

# THE JOURNAL OF FEDERAL AGENCY ACTION

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# The Department of Justice Issues New Guidance on Charging, Pleas, and Sentencing

John J. Delionado, Kevin E. Gaunt, and Martha Saine Condyles\*

*In this article, the authors discuss a memorandum issued recently by U.S. Attorney General Merrick Garland that makes it clear that prosecutors must give careful thought to making charging decisions consistent with the ultimate goal of achieving a sanction that is sufficient, but not disproportionate, to redress and deter the wrongdoing.*

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U.S. Attorney General Merrick Garland has issued a memorandum<sup>1</sup> (the memorandum or the Garland memo) providing updated guidance to federal prosecutors on the Department of Justice's (DOJ) general policies regarding charging, pleas, and sentencing for federal offenses.<sup>2</sup> The memorandum reflects a gentler prosecutorial tone with potentially positive implications for criminal defendants, including in the white-collar and corporate criminal enforcement context.

## Guidance on Charging Decisions

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The memorandum restates the long-standing DOJ policy that a prosecutor should not initiate a prosecution unless it is probable that the admissible evidence is sufficient to obtain a conviction and that the conviction will be upheld on appeal. However, even if this threshold is met, prosecution should not ensue if it would not serve a "substantial federal interest" or if adequate alternatives to prosecution are available.

In determining the sufficiency of serving a federal interest, prosecutors must conduct an "individualized assessment" and "weigh all relevant considerations," including the nature and seriousness of the offense, the individual's history with respect to criminal activity, their willingness to cooperate in the investigation of others, their "personal circumstances," and the probable sentence, if convicted. In assessing whether adequate alternatives

to federal prosecution are available, the prosecutor is advised to consider if effective prosecutions have been commenced by state or local authorities and whether sufficient noncriminal alternatives to prosecution exist, such as administrative remedies or a pretrial diversion. The memorandum directs each district to adopt a pretrial diversion policy.

For the white-collar defendant, these directives give defense counsel additional bargaining power at the precharging stage. Particularly for defendants who lack a criminal history and are not alleged to have committed egregious crimes, defense counsel can argue that civil remedies may be more appropriate or seek to divert their client to a pretrial diversion program in lieu of prosecution, an option that has rarely been afforded to white-collar criminal defendants in the past. For example, restitution and a diversion away from traditional criminal processing and into nonprison sentences, such as community service, may be appropriate under the totality of the circumstances, and should be assessed on a case-by-case basis.

## **Guidance on Selection of Charges and Mandatory Minimums**

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The Garland memo also reflects a continued move away from the Trump administration's charging policy that mandated prosecutors hold as a "core principle" that they "charge and pursue the most serious, readily provable offense." As an initial step away from this policy, in January 2021, the Biden administration, through then-acting Attorney General Monty Wilkinson, rescinded the Trump-era guidance in a memo entitled "Interim Guidance on Prosecutorial Discretion, Charging, and Sentencing." The goal of this interim step—prior to formulating a long-term policy—was to ensure that charging decisions were being made on an individual assessment of the facts of each case instead of automatically defaulting to the most serious charge available.

The Garland memo expands on the Wilkinson interim guidance, emphasizing that charging decisions be "informed by the individualized assessment of all the facts and circumstances of each particular case," with the goal being a sanction that is proportional to the seriousness of the defendant's conduct. In this context, the memorandum addresses the proliferation of mandatory minimum

sentences that can result in disproportionately long sentences relative to the charged conduct. Accordingly, the memorandum directs prosecutors to reserve charges that subject a defendant to mandatory minimums for instances where lesser included charges that do not carry a mandatory minimum would be insufficient to address either the seriousness of the defendant's conduct or an existing danger to the community. Prosecutors, in their discretion and in consultation with their supervisors, must assess all these considerations to meet the stated prosecutorial goal of a sanction that is "sufficient, but not greater than necessary."

This shift in policy under the Biden administration affords defendants more leverage to seek less serious charges or negotiate with the government to consider plea agreements that do not include the de facto severest penalty. The guidance also suggests a potential departure from the common practice in the context of financial crimes to stack on myriad charges resulting from the same conduct. This change is particularly significant in the white-collar context because prosecutors often have a wide range of potential charges that they could levy against a corporate defendant in financial fraud cases, including money laundering, wire fraud, and conspiracy.

## **Guidance on Plea Agreements**

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The memorandum also clearly instructs prosecutors against utilizing the threat of criminal charges to induce a plea deal. Specifically, the memorandum states that "charges should not be filed simply to exert leverage to induce a plea." Additionally, all plea agreements and charging decisions must be reviewed by a supervising attorney, and the inclusion of a mandatory minimum charge in a charging document or plea agreement must also obtain supervisory approval. Given these directives, defense counsel should not hesitate to engage with supervisors in the early stages of negotiation to attempt to thwart sometimes overzealous line prosecutors.

## **Conclusion**

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The Garland memo is a clear deviation from previous guidance under the Trump administration that essentially obligated prosecutors to always pursue the most serious, provable offense. Whether



the Garland memo will have any significant effect on white-collar criminal defendants remains to be seen, but it should not be overlooked in future negotiations with the DOJ, particularly for less egregious, first-time offenders. The guidance gives prosecutors wide, but not unfettered, discretion in their charging decisions, and mandates an individual assessment of the defendant's conduct. The clear message is that prosecutors must give careful thought to making charging decisions consistent with the ultimate goal of achieving a sanction that is sufficient, but not disproportionate, to redress and deter the wrongdoing.

## Notes

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1. <https://www.justice.gov/media/1265321/dl?inline>.

2. Merrick B. Garland, Att'y Gen., Memorandum for All Federal Prosecutors, General Departmental Policies Regarding Charging, Pleas, and Sentencing (Dec. 16, 2022). Note that the Garland memo was issued along with a companion memorandum that specifically instructed federal prosecutors to end disparities in charging and sentencing involving crack and powder cocaine, intending to reverse decades of policy that resulted in the disproportionate incarceration of Black Americans by treating crack offenders more punitively.