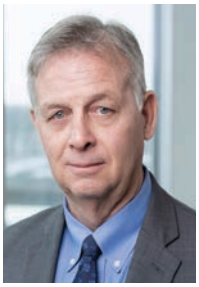
WESTERN NEW YORK
THE DAILY RECORD
Part of the BRIDGETOWER MEDIA network
JANUARY 25, 2023

White Collar Corner: **DOJ signals softer stance toward criminal defendants**

■ **ALAN J. BOZER and LUCAS A. HAMMILL** SPECIAL TO TDR

WHITE COLLAR DEFENSE LAWYERS have taken notice of a recent memo in which U.S. Attorney General Merrick Garland urged Department of Justice (DOJ) prosecutors to proceed thoughtfully when pursuing indictments, plea agreements or long prison sentences.


Alan J. Bozer


Lucas A. Hammill

In the Dec. 16, 2022 memo (Garland memo), "General Department Policies Regarding Charging, Pleas, and Sentencing," Garland cast doubt on the continuing viability of a 1980 DOJ standard under which prosecutors should charge "the most serious offense that is encompassed" by the defendant's conduct and "that is likely to result in a sustainable conviction."

Now, prosecutors should make an individualized assessment of each case and seek punishment that is "sufficient, but not greater than necessary," Garland wrote, in an apparent departure from Trump-era guidance promulgated in 2017 by then-Attorney General Jeff Sessions.

The Garland memo additionally warns prosecutors against filing charges to merely induce a plea, and requires that charging and plea agreement decisions must now be reviewed by a supervisory attorney. The memo appears to signal the coming of a "kinder, gentler DOJ," as one commentator described it to the legal news website Law360 earlier this month.

This article discusses the details of the Garland memo with an eye toward its implications for white collar defense attorneys specifically and all federal criminal lawyers generally. The article first outlines new considerations to be applied under the memo's guidance to the initial decision to prosecute a defendant. Second, it discusses the attorney general's new policies regarding which specific charges should be filed and limitations on filing them. Finally, it summarizes Garland's approach to sentencing.

DECIDING WHETHER TO PROSECUTE

Garland began by discussing the decision to initiate prosecution, noting the "longstanding" requirement that, in order to proceed, a prosecutor must believe that the accused "will more likely than not be found guilty beyond a reasonable doubt by an unbiased trier of fact and that the conviction will be upheld on appeal."

The memo adds, however, that even when that threshold requirement is met, a prosecutor should not initiate a case "if the prosecution would not serve a substantial federal interest." Determining whether the prosecution serves a federal interest, according to Garland, requires weighing, among other factors, federal law enforcement priorities, the interests of any victims, the probable consequences to the accused of a conviction, the seriousness of the offense, and the accused's criminal history, willingness to cooperate and personal circumstances.

An otherwise appropriate prosecution also should not be initiated if the accused "is subject to adequate alternatives to federal prosecution," Garland cautioned. Such adequate alternatives may include noncriminal sanctions, pretrial diversion or "effective prosecution by state, local, territorial, or Tribal authorities." Every U.S. attorney's office "should develop an appropriate pretrial diversion policy," perhaps giving white collar defense attorneys (and defense attorneys generally) an avenue to argue that such a policy should apply to their clients in lieu of criminal charges.

The Garland memo forbids a federal prosecutor's consideration of the accused's race, religion, gender, politics or other protected attributes in determining whether to initiate prosecution. Prosecutors are also prohibited by the memo from being influenced by their own personal feelings or self-interest in deciding whether to bring a case.

Importantly for attorneys plea bargaining with government lawyers before charges are filed, the Garland memo bars prosecutors from filing charges or raising the option of filing charges "simply to exert leverage to induce a plea."

DECIDING WHICH CHARGES TO BRING (AND DOCUMENTING THAT DECISION)

The Garland memo moved next to the decision that needs to be made after an initial determination that prosecution

WESTERN NEW YORK
THE DAILY RECORD

is appropriate: Which specific charges should the prosecutor bring?

Garland acknowledged that DOJ adopted a standard in 1980 providing that defendants should be charged with "the most serious offense that is encompassed" by the defendant's conduct and "that is likely to result in a sustainable conviction." Ordinarily, Garland wrote, the result that would be reached under that standard will align with his recommended course of action in future cases. But he cautioned that mandatory minimum sentences were rare in 1980 and that the U.S. Sentencing Guidelines had not been promulgated at that time.

Accordingly, Garland continued, prosecutors should undertake an individualized inquiry and select charges that would produce a result "proportional" to the seriousness of the defendant's conduct. Garland said the "goal in any prosecution" is a punishment that is "sufficient, but not greater than necessary," to satisfy this measure of proportionality, along with other values such as protection of the public, deterrence and rehabilitation.

Moreover, due to the "unwarranted disproportionality in sentencing" caused by the "proliferation of provisions carrying mandatory minimum sentences," Garland instructed prosecutors to reserve charges carrying mandatory minimums for cases in which other charges satisfied by the defendant's conduct "would not sufficiently reflect the seriousness of the defendant's criminal conduct" or align with other criminal-law values like public protection or victim restitution. The memo says the same principles apply to decisions to seek statutory sentencing enhancements.

Garland's directive appears to depart from an earlier memo issued in 2017 by then-Attorney General Jeff Sessions, who reaffirmed the 1980 standard notwithstanding mandatory minimums and the implementation of the Sentencing Guidelines. The Sessions memo said it was a "core principle that prosecutors should charge and pursue the most serious, readily provable offense," defined as the offense carrying the "most substantial" guidelines sentence, "including mandatory minimum sentences."

In the earliest days of the Biden administration — before Garland was confirmed by the U.S. Senate as attorney general — the DOJ rescinded the Sessions policy, and the Garland memo expressly supersedes previous memoranda regarding charges, pleas and sentencing.

During negotiations with federal prosecutors, white collar lawyers whose clients face the prospect of charges carrying mandatory minimums — for example, charges under the continuing financial crimes enterprise statute, or under the statute criminalizing embezzlement by certain foreign bankers — might point to the Garland memo to support an argument that such charges are inappropriate under DOJ policy.

The Garland memo additionally requires that prosecutors obtain supervisors' approval before finalizing decisions about charging and plea agreements.

"All but the most routine indictments should be accompanied by a prosecution memorandum that identifies the charging options supported by the evidence and the law and explains the charging decision," Garland wrote, adding that decisions to include charges carrying mandatory minimums must also win approval from supervisors.

DECIDING ON A SENTENCE TO RECOMMEND

In another departure from the earlier Sessions memo, Garland wrote that it is appropriate for federal prosecutors to consider whether the punishment set forth in the Sentencing Guidelines "is proportional to the seriousness of the defendant's conduct."

The Sessions memo had discouraged departing from the guidelines and required supervisory approval for any recommendations for "sentencing departures or variances."

While the Sessions memo states that "[i]n most cases, recommending a sentence within the advisory guideline range will be appropriate," Garland changed that to "in many cases," and added that prosecutors should advocate for application of the guidelines' departure provisions where "an individualized assessment of the facts and circumstances of the case [lead to the conclusion] that a request for a departure or variance above or below the guidelines range is warranted."

Recommendations for upward departures and variances must still be approved by a supervisor, Garland added.

CONCLUSION

White collar attorneys would be well advised to monitor whether the "kinder" and "gentler" DOJ theory that appears in the Garland memo is indeed kinder and gentler in practice. And while Garland clarified in a footnote that the "policies contained in these memoranda" are "not intended to create a substantive or procedural right or benefit" and "may not be relied upon by a party to litigation with the United States," it will not be surprising if the defense bar begins to use Garland's language against federal prosecutors in whatever ways it can.

Alan J. Bozer is a partner with Phillips Lytle LLP and leader of the firm's White Collar Criminal Defense & Government Investigations Practice Team. He is active in trying criminal and civil cases, as well as handling appellate and arbitration work. He can be reached at (716) 504-5700 or abozer@phillipslytle.com.

Lucas A. Hammill is an attorney with Phillips Lytle LLP and member of the firm's White Collar Criminal Defense & Government Investigations Practice Team. He can be reached at (716) 847-7015 or lhammill@phillipslytle.com.