

Alert | White Collar Defense & Special Investigations



February 2021

Biden DOJ Reinstates an Obama-Era Memo on Charging and Sentencing Policy

On January 29, 2021, the United States Department of Justice (DOJ) **announced** it was rescinding its “charging” policy and accompanying guidance, and, at least on an interim basis, reinstating a portion of the Obama-era policy on charging and sentencing. The policy shift – which governs all federal prosecutors’ charging decisions – is a significant change and will have an impact on ongoing investigations and future investigations overseen by President Biden’s Justice Department. At bottom, the DOJ policy now requires DOJ prosecutors to make individualized assessments of each matter, on a case-by-case basis.

Prior to the announcement, all DOJ prosecutors were governed by the May 10, 2017, Policy on Charging and Sentencing. Under the 2017 policy, the “core principle” was “that prosecutors should charge and pursue the most serious, readily provable offense.” At its most basic, and with little nuance, the 2017 policy required federal prosecutors to charge the crime that carried the most severe penalty, even if there were other less severe options and regardless, generally, of the individual defendant’s circumstances.

In reversing course, the DOJ has reinstated, at least temporarily, the policy instituted under then-Attorney General Eric Holder on May 19, 2010. The 2010 policy notes that prosecutors “should ordinarily” charge the most serious readily provable offense, but this “must always be made in the context of ‘an individualized assessment of the extent to which particular charges fit the specific circumstances of the case, are consistent with the purpose of the Federal criminal code and maximize the impact of Federal

resources on crime.” And, “[i]n all cases, the charges should fairly represent the defendant’s criminal conduct, and due consideration should be given to the defendant’s substantial assistance in an investigation or prosecution.”

The reversion to the 2010 policy is a significant change in DOJ policy and was communicated to all federal prosecutors in a written memorandum from the Acting Attorney General.

While these changes in policy often take time to have a real effect and may not result in an immediate and identifiable change, for individual and corporate defendants currently involved in DOJ investigations, the change will have practical consequences. It opens the door to substantive discussions with DOJ regarding potentially resolving matters short of a resolution that must contain the most serious possible charges. Indeed, the revived 2010 policy even directs DOJ prosecutors to take into account whether “adequate” non-criminal alternatives to prosecution exist. At the least, it may provide a useful shift to argue matters on their individual merits and not just as statutory violations.

Authors

This GT Alert was prepared by:

- [Jared E. Dwyer](#) | +1 305.579.0564 | dwyerje@gtlaw.com
- [Benjamin G. Greenberg](#) | +1 305.579.0850 | greenbergb@gtlaw.com
- [Nathan J. Muyskens](#) | +1 202.331.3164 | muyskensn@gtlaw.com

Greenberg Traurig’s U.S.-Based White Collar Defense & Special Investigations Practice:

- [David G. Barger](#) | +1 703.749.1307 | bargerd@gtlaw.com
- [Matthew J. Cannon](#) | +1 312.456.1066 | cannonm@gtlaw.com
- [Abigail A. Clapp](#) | +1 312.476.5072 | clappa@gtlaw.com
- [Jared E. Dwyer](#) | +1 305.579.0564 | dwyerje@gtlaw.com
- [Daniel P. Filor](#) | +1 212.801.6758 | filord@gtlaw.com
- [Kyle R. Freeny](#) | +1 202.331.3118 | freenyk@gtlaw.com
- [John F. Gibbons](#) | +1 312.476.5017 | gibbonsj@gtlaw.com
- [Benjamin G. Greenberg](#) | +1 305.579.0850 | greenbergb@gtlaw.com
- [Gregory W. Kehoe](#) | +1 813.318.5732 | kehoeg@gtlaw.com
- [David Klaudt](#) | +1 214.665.3616 | klaudtd@gtlaw.com
- [Pamela J. Marple](#) | +1 202.331.3174 | marplep@gtlaw.com
- [Carolyn Fitzhugh McNiven](#) | +1 415.655.1270 | mcnivenc@gtlaw.com
- [Scott Mendeloff](#) | +1 312.456.1083 | mendeloffs@gtlaw.com
- [David I. Miller](#) | +1 212.801.9205 | David.Miller@gtlaw.com
- [Nathan J. Muyskens](#) | +1 202.331.3164 | muyskensn@gtlaw.com
- [Jessica Natali](#) | +1 215.988.7824 | natalij@gtlaw.com

- **A. John Pappalardo** | +1 617.310.6072 | pappalardoj@gtlaw.com
- **Todd A. Pickles** | +1 916.868.0628 | picklest@gtlaw.com
- **Mathew S. Rosengart** | +1 310.586.3889 | rosengartm@gtlaw.com
- **Michael R. Sklaire** | +1 703.749.1308 | sklairem@gtlaw.com
- **John Voorhees** | +1 303.685.7465 | voorheesj@gtlaw.com
- **David B. Weinstein** | +1 813.318.5701 | weinsteind@gtlaw.com

Albany. Amsterdam. Atlanta. Austin. Boston. Chicago. Dallas. Delaware. Denver. Fort Lauderdale. Germany.~ Houston. Las Vegas. London.* Los Angeles. Mexico City.+ Miami. Milan.» Minneapolis. New Jersey. New York. Northern Virginia. Orange County. Orlando. Philadelphia. Phoenix. Sacramento. Salt Lake City. San Francisco. Seoul.∞ Shanghai. Silicon Valley. Tallahassee. Tampa. Tel Aviv.^ Tokyo.* Warsaw.~ Washington, D.C.. West Palm Beach. Westchester County.

*This Greenberg Traurig Alert is issued for informational purposes only and is not intended to be construed or used as general legal advice nor as a solicitation of any type. Please contact the author(s) or your Greenberg Traurig contact if you have questions regarding the currency of this information. The hiring of a lawyer is an important decision. Before you decide, ask for written information about the lawyer's legal qualifications and experience. Greenberg Traurig is a service mark and trade name of Greenberg Traurig, LLP and Greenberg Traurig, P.A. ~Greenberg Traurig's Berlin office is operated by Greenberg Traurig Germany, an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. *Operates as a separate UK registered legal entity. +Greenberg Traurig's Mexico City office is operated by Greenberg Traurig, S.C., an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. »Greenberg Traurig's Milan office is operated by Greenberg Traurig Santa Maria, an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. ∞Operates as Greenberg Traurig LLP Foreign Legal Consultant Office. ^Greenberg Traurig's Tel Aviv office is a branch of Greenberg Traurig, P.A., Florida, USA. ¶Greenberg Traurig's Tokyo Office is operated by GT Tokyo Horitsu Jimusho and Greenberg Traurig Gaikokuhojimubengoshi Jimusho, affiliates of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. ~Greenberg Traurig's Warsaw office is operated by Greenberg Traurig Grzesiak sp.k., an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. Certain partners in Greenberg Traurig Grzesiak sp.k. are also shareholders in Greenberg Traurig, P.A. Images in this advertisement do not depict Greenberg Traurig attorneys, clients, staff or facilities. No aspect of this advertisement has been approved by the Supreme Court of New Jersey. ©2021 Greenberg Traurig, LLP. All rights reserved.*