BRACEWELL

INSIGHTS

DOJ to Prosecutors: Think Twice and Ask Permission Before Charging

December 21, 2022

*By: **Seth D. DuCharme**, **Matthew G. Nielsen**, **Margaret B. Beasley**, and **Meagan C. Maloney***

Last week, Attorney General Merrick Garland issued a new DOJ charging and sentencing policy memorandum, replacing existing guidance to federal prosecutors in their exercise of prosecutorial discretion. The thrust of the extraordinary new policy is that prosecutors are no longer expected to charge the highest most readily provable offense, but rather to consider potential punishments and to exercise discretion to reduce defendants' sentencing exposure. It appears to be a policy of leniency intended to mitigate the increasing number of mandatory minimum sentences that Congress promulgated over recent decades in a number of areas.

While the memorandum reaffirms familiar guidance set forth in the *Principles of Federal Prosecution* and the Justice Manual, it announces robust new policies that direct prosecutors to take a different approach to charging decisions, plea resolutions, and sentencing recommendations, the effect of which swings the pendulum away from the very aggressive "tough on crime" approach of the prior administration.

For more than four decades, the *Principles of Federal Prosecution* has been a primary source of guidance for federal prosecutors deciding whether and what charges to bring, or what criminal sentence to recommend. Consistent with well-established practices, the new policy reminds prosecutors that, as a threshold matter, they should only begin a prosecution if it is probable that the admissible evidence will be sufficient to obtain and sustain a conviction.

The policy further reminds prosecutors that a case should only be charged if it would serve a substantial federal interest, consistent with current Department priorities, and if there are no adequate alternatives to federal prosecution. The existence of a substantial federal interest in favor of prosecution depends on:

- Department of Justice priorities;
- The nature and seriousness of the offense;
- The deterrent effect of prosecution;
- The defendant's culpability in connection with the offense;

- The defendant's history with respect to criminal activity;
- The defendant's willingness to cooperate in the investigation or prosecution of others;
- The defendant's personal circumstances;
- The interests of any victims; and
- The probable sentence or other consequences if the person is convicted.

Mindful of the substantial penalties attached to many federal crimes, the memorandum states that once a prosecutor elects to proceed, she must select charges that are "'sufficient, but not greater than necessary,' 18 U.S.C. § 3553(a), to satisfy" considerations of proportionality, punishment, protection of the public, deterrence, and rehabilitation, placing sentencing factors up front in the analysis.

While these Principles have remained generally consistent over the past 40 years, each administration has added its own flavor to the directives. Prior administrations, for example, ***directed*** prosecutors to hold as a "core principle" that they "charge and pursue the most serious, readily provable offense." The policies of the prior administration were ***rescinded*** in January 2021 and are now replaced with the policy announced on Friday. The inclusion of the "federal interest" guidance implies that the Department may no longer want to see local crimes federalized, which had been a core strategy of the last administration in several of its initiatives. The new policy notes that where conduct poses a threat to public safety, prosecutors maintain the discretion—with supervisory approval—to bring cases that carry significant sentences, but the default clearly has shifted to a strategy of moderation.

DOJ's Response to the Proliferation of Mandatory Minimums Drives the New Policy

Given that Congress has steadily increased the number of federal criminal violations that carry statutory mandatory minimum sentences over the past few decades, the Department's move away from charging offenses with such sentences is significant. Explaining that mandatory minimums "often cause[] unwarranted disproportionality in sentencing and disproportionately severe sentences," the policy directs prosecutors to reserve such offenses "for instances in which the remaining charges *(i.e.,* those for which the elements are also satisfied by the defendant's conduct, and do not carry mandatory minimum terms of imprisonment) would not sufficiently reflect the seriousness of the defendant's criminal conduct, danger to the community, harm to victims, or other considerations outlined" in the *Principles of Federal Prosecution*. Notably, charging lesser included offenses with no mandatory minimum also will result in capping a court's discretion to impose a sentence within the commensurate higher statutory maximum.

The new policy is being applied to all criminal violations, regardless of category, but it is likely to have the most dramatic impact on individuals charged with drug crimes, for which mandatory minimum sentences are especially common and severe, and sometimes exceed the advisory Sentencing Guidelines range, which a court also must consider (but by which it is not bound) in imposing a sentence.[1]

Application to White Collar Crime

Whether the new policy will significantly impact charging decisions for white collar defendants

remains to be seen. The Department has taken ***very aggressive positions*** on charging individuals and holding corporations accountable for violations of federal law, but a majority of white collar or financial crimes – money laundering, insider trading and wire fraud, for example – do not contain a mandatory minimum sentence and are therefore less likely to be impacted. That said, two charges that are sometimes brought along-side common white collar crimes do contain mandatory minimums and warrant brief mention. Title 18, United States Code, Section 225 concerns "Continuing Financial Crimes Enterprises" and carries a 10-year mandatory minimum. In recent years Section 225 has been charged in a case against a North Korean bank (along with conspiracy to commit offenses against and defraud the United States; violation of the International Emergency Economic Powers Act; bank fraud; conspiracy to launder money; and international money laundering), and a virtual currency exchange (along with conspiracy to operate an unlicensed money transmitting business; operation of that business; conspiracy to commit bank and wire fraud; bank fraud; wire fraud; money laundering, conspiracy to commit money laundering; and attempt to evade or defeat tax). Similarly, Section 1028A addresses aggravated identity theft and often is brought concurrently with charges of healthcare, wire, and bank fraud, as well as money laundering. Section 1028A carries a two-year mandatory minimum. Thus, the new policy may impact prosecutors' decision to add either of these charges to cases in which the other charges may satisfy the equitable and prudential concerns identified in the policy memorandum.

Greater Supervision and Oversight of Line Prosecutors

Beyond requiring supervisory approval before bringing charges, the Attorney General's memorandum also adds a significant additional layer of oversight to the exercise of prosecutorial discretion within the chain of command by requiring prior approval before including a mandatory minimum in a charging document or plea agreement. To track whether prosecutors are complying with the new directive, senior leadership in the Department is requiring U.S. Attorney's Offices to provide real-time data that will give the Department visibility into how cases are being brought and resolved, with greater internal transparency to ensure consistency and compliance with the directives.

While the memorandum acknowledges that a mandatory minimum sentence for violent crimes may be warranted after consideration of the above factors, it makes no exception to the requirement of supervisory approval for how such crimes will be treated. Accordingly, prosecutors charging federal crimes that touch on local conduct – such as armed robbery – will now have to consider carefully whether these cases are consistent with command intent.

In an unequivocal directive to temper the exercise of federal power, and the severe punishments that may arise from conviction, the Attorney General emphasized the need to be thoughtful and more moderate in the application of criminal statutes and sentencing postures. The memorandum asserts that such an approach will typically result in a sentence within the Guidelines, which are presumptively reasonable, and statutory sentencing ranges that allow courts broad discretion to impose sentences that are sufficient but not greater than necessary to serve the ends of justice. Because it is rare for courts to impose statutory maximum sentences, the Department likely concluded that courts will welcome the additional discretion they may exercise in the absence of a statutorily required mandatory minimum sentence.

The policy informs prosecutors' considerations in all pending and future cases but does not apply to matters in which a final judgment already has been rendered, so the beneficiaries of this policy are those defendants whose cases are still live.

The Department's new policy undoubtedly will be welcomed enthusiastically by defendants staring at the prospect of five, ten or even more years of incarceration, and opens the door for defense counsel to advance an array of equitable arguments previously unavailable to them in obtaining more lenient treatment from prosecutors and sentencing courts. It remains to be seen how the Department will address the countless charges that were brought under prior policies and consistent with previous (now defunct) federal priorities and directives, but it is reasonable to expect a significant change in tone and outcomes in resolving pending criminal cases.

---

1. A supplemental memorandum issued the same day that provides specific policies regarding charging, pleas, and sentencing in drug cases can be found ***here***.