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DOJ Issues New Policy on Coordination of Corporate Penalties to Address “Piling On”

Yesterday, Rod Rosenstein, Deputy Attorney General of the U.S. Department of Justice, announced a new policy, in the form of an addition to the United States Attorneys’ Manual (“USAM”), concerning the coordination of corporate resolution penalties in cases involving penalties imposed by more than one regulator or law enforcement authority. The new policy represents a promising development that has the potential to address a serious issue that has resulted in unfair outcomes due to the lack of coordination among enforcement authorities and the imposition of redundant fines and penalties.

In a speech announcing the new policy, DAG Rosenstein referred to the “piling on” of fines and penalties by multiple regulators and law enforcement agencies “in relation to investigations of the same misconduct.”¹ DAG Rosenstein noted that the “aim” of the new policy “is to enhance relationships with our law enforcement partners in the United States and abroad, while avoiding unfair duplicative penalties.”² Specifically, the new policy requires DOJ attorneys to “coordinate with one another to avoid the unnecessary imposition of duplicative fines, penalties and/or forfeiture against [a] company,” and further instructs DOJ personnel to “endeavor, as appropriate, to . . . consider the amount of fines, penalties and/or forfeiture paid to federal, state, local or foreign law enforcement authorities that are seeking to resolve a case with a company for the same misconduct.”³

The Four Key Components of the Policy

In his speech, DAG Rosenstein identified four key components of the new policy:

- The reaffirmation of the principle that “the federal government’s criminal enforcement authority should not be used against . . . company[ies] for purposes unrelated to the investigation and prosecution of a possible crime,” including using “the threat of criminal prosecution solely to persuade a company to pay a larger settlement in a civil case”;

¹ Rod Rosenstein, Deputy Att’y Gen., Deputy Attorney General Rod Rosenstein Delivers 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-rostenstein-delivers-remarks-new-york-city-bar-white-collar>.

² *Id.*

³ Memorandum from Rod Rosenstein, Deputy Att’y Gen. U.S. Dep’t of Just., to Heads of Dep’t Components U.S. Att’ys, Policy on Coordination of Corporate Resolution Penalties (May. 9, 2018), available at: <https://www.justice.gov/opa/speech/file/1061186/download>.

- An explicit direction to different components of the DOJ to coordinate with one another when seeking to resolve cases involving the same misconduct in order to achieve an “equitable” result;
- An invitation to DOJ attorneys that, when possible, they coordinate with other federal, state, local, and foreign enforcement authorities in resolving cases involving the same misconduct; and
- The identification of relevant factors (including 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 cooperation) for DOJ attorneys to consider when evaluating whether multiple penalties serve the interests of justice.⁴

Practical Implications

As is often the case with new policies, the ultimate effect of this latest amendment to the USAM will depend in large part on how it is applied. Although the new policy requires that DOJ attorneys coordinate with each other and with other regulators, and “consider” certain factors, it does not describe precisely how the policy might be implemented or the extent to which parties will be given “credit” for fines paid to other regulators in other proceedings. The policy also allows for consideration of subjective criteria, such as the “egregiousness of a company’s misconduct,” which could have an impact on its practical application.⁵

There are current precedents for inter-agency coordination that companies can potentially utilize in seeking to maximize the benefits of the new policy. The most immediate comparison will be to the DOJ’s long history of coordinating with the SEC in resolving parallel investigations. Moreover, FCPA resolutions, historically a harbinger of new directions in enforcement policy for the DOJ, also provide insight into how the DOJ likely will implement the new policy going forward. For example, in its settlement with Keppel Offshore Marine last December, which DAG Rosenstein expressly referenced in his remarks, the DOJ credited the company for penalties of \$211 million paid to Brazil and \$105.6 million paid to Singapore.⁶ Notably, in the FCPA context, the new policy is consistent with, and arguably goes

⁴ Memorandum from Rod Rosenstein (May 9, 2018).

⁵ *Id.*

⁶ See Deferred Prosecution Agreement, *U.S. v. Keppel Offshore & Marine Ltd.*, No. 17-CR-697 (KAM) (E.D.N.Y. Dec. 22, 2017) at 9.

Keppel is just one of several resolutions in which the DOJ has provided offsets for fines paid to foreign regulators. In 2016, when reaching a settlement with Odebrecht S.A. and Braskem S.A. over allegations of bribery, the DOJ agreed to credit the amount that Odebrecht is required to pay to Brazil and Switzerland over the full term of their respective agreements, with the United States and Switzerland receiving 10 percent each of the total criminal fine and Brazil receiving the remaining 80 percent. See DOJ Press Release, *Odebrecht and Braskem Plead Guilty and Agree to Pay at Least \$3.5 Billion in Global Penalties to Resolve Largest Foreign Bribery Case in History* (Dec. 21, 2016), available at:

further than, Article 4 of the OECD Convention, which requires that signatories with shared jurisdiction over a foreign bribery case consult with one another.⁷

For years, corporations have been arguing—with varying degrees of success—that fines and penalties imposed in related proceedings, whether foreign or domestic, should be considered in establishing an appropriate penalty. Sometimes these arguments were couched in terms of the availability of alternative remedies, other times as arguments about the unfairness and arbitrariness of multiple penalties imposed by different regulators (or indeed different components within the DOJ) based on the same underlying conduct. The introduction of the new policy will allow corporations to tie these arguments to specific provisions of the USAM.

Perhaps the first impact of the DOJ's new policy can be gleaned from the \$4.9 billion settlement by Royal Bank of Scotland (RBS) with the DOJ Residential Mortgage-Backed Securities Task Force, announced today. Observers had expected RBS to pay substantially more to the consortium of federal enforcement and regulatory agencies that comprise the Task Force.

It will be important for companies to begin to test the sweep of the new policy by seeking to hold the DOJ and other government authorities to the new standards, which should lead to more reasonable outcomes and a fairer, more efficient process if implemented in good faith along the lines described by the DAG.

<https://www.justice.gov/opa/pr/odebrecht-and-braskem-plead-guilty-and-agree-pay-least-35-billion-global-penalties-resolve>.

Similarly, according to the terms of the deferred prosecution agreement which VimpelCom Ltd. entered into in 2016, the DOJ agreed to offset the total criminal penalty of over \$460 million by up to \$230 million for any criminal penalties paid to the Dutch Prosecution Service. See Deferred Prosecution Agreement, *U.S. v. VimpelCom Ltd.*, No. 16-cr-137 (ER) (S.D.N.Y. Feb. 22, 2016) at 8–9. Additionally, in 2017, the DOJ credited penalties paid to the Brazilian and Dutch authorities when calculating the fine to be paid by SBM Offshore N.V., a Netherlands-based oil services company, to resolve charges of bribery. See DOJ Press Release, *SBM Offshore N.V. and United-States-Based Subsidiary Resolve Foreign Corrupt Practices Act Case Involving Bribes in Five Countries* (Nov. 29, 2017), available at: <https://www.justice.gov/opa/pr/sbm-offshore-nv-and-united-states-based-subsidiary-resolve-foreign-corrupt-practices-act-case>.

⁷ See Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, 37 I.L.M. 1, available at: http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf.

This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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