

Client Alert: Attorney General's December 2022 Revisions to DOJ's Charging, Pleas, and Sentencing Policies

Publications

January 25, 2023

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On December 16, 2022, Attorney General Merrick Garland issued a memorandum announcing important revisions to the Department of Justice (DOJ)'s policies on charges, pleas, and sentencings. These revisions align DOJ's policies with those in place under certain of Attorney General Garland's predecessors and continue the trend away from Trump-era policies.

The revisions, which will apply to future criminal prosecutions and in some circumstances pending criminal cases, include:

1. Reinforcing that a federal offense should be charged only if it serves a "substantial federal interest," taking into account the availability of prosecution by state or local governments and non-prosecutorial alternatives.
2. Emphasizing that prosecutors must select only those charges that are proportional to the seriousness of the offense, particularly in the context of charges carrying mandatory-minimum sentences.
3. Prohibiting the use of charges to exert leverage to induce a plea.
4. Requiring the development of policies and procedures within US Attorney's Offices to ensure the consistent and reasonable exercise of discretion.

Collectively, these revisions signal DOJ's stated intent to focus federal resources on prosecuting more serious federal offenses, charging those offenses in a fair and equitable manner, and developing more guardrails for the exercise of prosecutorial discretion.¹

Key aspects of the memorandum, and how they compare with past policies, are summarized below.

Summary of Changes

On May 10, 2017, then-Attorney General Jeff Sessions issued a policy requiring prosecutors to “fully utilize the tools Congress has given us” by “charg[ing] and pursu[ing] the most serious, readily provable offense” in most cases.² This policy was rescinded by Acting Attorney General Garland in interim guidance on January 29, 2021,³ in which he also reinstated May 19, 2010 Guidance from then-Attorney General Eric Holder, Jr. Under the Holder memorandum, prosecutorial “decisions about charging, plea agreements, and advocacy at sentencing” are to be “based on the merits of each case and reflect an individualized assessment of relevant facts.”⁴

Building on his interim guidance, Garland’s December 16, 2022 memorandum further continues a trend away from policies in place during the Trump Administration that favored the aggressive use of federal prosecutorial resources.

Many aspects of the Garland memorandum reflect a return to Holder-era policies. The memorandum uses language similar to Holder’s in directing that charges fairly reflect the seriousness of a defendant’s conduct, that federal charges be supported by a substantial federal interest, and that charges not be filed, nor the option of filing charges raised, simply to exert leverage to induce a plea. And, like the Holder memorandum, the Garland memorandum emphasizes the need for consistent application of the Sentencing Guidelines—but permits for use of departure provisions under the Guidelines in appropriate cases.

But the Garland memorandum expands in new ways on some of these topics:

- In addition to highlighting the need for a “substantial federal interest” in prosecution, the memorandum reinforces factors that bear on whether a particular prosecution would serve a substantial federal interest, such as federal law enforcement priorities, the nature and seriousness of the offense, and the person’s background and willingness to cooperate.⁵
- While repeating the adage from the Holder memorandum that ordinarily a prosecutor should charge the most serious offense encompassed by the defendant’s conduct that is likely to result in a sustainable conviction, the Garland memorandum notes that this principle predates most statutory mandatory minimums, and that the decision to bring any charge that carries a mandatory minimum sentence should be informed by an individualized assessment of the facts and circumstances to assure that other charges are insufficient to “capture the gravamen of the defendant’s conduct.” This guidance is likely to have the greatest impact in federal cases involving narcotics and violent crimes, but two notable federal fraud offenses carry mandatory sentences and may be affected by this new policy. Title 18 U.S.C. § 1028A criminalizes aggravated identity theft (often charged alongside wire, mail, bank, and healthcare fraud, or money laundering) and carries a two-year mandatory consecutive sentence. Although less frequently utilized, 18 U.S.C. § 225(a) criminalizes a continuing financial crimes enterprise and imposes a 10-year mandatory minimum.

- The memorandum provides a list of available alternatives to federal prosecution. For example, it reminds prosecutors to consider whether the person is subject to state, local, or tribal prosecution.⁶ It also directs prosecutors to consider whether non-criminal alternatives like pretrial diversion—an alternative to prosecution whereby offenders are diverted from traditional criminal justice proceedings into a program of supervision, either at the pre-charge stage or post-charge in lieu of conviction—would serve federal law enforcement interests.⁷

Moreover, the memorandum directs components within the Department—the US Attorney’s Offices in each of the 94 federal districts and litigating divisions of the Department—to develop and implement a number of important policies. For example, all districts are to develop an appropriate pretrial diversion policy. The Department’s enhanced focus on pretrial diversion and other alternatives to federal prosecution corresponds with the Sentencing Commission’s recent notice that it intends to conduct a study of court-sponsored diversion and alternatives-to-incarceration programs.⁸

Per Garland’s memorandum, all districts and litigating divisions also are to develop and/or expand procedures designed to ensure supervision of the exercise of discretion in the context of charging and sentencing. In addition to directing that charging and plea agreement decisions be reviewed by a supervisor, and that offices have written guidance describing their internal supervisory review processes, districts and litigating divisions also must implement a real-time tracking system that reports mandatory minimum charges to the Department.

For some components, these policies will be new; for others, the directives are consistent with policies already in effect.

Implications

In sum, the Garland memorandum reflects the Department’s desire to scale back on charging federal offenses that carry mandatory prison sentences, to enhance the discretion afforded a prosecutor to craft federal charges and a sentencing recommendation tailored to the individual case, and to increase oversight over the exercise of that discretion.

The memorandum also provides an opening for parties to explore alternatives to federal prosecution that may include pretrial diversion—for example, in cases where diversion coupled with an agreement to pay restitution or a fine, or to forfeit assets, would satisfy federal law enforcement’s interests.

It is important, however, not to overread the new guidance. Its most significant and immediate effect will be felt in federal narcotics cases, not white-collar cases. We should not expect that the memorandum’s articulated policies and new procedures will substantially lessen overall numbers of cases charged or charges brought in serious cases.

This is particularly true in the context of corporate crime. On January 17, 2023, Assistant Attorney General Kenneth A. Polite, Jr., explained that the Department is “using every tool at [its] disposal to combat corporate crime, including more sophisticated data analytics and other means to proactively identify criminal conduct.”⁹ Polite’s message is consistent with comments by Attorney General Garland last March, in which he called corporate crime a “first priority,”¹⁰ and with statements and memoranda issued by Deputy Attorney General Lisa Monaco, in which she has broadcast aggressiveness against corporate crime.¹¹ Accordingly, while Garland’s December 2022 guidance on charging, pleas, and sentencing may provide some new and additional flexibility, corporations should still ensure that their compliance programs are well-tailored to the DOJ’s expectations, and they should seek sophisticated counsel in the event they discover misconduct.

This article is available in the Jenner & Block Japan Newsletter. / この記事はJenner & Blockニュースレターに掲載されています。

Footnotes

[1] The memorandum also changes DOJ policies on charging and sentencing related to the disparate treatment of powder and crack cocaine.

[2] Department of Justice, Department Charging and Sentencing Policy (May 10, 2017), available at <https://www.justice.gov/archives/opa/press-release/file/965896/download>

[3] Department of Justice, Interim Guidance on Prosecutorial Discretion, Charging, and Sentencing (Jan. 29, 2021), available at https://www.justice.gov/d9/2022-12/2021-01-29_acting_attorney_general_memorandum.pdf.

[4] Department of Justice, Department Policy on Charging and Sentencing (May 19, 2010), available at <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/holder-memo-charging-sentencing.pdf>.

[5] Department of Justice, Justice Manual § 9-27.230, available at <https://www.justice.gov/jm/jm-9-27000-principles-federal-prosecution#9-27.230>.

[6] Department of Justice, Justice Manual § 9-27.240, available at <https://www.justice.gov/jm/jm-9-27000-principles-federal-prosecution#9-27.240>.

[7] Department of Justice, Justice Manual § 9-27.250, available at <https://www.justice.gov/jm/jm-9-27000-principles-federal-prosecution#9-27.250>.

[8] US Sentencing Commission, *Federal Register Notice Of Proposed 2022-2023 Priorities*, <https://www.ussc.gov/policymaking/federal-register-notice/federal-register-notice-proposed-2022-2023-priorities>

[9] Department of Justice, *Assistant Attorney General Kenneth A. Polite, Jr. Delivers Remarks on Revisions to the Criminal Division’s Corporate Enforcement Policy* (Jan. 17, 2023), available at <https://www.justice.gov/opa/speech/assistant-attorney-general-kenneth-polite-jr-delivers-remarks-georgetown-university-law>

[10] Department of Justice, *Attorney General Merrick B. Garland Delivers Remarks to the ABA Institute on White Collar Crime* (Mar. 17, 2022), available at <https://www.justice.gov/opa/speech/attorney-general-merrick-b-garland-delivers-remarks-aba-institute-white-collar-crime#:~:text=Corporate%20crime%20weakens%20our%20economic,in%20the%20rule%20of%20law>.

[11] Department of Justice, *Deputy Attorney General Lisa O. Monaco Delivers Remarks on Corporate Criminal Enforcement* (Sep. 15, 2022), available at <https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-delivers-remarks-corporate-criminal-enforcement>.

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