

Is the Trump administration charting a new course away from the duplicate fines of the financial crisis?

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Double jeopardy prevents criminal defendants from being convicted of the same crime twice. Res judicata prevents civil litigants from facing repeated claims by an overly aggressive plaintiff. Unfortunately, in the years after the financial crisis financial institutions were essentially unprotected from receiving multi-million dollar demands by multiple regulators for the same conduct.

The financial industry may soon experience a welcome shift from the government's burdensome and duplicative practice as policy changes at the federal level promise to constrain the practice of "piling on" by government authorities.

On May 9, 2018, Deputy Attorney General Rod Rosenstein announced¹ a new Department of Justice ("DOJ") enforcement policy encouraging "coordination among Department components and other enforcement agencies when imposing multiple penalties for the same conduct."

In adopting the new policy, the DOJ has acknowledged the reality of companies in highly regulated industries — they are accountable to numerous government authorities that may each impose a penalty on the company for the same conduct.

The overlapping jurisdiction "creates a risk of repeated punishment that goes beyond what is necessary to rectify the harm and deter future violations."

Rosenstein announced the policy shift two days before a speech² by SEC Commissioner Hester Peirce emphasizing a focus on coordination among agencies and a de-emphasis on headline-grabbing fines.

The new governmental coordination policy, if it had been in place in the years after the crisis, could have led to significantly different results for the Government and the regulated companies if they were addressed today, and it may already be having an effect in Foreign Corrupt Practices ("FCPA") matters.

The DOJ's new policy has four core features:

- (1) The policy reaffirms that the DOJ cannot make a threat of criminal prosecution solely to invoke a larger settlement from a company in a civil case.
- (2) The policy instructs DOJ attorneys to coordinate with each other to achieve an equitable result when DOJ attorneys in different offices and divisions are seeking to resolve a case based on the same alleged misconduct. The coordination

amongst DOJ divisions is aimed at avoiding "disproportionate punishment."

- (3) The policy encourages the DOJ to coordinate with other enforcement authorities, whether based in the U.S. or abroad, that are seeking to resolve a case related to the same conduct. Rosenstein specifically identified potential coordination with the SEC, Commodity Future Trading Commission ("CFTC"), Federal Reserve Bank ("FRB"), Federal Deposit Insurance Corporation ("FDIC"), Office of the Comptroller of the Currency ("OCC"), and Office of Foreign Assets Control ("OFAC").
- (4) The policy identifies factors the DOJ may evaluate in determining whether penalties from multiple enforcement authorities are appropriate, to include the egregiousness of the wrongdoing; statutory mandates regarding penalties; the risk of delay in finalizing a resolution; and the adequacy and timeliness of a company's disclosures and cooperation with the DOJ.

During the policy announcement, Rosenstein reinforced the DOJ's focus on encouraging companies to report suspected crimes promptly and to negotiate resolutions expeditiously. The new policy has been added to the U.S. Attorneys' Manual.

Two days later, on May 11, 2018, Commissioner Peirce, a Trump nominee, announced that the SEC will no longer follow a "broken windows" enforcement approach where it punishes all violations, from minor to major, to send the message that the SEC views enforcement seriously.

In contrast to the "more-is-always-better approach," the SEC will focus on bringing only "meaningful enforcement actions." To foster this policy shift, the SEC "can take into consideration whether other regulatory or criminal authorities are looking at the same conduct."

This approach allows the SEC to conserve resources in situations in which the DOJ, a state, or a foreign regulatory authority is addressing the same conduct.

Commissioner Peirce specifically noted that while it may be "nice" to have the SEC's "name on the press release," the SEC can "forgo the limelight" if "investors and markets are no better off" based on the SEC's involvement.

These pronouncements follow in the wake of criticism of the financial penalties that resulted from governmental investigations arising out

of the financial crisis. As demonstrated in the charts below,³ prior to the current Administration, financial institutions at the center of these investigations commonly faced penalties from three or more regulatory authorities across the globe.

In none of these circumstances did the government authorities appear to reduce their penalty amounts because of the fines paid to other authorities.

For example, Barclays was penalized a collective \$2.5 billion as a result of enforcement actions by six different U.S. and foreign authorities related to foreign exchange ("FX") investigations.

Citigroup followed closely behind with \$2.3 billion in fines from six government authorities.

Deutsche Bank did not fare better with respect to London Interbank Offered Rate ("LIBOR")⁴ investigations: it was penalized by six different agencies for a total of \$3.7 billion.

It will be interesting to see how fines in similar multi-regulator matters will be determined going forward under these new approaches.

To gain some insight into how these changes may impact enforcement actions moving forward, we can look to FCPA actions where the DOJ has been implementing a similar practice as announced in July 2017 by Sandra Moser, the Acting Chief of the DOJ Fraud Section.

Although in the past the DOJ has occasionally credited payments made to other government authorities, such as in the Odebrecht and Braskem⁵ settlements in December 2016, the practice now seems to be implemented in a majority of cases.

For example, in November 2017, the DOJ credited SBM Offshore N.V.'s payment of penalties to Dutch and Brazilian authorities in calculating the DOJ's penalty of \$238 million.⁶

Similarly, in the DOJ's settlement with Keppel Offshore Marine⁷ in December 2017, the DOJ credited the company for penalties of more than \$300 million paid to government authorities in Brazil and Singapore.

If executed as advertised, the DOJ's new policy against piling on and the SEC's focus on coordination will be a welcome change for financial institutions and other companies in highly regulated industries.

NOTES

¹ <https://bit.ly/2zotzX9>

² <https://bit.ly/2Gf694o>

³ As referenced in the charts: South African Competition Commission ("SACC"), Conselho Administrativo de Defesa Econômica (Administrative Council for Economic Defense ("CADE")), Swiss Financial Market Supervisory Authority ("FINMA"), New York Department of Financial Services ("NY DFS"), Financial Conduct Authority ("FCA"), State Attorney Generals ("State AGs"), Exchange Commission ("EC"), and Dutch Public Prosecutor ("DPP").

⁴ <https://bit.ly/2u4RRAj>

⁵ <https://bit.ly/2icnvr5>

⁶ <https://bit.ly/2KOesvd>

⁷ <https://bit.ly/2BCL4IM>

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