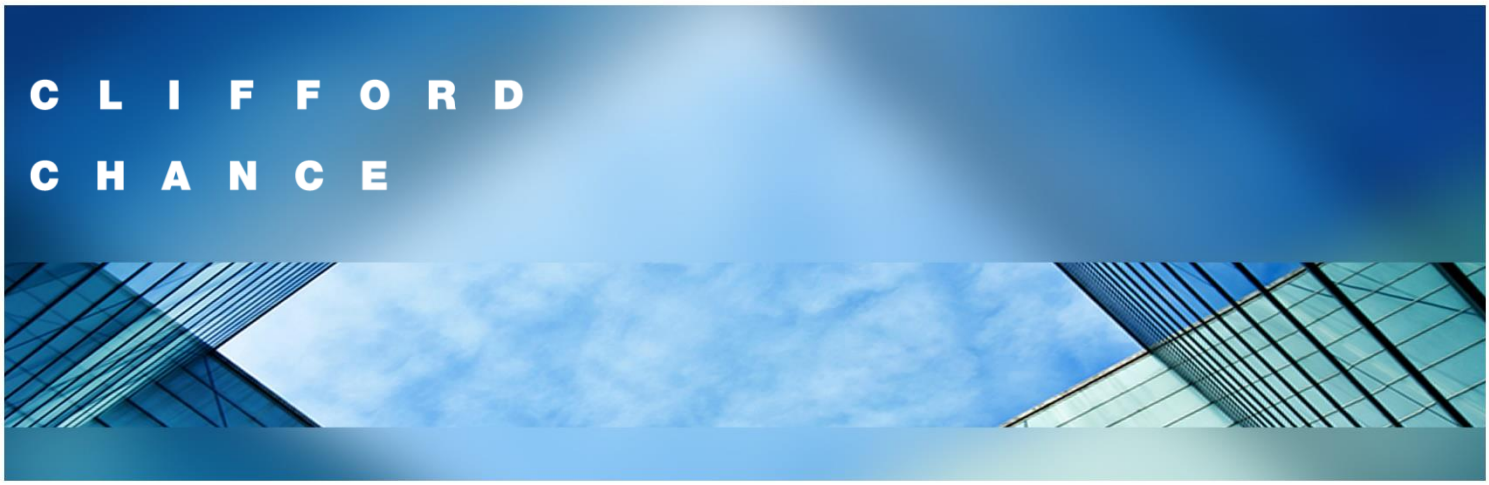

DOJ ANNOUNCES POLICY TO DISCOURAGE LAW ENFORCEMENT AGENCIES AND REGULATORS FROM "PILING ON" DUPLICATIVE AND PARALLEL PENALTIES

On May 9, 2018, Deputy Attorney General Rod Rosenstein announced that the United States Department of Justice ("DOJ") would implement a new policy discouraging regulators and law enforcement agencies engaged in parallel investigations from "piling on" multiple penalties for the same misconduct.[1] DOJ's new policy, which has been incorporated into the U.S. Attorney's Manual,[2] encourages coordination between agencies, both among DOJ components and externally with other regulators in the U.S. and around the world, to prevent what Rosenstein characterized as "disproportionate" enforcement of laws and "duplicative" penalties against corporate actors.

While the announcement is ostensibly a shift in policy, its impact remains uncertain. DOJ has been inching toward a revised approach,[3] but large parallel corporate penalties are still the norm. The new policy –while not enforceable – will provide companies with some new ammunition in their negotiations with DOJ. The policy will also require components within DOJ investigating the same conduct to coordinate their efforts with their DOJ colleagues. However, it remains to be seen whether DOJ's new approach will lower the total dollar value of high-profile corporate settlements, particularly those that test the enforcement mandates of parallel U.S. regulatory agencies, let alone law enforcement and regulatory agencies in multiple jurisdictions.

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1 Deputy Attorney General Rod Rosenstein, Remarks to the New York City Bar White Collar Crime Institute (May 9, 2018) (*available at:* https://www.justice.gov/opa/speech/deputy-attorney-general-rod-rosenstein-delivers-remarks-new-york-city-bar-white-collar).

2 UNITED STATES DEP'T OF JUSTICE, UNITED STATES ATTORNEY'S MANUAL, 1-12.100 (2018).

3 Rosenstein previously hinted at the new policy in a speech in November 2017, in which he stated "repeated punishment" for the same conduct can "undermine the spirit of fair play and the rule of law." Deputy Attorney General Rod Rosenstein, Remarks at the Clearing House's 2017 Annual Conference (Nov. 8, 2017) (*available at:* https://www.justice.gov/opa/speech/deputy-attorney-general-rosenstein-delivers-remarks-clearing-house-s-2017-annual).

What Is "Piling On"?

In the law enforcement context, "piling on" refers to multiple law enforcement agencies issuing their own independent penalties for the same corporate conduct. Piling on most typically comes about as the result of overlapping mandates for law enforcement and regulatory bodies, each with an interest in targeting a particular course of conduct. In his announcement, Rosenstein analogized "piling on" to football, where a player "piles on" by jumping on other tacklers after the opponent is already down. To proponents of the new DOJ policy, duplicative penalties from multiple law enforcement agencies are like "piling on" in football: they are unnecessary and unfair.

The notion of law enforcement "pile on" has received attention in recent years. DOJ components typically have enforcement mandates focusing on particular types of conduct (*e.g.* the Fraud Section, the Antitrust Division), regardless of market context. By contrast, other federal regulators have statutory oversight of particular sectors or markets (*e.g.* the Securities and Exchange Commission (the "SEC"), the Commodity Futures Trading Commission (the "CFTC")). Additionally, the enforcement mandates of federal regulators often function in tandem, and sometimes overlap, with the enforcement mandates of state, local, and foreign regulators. "Piling on" comes about most frequently when a challenged course of conduct falls within the mandates of (a) multiple conduct-oriented DOJ components; or (b) one or more DOJ components and another regulator with broad oversight of the market where the challenged conduct took place. In the United States, DOJ investigations are commonly conducted in parallel with investigations by other regulators, both at the federal and state level. When conduct also occurs outside the United States, DOJ penalties are also often coupled with the imposition of penalties by foreign regulators.

In the wake of the 2008 financial crisis, the practice of multiple law enforcement agencies issuing duplicative penalties against the same acts of corporate misconduct has been common in the United States, and indeed, around the world. For example, numerous regulators at the federal and state levels and abroad imposed billions of dollars in penalties on financial institutions in connection with guilty pleas to both fraud and antitrust crimes concerning alleged manipulation of the foreign exchange markets ("FX"). In the FX investigations, the Fraud Section of the DOJ Criminal Division used its mandate to target FX manipulation internal to the financial institutions themselves, while the Antitrust Division targeted the same conduct as engaged in between the financial institutions and their horizontal competitors (a *per se* violation of the Sherman Act). DOJ received parent-level guilty pleas from five financial institutions and more than $2.5 billion in criminal penalties.[4] Meanwhile, also at the federal level, the CFTC pursued enforcement actions against the financial institutions under the theory that the foreign exchange benchmarks were "commodities in interstate commerce" subject to the anti-manipulation provisions of the Commodity Exchange Act and the Federal Reserve used its authority under the Federal Deposit Insurance Act to issue sanctions. In addition, at the state level and abroad, the New York State Department of Financial Services, and foreign regulators such as the UK's Financial Conduct

[4] United States Department of Justice, Five Major Banks Agree to Parent-Level Guilty Pleas, (May 20, 2015) (*available at: https://www.justice.gov/opa/pr/five-major-banks-agree-parent-level-guilty-pleas).*

Authority, each imposed hefty sanctions pursuant to their respective mandates to prosecute violations of New York and UK law.

Enforcement of the Foreign Corrupt Practices Act ("FCPA") is another area vulnerable to "piling on," as DOJ's Fraud Section, the SEC, and foreign regulators regularly impose sanctions for the same corporate misconduct. DOJ pursues criminal violations of the FCPA, while the SEC brings civil enforcement actions pursuant to its ability to enforce violations of the anti-bribery, anti-fraud, books and records, internal accounting controls, and reporting provisions of the Securities Exchange Act. The resolutions of allegations against Odebrecht, the Brazilian company, and its subsidiary, Braskem, may provide an example of how coordination among law enforcement agencies in a cross border settlement will work under DOJ's new policy. In 2016, Odebrecht and Braskem settled allegations that they violated the FCPA with DOJ, the SEC, and foreign regulators in Brazil and Switzerland for a total of roughly $3.5 billion. As part of a global agreement, Odebrecht agreed to pay a total of roughly $2.6 billion in criminal penalties to DOJ and authorities in Brazil and Switzerland. Meanwhile, as part of separate global agreements, Braskem agreed to pay $325 million in disgorgement to the SEC and authorities in Brazil and roughly $632 million in criminal penalties to DOJ and authorities in Brazil and Switzerland. In 2017, however, DOJ agreed to receive a reduced amount from the Odebrecht global criminal settlement due to the company's inability to pay. Therefore, the cases both illustrate the risks of "piling on" and serve as examples of cross border law enforcement coordination.

DOJ's New Policy Against Piling On Regulatory Penalties: How Does It Work?

In announcing the policy, Rosenstein provided an outline of how the policy may function in practice.

The policy aims to enhance coordination within DOJ and between DOJ and other law enforcement agencies in the US and abroad, while avoiding "unfair" duplicative penalties from multiple authorities. The policy instructs DOJ "components"[5] to "appropriately coordinate" with one another and with other law enforcement agencies in the imposition of multiple penalties on a company regarding investigations of the same misconduct.

Rosenstein highlighted four elements of the new policy:

First, the policy reaffirms that criminal enforcement should not be used against a corporate entity for purposes unrelated to the investigation and prosecution of a possible crime, such as "using criminal enforcement authority unfairly to extract, additional civil or administrative monetary payments."

Second, where different components within DOJ pursue penalties against a company based on the same misconduct, the new policy orders DOJ components to coordinate with one another to avoid duplicative penalties, potentially through crediting and apportioning financial penalties, fines, and forfeitures.

5 The policy as incorporated in the US Attorney's Manual refers to units within DOJ as "components."

Third, the policy encourages attorneys within DOJ to coordinate, when possible, with other federal, state, local, and foreign enforcement authorities on particular cases.

Finally, the policy provides factors DOJ attorneys may evaluate in determining whether multiple penalties are appropriate under specific circumstances. The factors include (1) the nature of the alleged conduct, (2) statutory mandates regarding penalties, (3) the risk of delay in finalizing a resolution, and (4) the adequacy and timeliness of a company's disclosures and cooperation with DOJ. Ultimately, however, when duplicative penalties are deemed "essential" to achieve justice and protect the public, DOJ attorneys are directed not to hesitate in using them.

Notably, the new policy only relates to penalties and does not discourage the initiation of parallel investigations by multiple components within DOJ and other regulators.

What Should Companies Expect From This New Policy?

Despite the new policy's sweeping calls for "coordination," it remains to be seen whether and how such coordination within DOJ and between DOJ and other agencies will be achieved. At a minimum, the policy should provide a clearer path during settlement negotiations for questioning how different DOJ components are working toward a global resolution. Thus, companies facing investigations from numerous sections within DOJ should, moving forward, expect (and where appropriate, demand) enhanced coordination between the various DOJ components. All DOJ attorneys will be bound by the new guidance, even though it is not enforceable by third parties.

When DOJ is acting in coordination with other U.S. regulators or foreign regulators, however, it is unclear whether the new policy will result in better coordination among regulators. Non-DOJ entities at the federal and state levels and abroad will not be bound by the new policy and may not be interested in yielding to DOJ investigations to avoid duplicative penalties. Where "piling on" occurs, each agency sees its own efforts as furthering a robust, pro-enforcement posture in line with its respective mandate. It is difficult to envision agencies relinquishing those enforcement mandates in favor of sanctions brought by their counterparts. Nonetheless, companies can and should press DOJ to press its counterparts for a global, non-duplicative resolution, and where possible, delay any resolution with DOJ until such a global resolution is achieved.

Another wildcard is whether the new policy will lead to lower *overall* penalties, whether in cases involving multiple DOJ components, or DOJ and other regulators. Indeed, moving forward, overall penalty figures may well stay the same, but be levied by a single DOJ division. For example, rather than the Antitrust Division and the Fraud Section each pursuing penalties of $100 million, just one division could pursue a single $200 million penalty.

The new policy also appears to continue DOJ's efforts to hold individual decision makers, and not just corporate entities, responsible for misconduct. In the announcement, Rosenstein noted that the new policy of "coordination" will help DOJ "identify" and "hold accountable" culpable individuals. Thus, the "primary question" DOJ will ask is "Who made the decision to set the company on a course

of criminal conduct?" and it will proceed to focus its enforcement efforts on those individuals.

Even though some of the practical implications of the new policy are uncertain, avoiding regulatory "pile on" is a worthwhile goal, and companies should make every effort to take advantage of the policy when negotiating global settlements that involve DOJ.

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