution of a possible crime. We should not employ the threat of criminal prosecution solely to persuade a company to pay a larger settlement in a civil case.

That is not a policy change. It is a reminder of and commitment to principles of fairness and the rule of law.

Second, the policy addresses situations in which Department attorneys in different components and offices may be seeking to resolve a corporate case based on the same misconduct.

The new policy directs Department components to coordinate with one another, and achieve an overall equitable result. The coordination may include crediting and apportionment of financial penalties, fines, and forfeitures, and other means of avoiding disproportionate punishment.

Third, the policy encourages Department attorneys, when possible, to coordinate with other federal, state, local, and foreign enforcement authorities seeking to resolve a case with a company for the same misconduct.

Finally, the new policy sets forth some factors that Department attorneys may evaluate in determining whether multiple penalties serve the interests of justice in a particular case.

Sometimes, penalties that may appear duplicative really are essential to achieve justice and protect the public. In those cases, we will not hesitate to pursue complete remedies, and to assist our law enforcement partners in doing the same.

Factors identified in the policy that may guide this determination include the egregiousness of the wrongdoing; statutory mandates regarding penalties; the risk of delay in finalizing a resolution; and the adequacy and timeliness of a company's disclosures and cooperation with the Department.

> Cooperating with a different agency or a foreign government is not a substitute for cooperating with the Department of Justice. And we will not look kindly on companies that come to the Department of Justice only after making inadequate disclosures to secure lenient penalties with other agencies or foreign governments. In those instances, the Department will act without hesitation to fully vindicate the interests of the United States.
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> The Department's ability to coordinate outcomes in joint and parallel proceedings is also constrained by more practical concerns. The timing of other agency actions, limits on information sharing across borders, and diplomatic relations between countries are some of the challenges we confront that do not always lend themselves to easy solutions.
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> The idea of coordination is not new. The Criminal Division's Fraud Section and many of our U.S. Attorney's Offices routinely coordinate with the SEC, CFTC, Federal Reserve, and other financial regulators, as well as a wide variety of foreign partners. The FCPA Unit announced its first coordinated resolution with the country of Singapore this past December.
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> The Antitrust Division has cooperated with 21 international agencies through 58 different merger investigations during the past four years.

Here is a link to the policy on Coordination of Corporate Resolution Penalties.

As the Deputy Attorney General stated, coordination is not new. The Antitrust Division routinely coordinates with other federal and state agencies on most investigations. And some coordination always occurs on international investigations. In the recent financial crimes investigations such as Libor and FOREX the amount of coordination was extensive among federal agencies such as the Antitrust Division, Criminal Division, FBI, SEC, CFTC, state AG office, as well as with many foreign jurisdictions. It is rumored that meetings were held in the Great Hall at the Department of Justice since no conference room could hold the throngs of participating enforcers.

Coordination by the Antitrust Division with enforcers from other federal, state and international enforcers is not new, but there is a continual debate about whether such coordination prevents "piling on." Of course, what a defense attorney may call piling on, the prosecutors may deem to be a hard but fair hit. There is no referee or instant replay. The question of piling on or double counting is a subject of continuing debate in antitrust circles. It's a tough question as foreign jurisdictions are injured by

international cartels and they have stakeholders that want a significant penalty. Sorting out proportional penalties among sovereign nations is a particularly tough ongoing challenge. This new policy document is not going to end that debate but a written policy document (while creating no new rights) could enhance defendants' power of persuasion with the Department of Justice if they have some credible numbers to back up a "piling on" argument.

Thanks for reading.

PS. Several publications have reported that Richard Powers will become the next Deputy Assistant Attorney General for Criminal Enforcement in the Antitrust Division. The Antitrust Division has made no announcement yet. One of the many qualifications Mr. Powers will bring to the position, if he is named as the Criminal Deputy, is his experience in multi-agency, international prosecutions. He worked on both Libor and Forex while a member of the Antitrust Dvision's New York Field Office.

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