

White Collar Crime - USA

New Policies Herald Stiffer Sentences

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Two recent memoranda-orders from US Attorney General John Ashcroft to all US federal prosecutors represent an effort by the Department of Justice to require the imposition of more severe sentences for federal crimes. The first memorandum, issued in July 2003, is aimed at limiting the ability of the sentencing judge to impose a lesser sentence than is otherwise provided by the US Sentencing Guidelines for the crime of conviction. The second memorandum, issued in September 2003, seeks to limit the discretion of individual federal prosecutors in their charging decisions by obliging them to charge the most serious, readily provable offence. The policies set forth in these memoranda may have a significant impact on the way that federal crimes are charged, the conduct of plea negotiations and the sentence imposed.

The July 2003 Memorandum

A US sentencing judge must apply the US Sentencing Guidelines to determine the appropriate sentence upon conviction of a federal crime. In some circumstances the guidelines expressly authorize the sentencing judge to depart from the otherwise applicable sentence and impose a lesser sentence. For example, Section 5K1.1 of the guidelines allows the sentencing judge to depart from the applicable guideline range if the defendant has provided substantial assistance in the investigation or prosecution of another person.

A sentencing judge may also depart from the applicable guideline range even in situations in which the guidelines do not expressly authorize the judge to do so. For example, a judge may depart from the applicable sentencing range proscribed by the guidelines based upon a factor not adequately taken into consideration by the guidelines or on the basis of a combination of factors where no single factor would otherwise justify a departure.⁽¹⁾

The July 2003 memorandum aims to limit downward sentencing departures. The July 2003 memorandum directs federal prosecutors to oppose all downward sentencing departures that are not supported by the facts and the law. In a departure from accepted, prior practice, a prosecutor may no longer agree to 'stand silent' with respect to a defendant's request for a downward departure. In most cases the decision of a sentencing judge ordering a downward departure over the objection of the government must now be reported to the Appellate Section of the Criminal Division at the Department of Justice within 14 days of the judgment of conviction. The Justice Department has a significant say in whether a judicial candidate is nominated by the president.

The policies and procedures set forth in the July 2003 memorandum will likely result in more severe sentences because prosecutors will be obliged affirmatively to oppose most downward departures sought by a criminal defendant and sentencing judges will be less likely to depart downward in light of the new

reporting requirements.

The September 2003 Memorandum

Traditionally, federal prosecutors in the United States have had discretion to decide what criminal charges to pursue against a defendant. The September 2003 memorandum seeks to limit that discretion.

The September 2003 memorandum sets forth policies that all federal prosecutors "must follow" when deciding what charges to file. Except in certain limited circumstances, a prosecutor now has a duty to charge and pursue the "most serious, readily provable offence or offences". The most serious offence or offences "are those that generate the most substantial sentence under the sentencing guidelines".

If the policies in the September 2003 memorandum are strictly adhered to by federal prosecutors, the plea bargaining process will be much more difficult because federal prosecutors will not be able to forego pursuing a more serious charge in exchange for a guilty plea to a less serious charge. For example, prosecutors regularly decide to forego pursuing readily provable money-laundering charges under 18 United States Code (USC) Sections 1956 and 1957 in exchange for guilty pleas to wire and mail fraud charges under 18 USC Sections 1341 and 1343. The September 2003 memorandum now requires federal prosecutors to pursue readily provable money-laundering charges, which in most cases carry with them much longer sentences. The prospect of a longer sentence may induce a criminal defendant to take his or her chances at trial instead of entering a guilty plea to these more serious charges.

Implications for Foreign Defendants

Many US criminal laws allow federal prosecutors to file criminal charges against foreign individuals for activity occurring abroad on the basis of the extraterritorial jurisdiction conferred by those laws. The July 2003 and September 2003 memoranda apply equally with respect to the US prosecution of domestic and extraterritorial jurisdiction foreign individuals. Thus, foreign criminal defence lawyers and counsel advising clients with respect to highly regulated activity may wish to consult with US counsel to familiarize themselves with these memoranda in order competently to advise clients who have been or may be charged in the United States.

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Endnotes

(1) 18 USC Section 3553(b)(1); *Koon v United States*, 518 US 1 (1996).