DOJ Issues New Policy Against Duplicative Fines & Penalties for Corporate Misconduct

USA | May 11 2018

News & Knowledge

On May 9, 2018, the U.S. Department of Justice (DOJ) revised its internal policies to require coordination within DOJ and with other agencies to avoid the imposition of unnecessary or duplicative fines, penalties, and forfeitures against the same company for the same misconduct in parallel and/or joint corporate criminal and civil "investigations and proceedings involving multiple [DOJ] components and/or other federal, state, or local enforcement authorities." The policy is set forth in a memorandum entitled, "Policy on Coordination of Corporate Resolution Penalties" (available here) and incorporated into the United States Attorney's Manual, the internal policy manual that binds all DOJ attorneys.

U.S. Deputy Attorney General Rod J. Rosenstein announced the new policy during a speech at the New York City Bar Association's annual white collar crime conference. Recognizing the potential unfairness of overlapping civil and criminal penalties exacted by multiple regulators in various jurisdictions, Rosenstein stated that the new policy is designed to promote coordination internally within DOJ and with other enforcement authorities "to achieve reasonable and proportionate outcomes in major corporate investigations" and thus to guard DOJ's "brand" by protecting its prized "reputation for fairness"[1] He stated that DOJ's "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 highlighted four key features of the new policy:

(1) "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" (e.g., using "the threat of criminal prosecution solely to persuade a company to pay a larger settlement in a civil case");

(2) DOJ components should work together to "achieve an overall equitable result," such as through appropriate "crediting and apportionment of financial penalties, fines, and forfeitures, and other means of avoiding disproportionate punishment" (e.g., global resolutions, rather than stand-alone settlements);

(3) to the extent possible, DOJ should "coordinate with other federal, state, local, and foreign enforcement authorities seeking to resolve a case with a company for the same misconduct;" and

(4) "[DOJ] attorneys may evaluate [certain factors] in determining 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 [DOJ]."

Rosenstein also acknowledged that other factors may impede DOJ's ability to achieve coordinated resolutions, such as the "timing of other agency actions, limits on information sharing across borders, and diplomatic relations between countries."

Troutman Sanders' preliminary analysis of this new policy is that it appears to be a step in the right direction for DOJ, and a worthy policy goal. There are two aspects of the policy worth highlighting. First, civil enforcement actions against companies are far more common than criminal ones, but the policy does not explicitly state that it applies to civil penalties as well. That said, comments in the May 9, 2018 memorandum and Deputy Attorney General Rosenstein's speech make it clear that DOJ intends for it to do so. Second, the new policy applies only to corporate misconduct, not to individual misconduct. Individuals, however, are far less likely to be able to withstand duplicative or overlapping fines, penalties, and forfeitures by multiple criminal or civil regulators, and thus there is an even greater justification for applying this policy to them. This appears to be an oversight by DOJ that can be easily corrected.

Only time will tell if the new policy will be successful. It is possible that the new policy will encourage better coordination by regulators, more global resolutions, and fairer results for companies that may find themselves in the crosshairs of multiple regulators. But it is also possible that the new policy will encourage certain state, federal, or foreign authorities to race to the courthouse to exact penalties before they can be shared or coordinated with others, to the detriment of companies. It is also possible that prosecutors will invoke various exceptions to the policy to avoid complying with it, for fear that global civil and criminal resolutions will make settlements vulnerable to later coercion arguments, or delay DOJ's ability to resolve a case. For example, in our experience, some DOJ components decline to simultaneously negotiate civil and criminal resolutions to avoid any perception that the criminal resolution coerced the civil one, a phenomenon that is specifically acknowledged in, and prohibited by, the new policy. Further, in our experience, federal grand jury secrecy and other confidentiality rules often inhibit information-sharing between and among regulators in the same country, much less abroad, and it is virtually impossible for a regulator to settle a matter without access to the facts. As such, it is possible that the new policy could be swallowed up by its exceptions.

Sharie A. Brown
David M. Chaiken
Bryan B. Lavine
Megan Conway Rahman
John S. West