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# The Department of Justice's new 'piling on' policy

In a potentially significant development for companies facing cross-border investigations, the United States Department of Justice (DOJ) recently unveiled a new policy discouraging DOJ attorneys from 'piling on' multiple penalties against companies for the same misconduct. 'Piling on' is a term from US football, prohibiting one or more players from jumping on top of a player or group of players after a tackle has been made. In the cross-border anti-bribery context, different countries can 'pile on' to corporations by assessing multiple penalties for the same misconduct.

Among other things, the new policy encourages DOJ attorneys to coordinate with their non-US enforcement partners to resolve corporate investigations and, in doing so, to consider the amount of fines that companies pay to authorities in other jurisdictions. The policy is worded quite generally and, as with every new pronouncement by the DOJ, it remains to be seen how it will be implemented.

At least with respect to anti-bribery investigations, however, future implementation may be easier to predict because the policy appears to formalise what the DOJ already has been doing in practice. In recent coordinated settlements involving the US Foreign Corrupt Practices Act (FCPA)<sup>1</sup> and the anti-bribery laws of other jurisdictions, the DOJ has allowed for offsets or credits against the amounts of fines assessed under the FCPA that are equal to the penalties assessed by authorities outside of the US. This approach can be seen most recently in the DOJ's June 2018 settlement with Société Générale, in which the DOJ credited nearly \$293m that Société Générale paid to French authorities. A similar approach was taken in other recent settlements involving Odebrecht, Braskem, Keppel Offshore & Marine Ltd and several others.

These offsetting penalties can result in a significant benefit to companies, but there is an important caveat. In each of the cases in which the DOJ has allowed for offsets, the DOJ has emphasised the degree to which the company under investigation cooperated with

the DOJ. Thus, we can expect that, at least in anti-bribery cases, the DOJ's new policy will result in an increase in the practice of offsetting penalties, assuming the company cooperates to the DOJ's satisfaction. But for companies that do not, they face continued risk that multiple penalties will be 'piled on' by the DOJ and non-US enforcement authorities.

## *The new policy discourages 'piling on', but restates that cooperation is a prerequisite*

The DOJ's new policy, which has been incorporated into the US Attorney's Manual,<sup>2</sup> addresses the obvious unfairness of duplicative penalties in cross-border investigations. The policy states that the DOJ 'should endeavor, as appropriate, to coordinate with and consider the amount of fines, penalties, and/or forfeiture paid to other federal, state, local, or foreign enforcement authorities that are seeking to resolve a case with a company for the same misconduct'. The policy also sets forth factors to determine 'whether coordination and apportionment' between the DOJ and other enforcement authorities vindicates the interests of justice. These factors include the seriousness of the conduct, whether any penalties are mandated by statute, the risk of unwarranted delay in resolving the matter, and 'the adequacy and timeliness of a company's disclosures and its cooperation with the DOJ, separate from any such disclosures and cooperation with other relevant enforcement authorities'.<sup>3</sup>

In a speech on 9 May 2018, US Deputy Attorney General Rod Rosenstein warned companies of how critical it is to cooperate with the DOJ to achieve the benefit of the new policy: 'Cooperating with a different agency or a 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 DEPARTMENT OF JUSTICE'S NEW 'PILING ON' POLICY

Rosenstein's speech left no doubt that a failure to cooperate can lead to duplicative penalties from the US and other jurisdictions. He said that in such cases, the DOJ will 'pursue complete remedies' and encourage its non-US law enforcement partners to do the same.<sup>4</sup>

As it relates to anti-bribery investigations, the policy discouraging 'piling on' should be read in conjunction with two other recent DOJ policies. The first is the DOJ's FCPA Corporate Enforcement Policy, announced in November 2017. That policy allows companies a 50 per cent reduction off the low end of their fine range under the US Sentencing Guidelines, provided they voluntarily self-disclose the bribery, fully cooperate and remediate appropriately and in a timely manner. Companies that do not voluntarily self-disclose but meet the other requirements of the FCPA Corporate Enforcement Policy may obtain up to a 25 per cent reduction off the low end of their fine range.<sup>5</sup> This policy highlights the DOJ's continued emphasis on robust cooperation and voluntary disclosure.

The second recent DOJ policy, announced in September 2015 and applicable beyond FCPA matters, requires companies to 'identify all individuals involved in or responsible for the misconduct at issue, regardless of their position, status or seniority, and provide to the DOJ all facts relating to that misconduct' to receive cooperation credit.<sup>6</sup> Since the policy was announced, the DOJ has continued to stress the need to hold individuals accountable, and Rosenstein's 9 May speech was no exception. He said that a primary question for the DOJ is always: 'Who made the decision to set the company on a course of criminal conduct?'<sup>7</sup> The bottom line is that the DOJ will continue to expect companies to provide information on responsible individuals.

### *Recent anti-bribery settlements reveal how the DOJ is likely to implement the policy*

In several recent FCPA coordinated settlements, the DOJ has announced that it has offset the FCPA penalty in an amount equal to the penalty assessed by non-US authorities.

#### *Société Générale*

In June 2018, Paris-based financial institution Société Générale settled an FCPA case with the DOJ and French criminal authorities. The DOJ touted this as its first coordinated resolution with French authorities in a

bribery case.<sup>8</sup> (The settlement with the DOJ also covered a separate London Inter-bank Offered Rate (LIBOR) manipulation case, which was not addressed in the settlement with French authorities.)

The deferred prosecution agreement (DPA) between Société Générale and the DOJ detailed multiple bribes that Société Générale paid between 2005 and 2009 through an intermediary to Libyan government officials, in exchange for sizeable placements that the Libyan sovereign wealth fund and other state-owned entities made with Société Générale. The agreed-upon FCPA penalty was more than \$585m (a figure that represented less than a 25 per cent reduction off the low end of the Sentencing Guidelines fine range), because Société Générale not only did not voluntarily disclose the bribery conduct but also did not receive full cooperation credit. The DOJ agreed to offset that amount by roughly \$292m (50 per cent of the total fine), representing penalties that Société Générale had agreed to pay to the Parquet National Financier (PNF) in Paris.

In the DPA, the DOJ emphasised that Société Générale received 'substantial credit' for cooperation, which included conducting a thorough internal investigation, collecting and producing voluminous evidence from outside the US to the extent the company was permitted to, providing frequent updates to the DOJ on the status of facts that Société Générale was learning in its investigation, and providing information about individuals involved in the bribery. Société Générale did not receive full cooperation credit because of unspecified issues resulting in delay in the investigation's early stages, which led the DOJ to develop significant independent evidence of misconduct.<sup>9</sup>

#### *Odebrecht and Braskem*

In December 2016, Brazilian conglomerate Odebrecht SA and petrochemical company Braskem SA (of which Odebrecht is the majority owner) pleaded guilty to FCPA charges and agreed to pay a combined total fine of at least \$3.5bn (pending resolution of Odebrecht's claim that it was unable to pay more than \$2.6bn). Odebrecht engaged in a 15-year scheme to pay approximately \$788m in bribes to secure projects in 12 countries across Africa and Central and Latin America. The scheme included the establishment of a standalone division within the company that

effectively functioned as a bribe department. Braskem engaged in an eight-year scheme to pay approximately \$250m in bribes to a Petrobras official and Brazilian politicians and political parties, using Odebrecht's secret, off-book bribe payment system.

In separate plea agreements, the DOJ agreed to credit the penalties assessed by Brazil, Switzerland and the US for both companies. In Odebrecht's case, the criminal penalty of \$2.6bn was apportioned: 80 per cent to Brazil, ten per cent to Switzerland and ten per cent to the US. In Braskem's case, the three jurisdictions shared the criminal penalty of \$632m in a proportion: 70 per cent, 15 per cent and 15 per cent, respectively.<sup>10</sup> Because neither company voluntarily disclosed the misconduct, they were at most eligible for a 25 per cent reduction in their fine range under the FCPA Corporate Enforcement Policy. Odebrecht received the full 25 per cent reduction for cooperation, which included collecting evidence and performing forensic data collection in multiple jurisdictions, producing documents from foreign countries in ways that did not implicate data privacy laws, informing the DOJ of facts relating to projects obtained through bribery and individuals involved in the scheme, and encouraging current and former employees to cooperate with the DOJ.<sup>11</sup> Braskem only received partial credit – 15 per cent off its fine range – because, although it undertook similar steps to Odebrecht, it did not begin to do so until the DOJ had developed significant independent evidence and it did not produce any documents or provide the DOJ with any information until seven months after it contacted the DOJ about the matter.<sup>12</sup>

#### *Keppel Offshore & Marine Ltd*

In December 2017, Singapore-based offshore rig construction and shipbuilding company Keppel Offshore & Marine Ltd (KOM) paid more than \$422m to settle bribery charges with the DOJ, the Brazilian Ministério Público Federal (MPF), and the Singapore Attorney General's Chambers (AGC). The DPA between the DOJ and KOM chronicled a 13-year bribery scheme, between 2001 and 2014, in which KOM paid or conspired to pay approximately \$55m in bribes to officials of the Brazilian state-owned company Petrobras and the political Worker's Party of Brazil.

The \$422m fine was what the US Sentencing Guidelines called for (after a 25 per cent reduction, pursuant to the FCPA

Corporate Enforcement Policy), because the company did not voluntarily disclose the bribery in a timely manner. The DOJ, however, credited the amount that KOM paid to the other jurisdictions, with Brazil receiving 50 per cent of the total penalty and Singapore receiving 25 per cent. Thus, the penalty assessed by the DOJ was just over \$105m (25 per cent of the total fine). As with the Société Générale matter, the DOJ emphasised how much KOM had cooperated in the matter, including conducting a thorough internal investigation, promptly responding to the DOJ's requests, identifying issues and facts that the DOJ would be interested in, making regular presentations to DOJ attorneys, agreeing to make foreign-based employees available for interviews in the US, producing documents from outside the US, and providing information about individuals involved in the bribery, which assisted the DOJ in its prosecution of a former KOM in-house attorney.<sup>13</sup>

#### *Other recent examples*

Several other recent FCPA settlements contain offsets of FCPA fine amounts, including:

- the DOJ's September 2017 settlement with Telia Company AB (total criminal penalty of roughly \$548m, offset by payment of \$274m to the Organization of the Public Prosecution Service of the Netherlands – the Dutch Prosecution Service); and
- the DOJ's January 2017 settlement with Rolls-Royce plc (FCPA penalty of roughly \$195m, offset by payment of roughly \$25m to Brazilian MPF; the company also settled with UK Serious Fraud Office for roughly \$604m).

#### *Key takeaways*

The DOJ's new policy discouraging 'piling on' will likely institutionalise the approach seen in the above examples, and credits or offsets of penalties will become the norm if the company cooperates with the DOJ in a meaningful way. For companies caught up in cross-border anti-bribery investigations, there are at least three key takeaways.

First, throughout the investigation, companies should pay close attention to the benefits that can be achieved through meaningful cooperation. But it is also useful to note that the above examples make clear that the DOJ does not have a set-in-stone approach to cooperation; companies have



## THE DEPARTMENT OF JUSTICE'S NEW 'PILING ON' POLICY

received significant offsets even when they did not voluntarily disclose the misconduct and/or when there were delays in getting critical information to the DOJ.

Second, although the new policy is not legally enforceable, it does give companies another issue to raise with the DOJ in negotiations. While the policy does not require DOJ attorneys to avoid 'piling on', it is hard to imagine the DOJ ignoring the policy, and it is fair for a company to ask how the DOJ views the policy in the context of a specific case.

Third, to the extent possible, companies should try to resolve cross-border anti-bribery matters with the DOJ and other jurisdictions at the same time, so the DOJ can credit amounts paid to its enforcement partners in other parts of the world.

### Notes

- \* The authors have practices focusing on white collar criminal defence and regulatory investigations, including cross-border investigations. Jonathan S Abernethy currently serves as the IBA Criminal Law Committee North American Regional Representative.
- 1 The FCPA prohibits corrupt payments or offers to pay anything of value to non-US government officials or third parties acting on their behalf in order to obtain or retain business; 15 USC ss 78dd-1, 78dd-2, 78dd-3.
- 2 The US Attorney's Manual contains policies and guidance for DOJ attorneys to follow, but those policies are not enforceable in court.
- 3 Coordination of Corporate Resolution Penalties in Parallel and/or Joint Investigations and Proceedings Arising from the Same Misconduct, US Attorney's Manual s1-12.100. The full policy, available at [www.justice.gov/usam/usam-1-12000-coordination-parallel-criminal-civil-regulatory-and-administrative-proceedings#1-12.100](http://www.justice.gov/usam/usam-1-12000-coordination-parallel-criminal-civil-regulatory-and-administrative-proceedings#1-12.100), also contains two additional components: a statement affirming that DOJ attorneys should not use the threat of criminal prosecution to extract or attempt to extract a

larger settlement against a company in a civil case; and, in cases in which multiple components of the DOJ are investigating the same misconduct, a directive that those components co-ordinate with one another to avoid duplicative penalties. Ibid.

- 4 Deputy Attorney General Rod Rosenstein Delivers Remarks to the New York City Bar White Collar Crime Institute, 9 May 2018, available at [www.justice.gov/opa/speech/deputy-attorney-general-rod-rosenstein-delivers-remarks-new-york-city-bar-white-collar](http://www.justice.gov/opa/speech/deputy-attorney-general-rod-rosenstein-delivers-remarks-new-york-city-bar-white-collar).
- 5 US Attorney's Manual s9-47.120, available at [www.justice.gov/usam/usam-9-47000-foreign-corrupt-practices-act-1977#9-47.120](http://www.justice.gov/usam/usam-9-47000-foreign-corrupt-practices-act-1977#9-47.120). Companies also are eligible for a declination, or determination by the DOJ not to prosecute, if they meet all of the requirements of the policy and there are no 'aggravating circumstances', such as senior executive involvement in the bribery or a previous violation by the company.
- 6 US Attorney's Manual s9-28.700, available at [www.justice.gov/usam/usam-9-28000-principles-federal-prosecution-business-organizations#9-28.700](http://www.justice.gov/usam/usam-9-28000-principles-federal-prosecution-business-organizations#9-28.700). This policy was instituted as part of the 'Yates Memorandum', named after Sally Yates, the prior Deputy Attorney General.
- 7 See n 4 above.
- 8 DOJ press release, 'Société Générale S.A. Agrees to Pay \$860 Million in Criminal Penalties for Bribing Gaddafi-Era Libyan Officials and Manipulating LIBOR Rate', 4 June 2018, available at [www.justice.gov/opa/pr/soci-t-g-n-rale-sa-agrees-pay-860-million-criminal-penalties-bribing-gaddafi-era-libyan](http://www.justice.gov/opa/pr/soci-t-g-n-rale-sa-agrees-pay-860-million-criminal-penalties-bribing-gaddafi-era-libyan).
- 9 Deferred Prosecution Agreement, 'United States of America against Société Générale SA', dated 5 June 2018, available at [www.justice.gov/opa/press-release/file/1068521/download](http://www.justice.gov/opa/press-release/file/1068521/download), at 4-5, 13-14, A-6-A-7.
- 10 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', 21 December 2016, available at [www.justice.gov/opa/pr/odebrecht-and-braskem-plead-guilty-and-agree-pay-least-35-billion-global-penalties-resolve](http://www.justice.gov/opa/pr/odebrecht-and-braskem-plead-guilty-and-agree-pay-least-35-billion-global-penalties-resolve).
- 11 Odebrecht Plea Agreement, available at [www.justice.gov/opa/press-release/file/919916/download](http://www.justice.gov/opa/press-release/file/919916/download), at 2-3.
- 12 Braskem Plea Agreement, available at [www.justice.gov/opa/press-release/file/919906/download](http://www.justice.gov/opa/press-release/file/919906/download), at 2-3.
- 13 Deferred Prosecution Agreement, 'United States of America v Keppel Offshore & Marine Ltd', dated 22 December 2017, available at [www.justice.gov/opa/press-release/file/1020706/download](http://www.justice.gov/opa/press-release/file/1020706/download), at 3-4, 8-9, A-4-A-5.

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