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White-Collar Crime

Expert Analysis

Sessions' Justice Department's Pragmatic Approach to Corporate Accountability

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Many of the administration's enforcement priorities may raise serious concerns for criminal defense lawyers and other champions of legal rights. White-collar practitioners, however, might be able to conjure up some gratitude for the new regime at the Justice Department when they find themselves advocating for fairer treatment of their corporate clients.

Attorney General Jeff Sessions has commented about shifting enforcement resources toward more traditional, non-white-collar cases and, when addressing white-collar enforcement, he has spoken of an increasing focus on individual rather than corporate liability. Indeed, the country's top law enforcement officer has opined that corporations should not necessarily be penalized by criminal prosecution for the wrongful behavior of a few isolated employees.

Following this lead comes the May 9, 2018 announcement by Deputy Attorney General Rod Rosenstein at the New York City Bar White Collar Crime Institute, of an "anti-piling on" policy. Rosenstein spoke of creating a new policy in response to concerns expressed by companies that operate in highly regulated industries, such as banking or health care, which are accountable to multiple regulatory bodies. The approach is intended to reduce the perceived unfairness for repeated punishments that may exceed what is "necessary to rectify the harm and deter future violations," a risk that is magnified by the global reach of many businesses. The policy's addition to the United States Attorneys' Manual is evidence of a more pragmatic approach to accountability for corporate wrongdoing.

The New Policy

As detailed by Rosenstein, the policy aims to promote coordination of corporate penalties among various enforcement entities investigating the same conduct and reduce the unfair burden of overlapping penalties. Although the addition of the policy to the United States Attorneys' Manual does not have the force of law, the policy's inclusion in the prosecutor's manual communicates to prosecutors the business-friendly administration's desire to achieve more rational outcomes in the resolution of corporate misconduct.

As set forth in Section 1-12.100 of the United States Attorneys' Manual, the new direction to prosecutors has four components. First, prosecutors are reminded of their ethical obligation not to use the Justice Department's criminal enforcement authority "unfairly to extract, or to attempt to extract, additional civil or administrative monetary penalties." Rosenstein notes that this is not so much a policy change as a reminder that the threat of prosecution should not be used to extract large civil settlements.

Second, Justice Department attorneys are directed to coordinate with one another where a company is being investigated by multiple DOJ components or offices for the same conduct. Department attorneys are directed to work collaboratively to apportion penalties to achieve an overall "equitable result." In some instances, one component of the Department may need to credit the company for previously paid financial penalties or fines. The third

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element of the policy takes this one step further, directing DOJ attorneys to coordinate with other federal, state, local or foreign enforcement authorities investigating the same misconduct as appropriate.

The final element of the new policy sets forth a number of relevant factors to be considered in determining whether coordination and the apportionment of penalties will result in the "full vindication" of justice. These factors include: 1) the egregiousness of a company's misconduct; 2) statutory mandates regarding penalties, fines and/or forfeitures; 3) the risk of unwarranted delay in achieving a final resolution; and 4) the adequacy and timeliness of a company's disclosures and its cooperation with the Justice Department, separate from any such disclosures and cooperation with other enforcement authorities.

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To this last point, Rosenstein stated, "[c]ooperating with a different agency or foreign government is not a substitute for cooperating with the Department of Justice. And we will not look kindly on companies that come to the Department of Justice only after making inadequate disclosures to secure lenient penalties with other agencies or foreign governments. In those instances, the Department will act without hesitation to fully vindicate the interests of the United States." The anti-piling on policy sets the tone for a more equitable and reasonable approach to the resolution of corporate misconduct. A brief examination of the background of the Justice Department's approach to corporate criminal enforcement in recent years demonstrates the need for this change.

Recent Trends In Corporate Enforcement

White-collar practitioners are all too familiar with the Arthur Andersen debacle, where a company whose conviction was overturned by the Supreme Court was destroyed and tens of thousands of innocent employees were put out of work because of what some believe to have been an unnecessarily aggressive prosecution. Andersen's collapse led to a shift in the Justice Department's approach to corporate wrongdoing to avoid the devastating impact of criminal indictments on corporate entities and, more importantly, innocent employees and shareholders.

The most prominent approach taken by the government has been the use of deferred and non-prosecution agreements, which required business organizations to admit wrongdoing but allow them to avoid most of the effects of a guilty plea. Between 2001 and 2014, over 300 such agreements were made whereas less than two dozen had been made in the preceding decade. Attorney General Sessions has been appropriately critical of these agreements because they exact large fines without any real determination of guilt.

The Justice Department also increasingly has sought to recover for corporate wrongdoing by bringing civil fraud actions under statutes such as the Financial Institutions Reform, Recovery, and Enforcement Act and the False Claims Act, and in such instances, corporate entities simultaneously often faced suits brought by other federal and state enforcement agencies, such as the Securities and Exchange Commission and New York's Department of Financial Services. Finally, increased globalization brought foreign governments into investigations of corporate wrongdoing. The investigation into the rigging of the interest rate benchmark known as LIBOR in the mid-2010's is a prime example. Entities involved in the scandal faced cases brought by regulators with overlapping jurisdiction on both sides of the Atlantic under a variety of legal theories, including securities fraud, antitrust violations, commodities manipulation, racketeering, not to mention shareholder claims of breach of fiduciary duties.

The result in these types of cases was often the payment of duplicative and excessive financial penalties by corporate entities—a practice that has commonly come to be known as "piling on." This, in turn, resulted in greater reluctance by companies to self-disclose any misconduct discovered, and the cycle of unduly punishing corporations for failing to timely come forward was perpetuated.

How the Anti-Piling On Policy Will Work in Practice

Although Rosenstein referred to the anti-piling on policy as "new," enforcement authorities have been discussing the concept since 2016, mostly within the context of the Foreign Corrupt Practices Act where corporations often deal with multiple regulators within

the United States as well as across the globe. In 2015-2016, the Chief of the FCPA Unit at the Securities and Exchange Commission and the head of the FCPA Unit at the Justice Department worked together to create a network of international cooperation to combat bribery and corruption. Kara Brockmeyer and Daniel Kahn hosted three conferences dedicated to the training of foreign prosecutors on a variety of topics, including cooperation between countries investigating the same conduct. One of the ideas discussed was the "one pie" concept—the equitable division among worldwide enforcement authorities of the one total cost imposed on anti-corruption violators.

The VimpelCom and Telia settlements of FCPA claims in 2016 and 2017 serve as an example. In both instances, the companies settled for one sum with multiple American regulators as well as foreign entities. The application of the one pie concept to these cases and the cooperation of regulators and prosecutors achieved its goal—the corporate misconduct was penalized, while for the most part avoiding the worst excesses of overlapping and duplicative criminal and regulatory penalties. As stated in July 2017 by Sandra Moser, then-Principal Deputy Chief of the Fraud Section of the Justice Department, this coordination among countries will continue primarily because it is fair to businesses. "It encourages companies to cooperate across the board, because we understand that, at the end of a case, money paid out is derived from one pie. A resolving company should not have piled upon it duplicative fines via separate resolutions that do not credit one another."

The implementation of the Justice Department's anti-piling on policy is likely to look similar. International cooperation and the coordination of outcomes in joint and parallel proceedings will be emphasized. The primary investigative focus is likely to be on who set the company on a course of criminal conduct, and investigations will focus on these individuals. In his comments, Rosenstein stated, "Corporate settlements do not necessarily directly deter individual wrongdoers. They may do so indirectly, by incentivizing companies to develop and enforce internal compliance programs. But at the level of each individual decision-maker, the deterrent effect of a potential corporate penalty is muted and diffused. Our goal in every case should be to make the next violation less likely to occur by punishing individual wrongdoers."

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In conjunction with his announcement of the policy, Rosenstein announced the creation of a new Working Group on Corporate Enforcement and Accountability, created to "promote consistency in [the Department's] white-collar efforts." The working group, which includes senior officials from the FBI and litigating divisions within the Department, will make internal recommendations about white-collar crime, corporate compliance and related issues.

A note of caution is warranted. Properly rewarding corporate cooperation, punishing individual wrongdoers, and taking into account potentially duplicative penalties by other law enforcers are not new enforcement concepts; they have long been part of federal prosecutors' official and unofficial policy guidebook. It is also common for a new administration to officially announce "new" enforcement policies that have limited impact on the real-world work of prosecutors. Reasons may include that the die was already cast in long-running investigations before the new administration was sworn in; because there is a degree of resistance in the ranks below the most senior levels in Washington (particularly in historically independent offices like the Southern District of New York); and because the "new" policies include ample exceptions that turn out to apply in the big, headline-grabbing cases. The anti-piling on policy introduced by Rosenstein, though a rhetorical step in the right direction, appears to be subject to all of these potential pitfalls.

Conclusion

The Justice Department's messaging of a shift in its approach to corporate accountability for wrongdoing committed within an organization is welcome. How this shift will translate into prosecutors' actual decision making in individual cases remains to be seen.