

Deputy Attorney General Rosenstein Announces New Policy to Limit “Piling On” in Enforcement Actions

May 10, 2018

On May 9, Deputy Attorney General Rod J. Rosenstein provided remarks at the American Conference Institute’s 20th Anniversary New York Conference on the Foreign Corrupt Practices Act (“FCPA”),¹ in which he reviewed the Justice Department’s progress with respect to FCPA enforcement, and announced a new policy designed to promote coordination and limit the imposition of multiple penalties on a company for the same conduct, which he referred to as “piling on.” In addition, Rosenstein announced the establishment of a new Working Group on Corporate Enforcement and Accountability, to further promote the Justice Department’s efforts at coordination and consistency in enforcement.

This memorandum highlights some of the most salient points from Rosenstein’s remarks, and describes the key elements of the new policy, with an eye towards potential implications for enforcement actions going forward.

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¹ <https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rostenstein-delivers-remarks-american-conference-institutes>



Review of FCPA Enforcement Efforts

Rosenstein began his remarks by reviewing the recent progress led by the United States' commitment to doing business with integrity. In particular, Rosenstein noted that the FCPA Unit has announced eight guilty pleas since the start of 2018, and highlighted the continued coordination between the Justice Department, SEC and other federal agencies, as well as counterparts abroad, including the first coordinated resolution with enforcement authorities in Singapore last December.²

In addition, Rosenstein referred to the FCPA Corporate Enforcement Policy,³ announced last November, which was designed to encourage responsible corporate behavior through benefits offered to companies that meet certain requirements regarding disclosure, cooperation, and remediation. In particular, the Corporate Enforcement Policy instituted a presumption in favor of declination for companies that satisfy the relevant standards. Rosenstein noted that the Corporate Enforcement Policy has been incorporated directly into the U.S. Attorneys' Manual, as part of the Justice Department's general effort to increase accessibility, transparency, and consistency in its application, and that the Justice Department has initiated a "comprehensive review and update" to the manual, to "identify redundancies, clarify ambiguities, eliminate surplusage, and incorporate constructive additions."

New Policy

The new policy aims to address the fact that "[i]n highly regulated industries, a company may be accountable to multiple regulatory bodies [which] creates a risk of repeated punishment that goes beyond what is necessary to rectify the harm and deter future violations." Rosenstein referred to the imposition of multiple penalties stemming from the same conduct as "piling on," which, in the Justice Department's view, may "deprive a company of the benefits of certainty

and finality ordinarily available through a full and final settlement."

As such, the new policy encourages coordination through what Rosenstein described as four core features:

1. Reaffirming 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, and that the Justice Department may not invoke the threat of criminal prosecution to persuade a company to pay a larger settlement in a civil case;
2. Addressing situations in which attorneys in different components and offices of the Justice Department may be seeking to resolve a corporate case stemming from the same misconduct, and directing them to coordinate with one another to achieve an overall equitable result;
3. Encouraging attorneys in the Justice Department to coordinate, where possible, with other federal, state, local, or foreign enforcement authorities seeking to resolve a case with a company stemming from the same misconduct;
4. Setting forth factors relevant to the determination of whether multiple penalties serve the interests of justice in a particular case, including: egregiousness of the wrongdoing, statutory mandates requiring penalties, the risk of delay in finalizing a resolution, and the adequacy and timeliness of a company's disclosures and cooperation with the Justice Department.

Finally, Rosenstein announced the establishment of a new Working Group on Corporate Enforcement and Accountability within the Justice Department, which includes leaders and senior officials from the FBI, Criminal Division, Civil Division, other litigating divisions involved in significant corporate investigations, and the U.S. Attorney's Offices. The working group will make internal recommendations

² <https://www.justice.gov/opa/pr/keppel-offshore-marine-ltd-and-us-based-subsiary-agree-pay-422-million-global-penalties>

³ <https://www.justice.gov/criminal-fraud/file/838416/download>

about white collar crime, corporate compliance, and related issues, in further effort to promote consistency within the Justice Department.

Looking Ahead

The Justice Department has, to some extent, recently been implementing the approach described in its new policy in the FCPA context, where it has calculated penalties according to the United States Sentencing Guidelines, and then has shared the penalty with other foreign authorities involved in the investigation. It remains to be seen, however, the extent to which this coordinated approach will be applied in the broader enforcement context, particularly in light of Rosenstein’s cautionary statement that “cooperating with a different agency or a foreign government is not a substitute for cooperating with the Department of Justice,” and that the Justice Department “will not look kindly on companies that come to us after making inadequate disclosures to secure lenient penalties with other agencies or foreign governments.” Further, in discussing the factors set forth above, Rosenstein recognized that in certain cases, “penalties that may seem duplicative really are essential to achieve justice and protect the public,” leaving open the possibility for “piling on” in some instances. As a result, it will be important to look for trends that develop both within and beyond the FCPA context as the policy is implemented, where multiple regulatory and enforcement authorities are involved in the investigation.

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