THE
NATIONAL LAW REVIEW

Rosenstein Announces New DOJ Policies to Reduce 'Piling On' and Refocus Corporate Enforcement

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Wednesday, May 9, 2018

In a highly anticipated speech to the New York City Bar White Collar Crime Institute this morning, Deputy Attorney General Rod Rosenstein announced two new Department of Justice (DOJ) policies: first, a directive encouraging "coordination among Department components and other enforcement agencies when imposing multiple penalties for the same conduct," and second, the establishment of a new Working Group on Corporate Enforcement and Accountability designed to foster consistency in DOJ outcomes surrounding white collar crime and corporate compliance.

The first new policy grew out of an observation that defendants may face overlapping civil and criminal penalties from various enforcement agencies, including DOJ, the Securities and Exchange Commission, the Commodity Futures Trading Commission, and others, including state, local, and international authorities. Rosenstein stated that the new policy is specifically designed to discourage "piling on" by seeking "multiple penalties on a company in relation to investigations of the same misconduct."

As announced, the "no piling on" policy has four components. First, Rosenstein reiterated 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"—specifically with respect to use of "the threat of criminal prosecution solely to persuade a company to pay a larger settlement in a civil case."

Second, the policy focuses on incentivizing cooperation toward "an overall equitable result" through appropriate "crediting and apportionment of financial penalties, fines, and forfeitures, and other means of avoiding disproportionate punishment." In other words, agencies should be prepared to share the spoils of a successful prosecution, rather than pursue a "go it alone" strategy at the defendant's expense.

Third, the policy encourages DOJ attorneys "to coordinate with other federal, state, local, and foreign enforcement authorities seeking to resolve a case with a company for the same misconduct." That obligation places the weight of DOJ management behind what seems common sense: that DOJ staff are obligated to work with other stakeholders—rather than ignore them—to ensure equitable results where a defendant faces potentially overlapping enforcement actions.

Finally, the policy expressly lays out factors that should guide "whether multiple penalties serve the interests of justice in a particular case," including "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."

At the same time, Rosenstein warned that "[c]ooperating with a different agency or a foreign government is not a substitute for cooperating with the [DOJ]," and that DOJ "will not look kindly on companies that come to [DOJ] only after making inadequate disclosures to secure lenient penalties with other agencies or foreign governments." He also observed that other factors, such as "[t]he timing of other agency actions, limits on information sharing across borders, and diplomatic relations between countries" could impede DOJ's ability to coordinate outcomes. And although the new policy "will be incorporated into the U.S. Attorneys' Manual" and "will guide the Department's decision," it "provides no private right of action and is not enforceable in court."

The second directive announced by Rosenstein was the creation of a new Working Group on Corporate Enforcement and Accountability within DOJ. Though Rosenstein did not identify particular members of the Working Group, he stated that it will include "Department leaders and senior officials from the FBI, the Criminal Division, the Civil Division, other litigating divisions involved in significant corporate investigations, and the U.S. Attorney's Offices."

The hallmark of the new Working Group will be "internal recommendations about white collar crime, corporate compliance, and related issues," designed to ensure consistency in DOJ outcomes in these areas. Though Rosenstein did not identify specific areas in which he viewed consistency as lacking, he noted that corporate settlements tend to deter individual wrongdoers only "indirectly," and that "at the level of each individual decision-maker, the deterrent effect of a potential corporate penalty is muted and diffused." Rosenstein emphasized that DOJ's goal "in every case should be to make the next violation less likely to occur by punishing individual wrongdoers."

The expectation, then, should be that the Working Group will operate to ensure that all corporate settlements incorporate appropriate deterrent measures with respect to individual actors, likely including parallel prosecutions where supported by the evidence. Rosenstein closed by emphasizing his belief that "Corporate America should regard law enforcement as an ally" in the prosecution of "criminals who seek unfair advantages," and stating that the law must be enforced "with sufficient vigor that people fear the consequences of violating it."

The full text of Rosenstein's remarks can be found here.