

Federal Banking Agencies' New Policy on Coordinating Enforcement Actions Is an Important First Step

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Not enough attention has been paid to the FFIEC's policy announcement on enforcement which is, we hope, the first step toward fundamental change. The [Policy Statement on Interagency Notification of Formal Enforcement Actions](#) rescinds a [1997 policy statement](#) and addresses the need for coordination in enforcement actions among the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, and the Office of the Comptroller of the Currency (Federal Banking Agencies). Notably, and unfortunately, the CFPB is not part of the Policy Statement. With the Policy Statement, the Federal Banking Agencies add to the growing number of U.S. government agencies beginning to address piling on concerns in multi-agency enforcement actions.

The Policy Statement—issued by the Federal Banking Agencies under the leadership of Jelena McWilliams, recently appointed chair of the FDIC and the FFIEC—seeks to “promote notification of, and coordination on, formal enforcement actions among the [Federal Banking Agencies] at the earliest practicable date.” Going forward, a Federal Banking Agency undertaking an enforcement action against a financial institution is to notify other Federal Banking Agencies with an interest in the action. The Policy Statement makes the point that another Federal Banking Agency would have an interest in a financial institution's unsafe or unsound practices, significant violations of law, or misconduct that may have significant connections with a regulated institution. Notification should be made at the earlier of notice being provided to the institution or when the Federal Banking Agency determines that a “formal enforcement action is expected to be taken.” Most notably, the Policy Statement instructs the Federal Banking Agencies to coordinate potential penalties in multi-agency actions, a significant change from past agency practice.

With this change, the Policy Statement aligns with DOJ's recent focus on avoiding piling on—the concern that a company may be required to pay a disproportionate and unfair penalty solely because multiple agencies are involved in an investigation arising from the same conduct. The piling on of multiple fines for the same conduct has become a rule of law concern over the last several years, as an increasing number of regulatory orders and penalties have involved multiple agencies each assessing separate penalties. Just last month, DOJ recognized this concern, issuing a [new policy](#) and promulgating new sections of the U.S. Attorneys' Manual, which, among other provisions, recommend that DOJ “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.”

It remains to be seen how the Federal Banking Agencies will implement the Policy Statement, but one would hope that it will begin the journey of changing some of the unfortunate practices frequently seen in the recent past, where regulators failed to coordinate their enforcement actions and were unsympathetic to concerns of piling on when assessing penalties. The Federal Banking Agencies—and other regulatory agencies—should continue to work to achieve more proportionate, fair resolutions to enforcement actions.

Associates Andrew Gehring and Kelsey Clark contributed to this post.

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If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

Margaret E. Tahyar

+1 212 450 4379

margaret.tahyar@davispolk.com

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