

Resources

DOJ to Reduce “Piling on” Penalties to Incentivize Corporate Voluntary Self Disclosures

June 1, 2018

On May 9, 2018, Deputy Attorney General Rod J. Rosenstein released a new “Policy on Coordination of Corporate Resolution Penalties” (“Policy”) in an effort to ameliorate the unwarranted “piling on” of penalties by the Department of Justice (“DOJ”) and other law enforcement agencies outside of the DOJ. The Policy’s teeth come in the form of the new section 1-12.100 to the United States Attorney Manual, which requires U.S. Attorneys to consider “the totality of fines, penalties, and/or forfeiture imposed by all [DOJ] components as well as other law enforcement agencies and regulators to achieve an equitable result.”

Importantly, the Policy directs that DOJ attorneys “should remain mindful of their ethical obligation not to use criminal enforcement authority unfairly to extract, or to attempt to extract, additional civil or administrative monetary payments.” To that end, when multiple DOJ attorneys from different DOJ components are investigating the same misconduct, the Policy requires DOJ attorneys to cooperate in order to achieve an equitable outcome that does not result in redundant penalties. The Policy expects the same cooperation by DOJ attorneys with other federal, state or local authorities.

When deciding whether the levying of multiple penalties “allows the interests of justice to be fully vindicated,” the Policy identifies the following factors for consideration:

- The egregiousness of a company’s misconduct;
- Statutory mandates regarding penalties, fines and/or forfeitures;
- The risk of unwarranted delay in achieving a final resolution; and
- The adequacy and timeliness of a company’s disclosures and its cooperation with the DOJ, separate from any such disclosures and cooperation with other relevant enforcement authorities.

Rosenstein’s Policy comes on the heels of the DOJ’s announcement of a revised “FCPA Corporate Enforcement Policy” in late 2017 that focused on encouraging companies to voluntarily disclose misconduct under the Foreign Corrupt Practices Act. The Policy builds on this carrot, rather than stick, approach to compliance by including voluntary disclosures and cooperation with the DOJ as a factor to consider when imposing multiple penalties. However, inadequate disclosures made in an attempt to secure lenient penalties from the DOJ and other agencies will not be tolerated. Rosenstein remarked that, “[i]n those instances, the [DOJ] will act without hesitation to fully vindicate the interests of the United States.”

Policy: <https://www.justice.gov/opa/speech/file/1061186/download>

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

For more information about this alert or the Policy, please contact Jonathan Feld (jfeld@dykema.com), Matthew Dybas (modybas@dykema.com) or your Dykema relationship attorney.

Attorneys

Jonathan S. Feld

Sean C. Griffin

Jason M. Ross

DOJ to Reduce “Piling on” Penalties to Incentivize Corporate Voluntary Self Disclosures (Cont.)

Practice Areas

Business Services

Corporate Finance

Government Investigations and Corporate Compliance

Litigation

As part of our service to you, we regularly compile short reports on new and interesting developments and the issues the developments raise. Please recognize that these reports do not constitute legal advice and that we do not attempt to cover all such developments. Rules of certain state supreme courts may consider this advertising and require us to advise you of such designation. Your comments are always welcome. © 2021 Dykema Gossett PLLC.