

DOJ Issues Memorandum on Charging, Plea Resolution, and Sentencing Recommendation Policies

On December 16, 2022, United States Attorney General Merrick B. Garland issued a [memorandum](#) that sets out certain general policies regarding U.S. Department of Justice (DOJ) charging decisions, plea resolutions, and sentencing recommendations. The memorandum, which took effect on January 15, 2023, largely reaffirms longstanding DOJ policies in these areas, but does contain a few new policies and underscores select pre-existing policies. While parts of the memorandum specifically address violent crime, the policies are applicable to all DOJ prosecutions.

Here are the relevant take-aways:

I. Charging Decisions

The memorandum repeats longstanding DOJ policy that, as a threshold matter, a prosecution may be initiated only if a prosecutor believes it is probable that admissible evidence will be sufficient to obtain a conviction and sustain that conviction on appeal. Further, the memorandum reminds prosecutors that a prosecution should be commenced only if it serves a substantial federal interest and alternatives to federal prosecution are inadequate. Relevant factors in evaluating whether a prosecution vindicates a substantial federal interest include: federal law enforcement priorities; the nature and seriousness of the offense; the deterrent effect of prosecution; the person's culpability, criminal history, willingness to cooperate, and personal circumstances; victims' interests; and, the likely sentence.

Alternatives to federal prosecution include state or local prosecution, non-criminal options such as federal or state civil or administrative remedies, and pretrial diversion. Notably, the memorandum newly announces that every prosecuting DOJ component should develop a pretrial diversion policy. The memorandum also highlights existing DOJ policy stating that “[c]harges may not be filed, nor the option of filing charges raised, simply to exert leverage to induce a plea.”

Assuming the above criteria are met, prosecutors must decide which charges are appropriate. The memorandum cites benchmark DOJ policy requiring that a prosecutor select the most serious provable charge applicable to an individual's conduct. However, this memorandum qualifies that directive with the concept of proportionality. Noting that the “most serious offense” standard was announced in 1980, when mandatory minimums were rare and prior to the Sentencing Guidelines' enactment, the memorandum instructs prosecutors to ensure that the proposed charges are commensurate with the seriousness of the offense and likely to result in a sentence sufficient but not

greater than necessary to achieve fundamental criminal justice goals. While proportionality is not a new charging principle for DOJ, this memorandum gives it more weight.¹

II. Plea Resolutions and Sentencing Recommendations

Regarding plea agreements, consistent with previous DOJ guidance, the memorandum provides that while charges should not be pursued simply to extract a guilty plea, nor should charges be abandoned for a plea bargain that does not reflect the seriousness of the charged offense. The memorandum repeats established policy mandating that all charges and plea agreements be reviewed and approved by a supervisor, and adds a heightened supervision requirement for charges and plea agreements containing mandatory minimum offenses.

With respect to sentencing, the memorandum reiterates previous policies stating that a prosecutor's sentencing recommendation should be guided by the same sentencing framework Congress has established for federal courts, *i.e.*, the sentence should be sufficient but not greater than necessary to reflect the seriousness of the offense, provide a just punishment, afford adequate deterrence, and protect the public, among other goals. The memorandum also provides that prosecutors, in appropriate cases, may seek a variance from the advisory Guideline range, up or down, to properly account for the relative seriousness of the offense conduct.

Consistent with its charging guidance, the memorandum states that prosecutors should seek plea resolutions and sentences that are proportionate to the offense and the defendant's background.

III. Conclusion

While the memorandum does not represent a significant departure from DOJ's previous guidance on charging, plea resolutions, and sentencing recommendations, and its impact will be felt most acutely in mandatory minimum cases, the memorandum does signal a marginally more moderate and tailored approach to DOJ's prosecutions generally. Moreover, the memorandum provides additional support for the argument that a civil remedy, such as an administrative enforcement plea accompanied by a fine, may be a suitable resolution to a DOJ criminal investigation.

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¹The memorandum also provides that charges carrying statutory mandatory minimum sentences should be brought only when other charges are inadequate. While the vast majority of federal mandatory minimum charges are for narcotics and firearms offenses, we note, parenthetically, that the infrequently charged continuing criminal enterprise statute and the aggravated identity theft statute do have mandatory minimums.

If you have any questions about the issues addressed in this memorandum, please do not hesitate to reach out to:

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