

MAY 16, 2018

## DOJ Announces New "No Piling" FCPA Policy

On May 9, 2018, The Deputy Attorney General Rod Rosenstein announced a new US Department of Justice ("DOJ") Policy, highlighting that some companies may be overpaying for their corruptions and bribe related crimes due to the enforcement of fines by multiple agencies not only from the United States, but from all around the world.

In his speech, at a New York City Bar Association Conference, Mr. Rosenstein described the policy as being aligned with the Foreign Corrupt Practices Act (FCPA) Corporate Enforcement Policy program announced in December 2017, which would facilitate the avoidance of penalties by companies that self-report corruption and bribery and that cooperate with the government agency investigations. With both policies, the DOJ's goal is to focus on holding individuals accountable for the wrongdoings, as penalizing companies with excessively large fines, according to Mr. Rosenstein, indirectly impacts innocent employees and investors.

Another argument in favor of the new "no piling on" policy is that the individual wrongdoer is not deterred by the large fines, because the impact is on the company. The other companies, when facing potentially large fines due to FCPA violations, will enhance its compliance programs and its cooperation efforts with the governments but would still be at risk of having an individual wrongdoer acting within its entities. For that reason, the DOJ is seeking to "award" the good faith and effective compliance and cooperation efforts by these companies and focus on the wrongdoer.

The new policy also materializes an ongoing trend by the DOJ and the US Securities and Exchange Commission (SEC) of taking foreign government agencies' penalties into consideration when determining their own fines. On September 21, 2017, the SEC and the DOJ announced a global settlement with Telia Company AB, a Sweden-based telecommunications company (and former U.S. issuer), in the total amount of \$965 million, which includes a criminal fine of more than \$508 million imposed by the DOJ and a disgorgement obligation in the amount of \$457 million. In that case, the SEC agreed to credit any disgorged profits that Telia pays to the Swedish Prosecution Authority or to the Public Prosecution Service of the Netherlands (Openbaar Ministrie, or OM), up to half of the total of the disgorgement. In addition, the DOJ agreed to credit the criminal penalty paid to the OM as part of its agreement with the company.

The official implementation of the policy also brings a clearer path for the companies to follow, and it could mean that State enforced fines would also be included in such abatements. Accordingly, Mr. Rosenstein assured the discouragement of disproportionate penalties should follow a range of outlined criteria such as timely and adequate disclosures, specifically cooperation with the DOJ and not only with foreign jurisdictions, information shared between all agencies, diplomatic relations between countries, the egregiousness of the misconduct, etc.

With record-setting fines being levied in the billions of dollars, coupled with the DOJ and SEC's aggressive enforcement and appreciation of companies' compliance efforts, it is more critical than ever for companies to establish and assess Anti-Corruption Compliance Programs to mitigate the risks of FCPA violations. Our attorneys and advisors have extensive experience advising clients on the FCPA and effective Anti-Corruption Compliance Programs in over 30 countries, including Latin America.

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