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U.S. Attorney General Releases New DOJ Charging and Sentencing Policy – Little Impact Anticipated for White Collar Cases and FCPA Pilot Program

On May 12, 2017, U.S. Attorney General Jeff Sessions issued a two-page memorandum setting forth a new charging and sentencing policy for the U.S. Department of Justice (“**DOJ**”) (the “**Sessions Memo**,” available [here](#)). Except in limited circumstances, the new policy directs federal prosecutors to charge criminal defendants with “the most serious, readily provable offense,” and requires them to disclose to the sentencing court “all facts that impact the sentencing guidelines or mandatory minimum sentences.”¹ The new policy rescinds a memorandum that former Attorney General Eric Holder issued on August 12, 2013 (the “**Holder Memo**,” available [here](#)), which instructed federal prosecutors to “conduct an individualized assessment of the extent to which charges fit the specific circumstances of the case.”

While the Sessions Memo is likely to have a material impact in drug and violent crime cases, its effect on white-collar cases is less clear. Indeed, white-collar cases involve complex questions of intent, and the most “serious, readily provable offense” will likely continue to be subject to prosecutorial judgment and discretion. Importantly, DOJ has already issued a statement that the “[t]he [Foreign Corrupt Practices Act] pilot program is not affected by the new department charging and sentencing policy, as any potential exception made as part of the program would comply with the approval requirements laid out in the memo.”^{2, 3}

¹ The U.S. Sentencing Guidelines are non-binding rules that set forth a uniform sentencing policy for defendants convicted in the federal court system, which judges must consider in determining a criminal defendant’s sentence (available [here](#)). While not binding, they substantially influence the sentences imposed.

² The Foreign Corrupt Practices Act Pilot Program (the “**FCPA Pilot Program**”), which began in April 2016, allows for companies that voluntarily self-report misconduct to obtain up to a 50% reduction in fines. We have previously written about the FCPA Pilot Program (available [here](#)), and DOJ’s commitment to continue the program past its original one-year term while under review (available [here](#)).

³ Adam Dobrik, *New sentencing policy won’t affect FCPA pilot programme*, Global Investigations Review (May 12, 2017) (available [here](#)).

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Under the Sessions Memo, any decision to depart from the new charging policy must be approved by a United States Attorney, Assistant Attorney General, or a designated supervisor, and the reasons must be set forth in writing.

Experienced practitioners may notice similarities between the Sessions Memo and previous guidance issued by Attorney General John Ashcroft in the early 2000s. In a memorandum dated September 22, 2003 (the “**Ashcroft Memo**,” available [here](#)), Ashcroft similarly ordered prosecutors to “charge and pursue the most serious, readily provable offense or offenses that are supported by the facts of the case.”

However, the Sessions Memo potentially provides prosecutors with more flexibility than the Ashcroft Memo. Unlike the Ashcroft Memo, the Sessions Memo acknowledges that exceptions to the general policy of charging the most serious offense can be made in appropriate circumstances. The Ashcroft Memo, on its face, strictly limited such exceptions. That said, the Ashcroft Memo was interpreted and implemented differently in different U.S. Attorneys’ Offices and DOJ litigating components. Some followed it to the letter; others interpreted the policy as having implicit exceptions in cases where charging the most serious offense was too harsh. Like with the Ashcroft Memo, the full impact of the Sessions Memo will not be appreciated until we gain a sense of how different United States Attorneys’ Offices and DOJ litigating components interpret and implement the policy over time.

Companies should carefully monitor the implementation of the Sessions Memo, and if faced with an investigation, should remind prosecutors that the Sessions Memo still provides discretion in charging and sentencing decisions.

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