APPENDIX F

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9-27.001 Preface

These principles of Federal prosecution provide to Federal prosecutors a statement of sound prosecutorial policies and practices for particularly important areas of their work. As such, it should promote the reasoned exercise of prosecutorial authority and contribute to the fair, evenhanded administration of the Federal criminal laws.

The manner in which Federal prosecutors exercise their decision-making authority has far-reaching implications, both in terms of justice and effectiveness in law enforcement and in terms of the consequences for individual citizens. A determination to prosecute represents a policy judgment that the fundamental interests of society require the application of the criminal laws to a particular set of circumstances—recognizing both that serious violations of Federal law must be prosecuted, and that prosecution entails profound consequences for the accused and the family of the accused whether or not a conviction ultimately results. Other prosecutorial decisions can be equally significant. Decisions, for example, regarding the specific charges to be brought, or concerning plea dispositions, effectively determine the range of sanctions that may be imposed for criminal conduct. The rare decision to consent to pleas of nolo contendere may affect the success of related civil suits for recovery of damages. Also, the government's position during the sentencing process will help assure that the court imposes a sentence consistent with the Sentencing Reform Act.

These principles of Federal prosecution have been designed to assist in structuring the decision-making process of attorneys for the government. For the most part, they have been cast in general terms with a view to providing guidance rather than to mandating results. The intent is to assure regularity without regimentation, to prevent unwarranted disparity without sacrificing necessary flexibility.

The availability of this statement of principles to Federal law enforcement officials and to the public serves two important purposes: ensuring the fair and effective exercise of prosecutorial responsibility by attorneys for the government, and promoting confidence on the part of the public and individual defendants that important prosecutorial decisions will be made rationally and objectively on the merits of each case. The Principles provide convenient reference points for the process of making prosecutorial decisions; they facilitate the task of training new attorneys in the proper discharge of their duties; they contribute to more effective management of the government's limited prosecutorial resources by promoting greater consistency

among the prosecutorial activities of all United States Attorney's offices and between their activities and the Department's law enforcement priorities; they make possible better coordination of investigative and prosecutorial activity by enhan cing the understanding of investigating departments and agencies of the considerations underlying prosecutorial decisions by the Department; and they inform the public of the careful process by which prosecutorial decisions are made.

Important though these principles are to the proper operation of our Federal prosecutorial system, the success of that system must rely ultimately on the character, integrity, sensitivity, and competence of those men and women who are selected to represent the public interest in the Federal criminal justice process. It is with their help that these principles have been prepared, and it is with their efforts that the purposes of these principles will be achieved.

These principles were originally promulgated by Attorney General Benjamin R. Civiletti on July 28, 1980. While they have since been updated to reflect changes in the law and current policy of the Department of Justice, the underlying message to Federal prosecutors remains unchanged.

9-27.110 Purpose

A. The principles of Federal prosecution set forth herein are intended to promote the reasoned exercise of prosecutorial discretion by attorneys for the government with respect to:

1. Initiating and declining prosecution;
2. Selecting charges;
3. Entering into plea agreements;
4. Opposing offers to plead nolo contendere;
5. Entering into non-prosecution agreements in return for cooperation; and
6. Participating in sentencing.

B. Comment. Under the Federal criminal justice system, the prosecutor has wide latitude in determining when, whom, how, and even whether to prosecute for apparent violations of Federal criminal law. The prosecutor's broad discretion in such areas as initiating or foregoing prosecutions, selecting or recommending specific charges, and terminating prosecutions by accepting guilty pleas has been recognized on numerous occasions by the courts. *See, e.g., Oyler v. Boles*, 368 U.S. 448 (1962); *Newman v. United States*, 382 F.2d 479 (D.C. Cir. 1967); *Powell v. Ratzenbach*, 359 F.2d 234 (D.C. Cir. 1965), *cert. denied*, 384 U.S. 906 (1966). This discretion exists by virtue of his/her status as a member of the Executive Branch, which is charged under the Constitution with ensuring that the laws of the United States be "faithfully executed." U.S. Const. Art. § 3. *See Nader v. Saxbe*, 497 F.2d 676, 679 n. 18 (D.C. Cir. 1974).

Since Federal prosecutors have great latitude in making crucial decisions concerning enforcement of a nationwide system of criminal justice, it is desirable, in the interest of the fair and effective administration of justice in the Federal system, that all Federal prosecutors be guided by a general statement of principles that summarizes appropriate considerations to be weighed, and desirable practices to be followed, in discharging their prosecutorial responsibilities.

Although these principles deal with the specific situations indicated, they should be read in the broader context of the basic responsibilities of Federal attorneys: making certain that the general purposes of the criminal law—assurance of warranted punishment, deterrence of further criminal conduct, protection of the public from dangerous offenders, and rehabilitation of offenders—are

adequately met, while making certain also that the rights of individuals are scrupulously protected.

[cited in USAM 9-2.031]

9-27.120 Application

A. In carrying out criminal law enforcement responsibilities, each Department of Justice attorney should be guided by the principles set forth herein, and each United States Attorney and each Assistant Attorney General should ensure that such principles are communicated to the attorneys who exercise prosecutorial responsibility within his/her office or under his/her direction or supervision.

B. Comment. It is expected that each Federal prosecutor will be guided by these principles in carrying out his/her criminal law enforcement responsibilities unless a modification of, or departure from, these principles has been authorized pursuant to USAM 9-27.140. See also Criminal Resource Manual 792 ("Incentives for Subjects and Targets of Criminal Investigations and Defendants in Criminal Cases to Provide Foreign Intelligence Information"). However, it is not intended that reference to these principles will require a particular prosecutorial decision in any given case. Rather, these principles are set forth solely for the purpose of assisting attorneys for the government in determining how best to exercise their authority in the performance of their duties.

[updated January 2007]

9-27.130 Implementation

A. Each United States Attorney (USA) and responsible Assistant Attorney General should establish internal office procedures to ensure:

1. That prosecutorial decisions are made at an appropriate level of responsibility, and are made consistent with these principles; and

2. That serious, unjustified departures from the principles set forth herein are followed by such remedial action, including the imposition of disciplinary sanctions, when warranted, as are deemed appropriate.

B. Comment. Each USA and each Assistant Attorney General responsible for the enforcement of Federal criminal law should supplement the guidance provided by the principles set forth herein by establishing appropriate internal procedures for his/her office. One purpose of such procedures should be to ensure consistency in the decisions within each office by regularizing the decision making process so that decisions are made at the appropriate level of responsibility. A second purpose, equally important, is to provide appropriate remedies for serious, unjustified departures from sound prosecutorial principles. The USA or Assistant Attorney General may also wish to establish internal procedures for appropriate review and documentation of decisions.

9-27.140 Modifications or Departures

A. United States Attorneys (USA) may modify or depart from the principles set forth herein as necessary in the interests of fair and effective law enforcement within the district. Any significant modification or departure contemplated as a matter of policy or regular practice must be approved by the appropriate Assistant Attorney General and the Deputy Attorney General.

B. Comment. Although these materials are designed to promote consistency in the application of Federal criminal laws, they are not intended to produce rigid uniformity among Federal prosecutors in all areas of the country at the expense of the fair administration of justice. Different offices face different conditions and have different requirements. In recognition of these realities, and in order to maintain the flexibility necessary to respond fairly and effectively to local conditions, each USA is specifically authorized to modify or depart from the principles set forth herein, as necessary in the interests of fair and effective law enforcement within the district. In situations in which a modification or departure is contemplated as a matter of policy or regular practice, the appropriate Assistant Attorney General and the Deputy Attorney General must approve the action before it is adopted.

[cited in USAM 9-27.120]

9-27.150 Non-Litigability

A. The principles set forth herein, and internal office procedures adopted pursuant hereto, are intended solely for the guidance of attorneys for the government. They are not intended to, do not, and may not be relied upon to create a right or benefit, substantive or procedural, enforceable at law by a party to litigation with the United States.

B. Comment. This statement of principles has been developed purely as matter of internal Departmental policy and is being provided to Federal prosecutors solely for their own guidance in performing their duties. Neither this statement of principles nor any internal procedures adopted by individual offices pursuant hereto creates any rights or benefits. By setting forth this fact explicitly, USAM 9-27.150 is intended to foreclose efforts to litigate the validity of prosecutorial actions alleged to be at variance with these principles or not in compliance with internal office procedures that may be adopted pursuant hereto. In the event that an attempt is made to litigate any aspect of these principles, or to litigate any internal office procedures adopted pursuant to these materials, or to litigate the applicability of such principles or procedures to a particular case, the United States Attorney concerned should oppose the attempt and should notify the Department immediately.

9-27.200 Initiating and Declining Prosecution—Probable Cause Requirement

A. If the attorney for the government has probable cause to believe that a person has committed a Federal offense within his/her jurisdiction, he/she should consider whether to:

1. Request or conduct further investigation;

2. Commence or recommend prosecution;

3. Decline prosecution and refer the matter for prosecutorial consideration in another jurisdiction;

4. Decline prosecution and initiate or recommend pretrial diversion or other non-criminal disposition; or

5. Decline prosecution without taking other action.

B. Comment. USAM 9-27.220 sets forth the courses of action available to the attorney for the government once he/she has probable cause to believe that a person has committed a Federal offense within his/her jurisdiction. The probable cause standard is the same standard as that required for the issuance of an arrest warrant or a summons upon a complaint (*See* Fed. R. Crim. P. 4(a)), for a magistrate' s decision to hold a defendant to answer in the district court (*See* Fed. R. Crim. P. 5.1(a)), and is the minimal requirement for indictment by a grand jury. *See Branzburg v. Hayes*, 408 U.S. 665, 686 (1972). This is, of course, a

threshold consideration only. Merely because this requirement can be met in a given case does not automatically warrant prosecution; further investigation may be warranted, and the prosecutor should still take into account all relevant considerations, including those described in the following provis ions, in deciding upon his/her course of action. On the other hand, failure to meet the minimal requirement of probable cause is an absolute bar to initiating a Federal prosecution, and in some circumstances may preclude reference to other prosecuting authorities or recourse to non-criminal sanctions as well.

[cited in USAM 9-10.060; USAM 9-2.031]

9-27.220 Grounds for Commencing or Declining Prosecution

A. The attorney for the government should commence or recommend Federal prosecution if he/she believes that the person's conduct constitutes a Federal offense and that the admissible evidence will probably be sufficient to obtain and sustain a conviction, unless, in his/her judgment, prosecution should be declined because:

1. No substantial Federal interest would be served by prosecution;

2. The person is subject to effective prosecution in another jurisdiction; or

3. There exists an adequate non-criminal alternative to prosecution.

B. Comment. USAM 9-27.220 expresses the principle that, ordinarily, the attorney for the government should initiate or recommend Federal prosecution if he/she believes that the person's conduct constitutes a Federal offense and that the admissible evidence probably will be sufficient to obtain and sustain a conviction. Evidence sufficient to sustain a conviction is required under Rule 29(a), Fed. R. Crim. P., to avoid a judgment of acquittal. Moreover, both as a matter of fundamental fairness and in the interest of the efficient administration of justice, no prosecution should be initiated against any person unless the government believes that the person probably will be found guilty by an unbiased trier of fact. In this connection, it should be noted that, when deciding whether to prosecute, the government attorney need not have in hand all the evidence upon which he/she intends to rely at trial: it is sufficient that he/she have a reasonable be lief that such evidence will be available and admissible at the time of trial. Thus, for example, it would be proper to commence a prosecution though a key witness is out of the country, so long as the witness's presence at trial could be expected with reasonable certainty.

The potential that—despite the law and the facts that create a sound, prosecutable case—the factfinder is likely to acquit the defendant because of the unpopularity of some factor involved in the prosecution or because of the overwhelming popularity of the defendant or his/her cause, is not a factor prohibiting prosecution. For example, in a civil rights case or a case involving an extremely popular political figure, it might be clear that the evidence of guilt—viewed objectively by an unbiased factfinder—would be sufficient to obtain and sustain a conviction, yet the prosecutor might reasonably doubt whether the jury would convict. In such a case, despite his/her negative assessment of the likelihood of a guilty verdict (based on factors extraneous to an objective view of the law and the facts), the prosecutor may properly conclude that it is necessary and desirable to commence or recommend prosecution and allow the criminal process to operate in accordance with its princip les.

Merely because the attorney for the government believes that a person's conduct constitutes a Federal offense and that the admissible evidence will be sufficient to obtain and sustain a conviction, does not mean that he/she necessarily should initiate or recommend prosecution: USAM 9-27.220 notes three situations in which the prosecutor may property decline to take action nonetheless: when no substantial Federal interest would be served by prosecution; when the person is subject to effective prosecution in another jurisdiction; and when there exists an adequate non-criminal alternative to prosecution. It is left to the judgment of the attorney for the government whether such a situation

exists. In exercising that judgment, the attorney for the government should consult USAM 9-27.230, 9-27.240, or 9-27.250, as appropriate.

[cited in USAM 6-4.210; USAM 9-10.060; USAM 9-27.200; USAM 9-28.300]

9-27.230 Initiating and Declining Charges—Substantial Federal Interest

A. In determining whether prosecution should be declined because no substantial Federal interest would be served by prosecution, the attorney for the government should weigh all relevant considerations, including:

1. Federal law enforcement priorities;
2. The nature and seriousness of the offense;
3. The deterrent effect of prosecution;
4. The person's culpability in connection with the offense;
5. The person's history with respect to criminal activity;
6. The person's willingness to cooperate in the investigation or prosecution of others; and
7. The probable sentence or other consequences if the person is convicted.

B. Comment. USAM 9-27.230 lists factors that may be relevant in determining whether prosecution should be declined because no substantial Federal interest would be served by prosecution in a case in which the person is believed to have committed a Federal offense and the admissible evidence is expected to be sufficient to obtain and sustain a conviction. The list of relevant considerations is not intended to be all-inclusive. Obviously, not all of the factors will be applicable to every case, and in any particular case one factor may deserve more weight than it might in another case.

1. **Federal Law Enforcement Priorities.** Federal law enforcement resources and Federal judicial resources are not sufficient to permit prosecution of every alleged offense over which Federal jurisdiction exists. Accordingly, in the interest of allocating its limited resources so as to achieve an effective nationwide law enforcement program, from time to time the Department establishes national investigative and prosecutorial priorities. These priorities are designed to focus Federal law enforcement efforts on those matters within the Federal jurisdiction that are most deserving of Federal attention and are most likely to be handled effectively at the Federal level. In addition, individual United States Attorneys may establish their own priorities, within the national priorities, in order to concentrate their resources on problems of particular local or regional significance. In weighing the Federal interest in a particular prosecution, the attorney for the government s hould give careful consideration to the extent to which prosecution would accord with established priorities.

2. **Nature and Seriousness of Offense.** It is important that limited Federal resources not be wasted in prosecuting inconsequential cases or cases in which the violation is only technical. Thus, in determining whether a substantial Federal interest exists that requires prosecution, the attorney for the government should consider the nature and seriousness of the offense involved. A number of factors may be relevant. One factor that is obviously of primary importance is the actual or potential impact of the offense on the community and on the victim.

   The impact of an offense on the community in which it is committed can be measured in several ways: in terms of economic harm done to community interests; in terms of physical danger to the citizens or damage to public property; and in terms of erosion of the inhabitants' peace of mind and

sense of security. In assessing the seriousness of the offense in these terms, the prosecutor may properly weigh such questions as whether the violation is technical or relatively inconsequential in nature and what the public attitude is toward prosecution under the circumstances of the case. The public may be indifferent, or even opposed, to enforcement of the controlling statute whether on substantive grounds, or because of a history of nonenforcement, or because the offense involves essentially a minor matter of private concern and the victim is not interested in having it pursued. On the other hand, the nature and circumstances of the offense, the identity of the offender or the victim, or t he attendant publicity, may be such as to create strong public sentiment in favor of prosecution. While public interest, or lack thereof, deserves the prosecutor's careful attention, it should not be used to justify a decision to prosecute, or to take other action, that cannot be supported on other grounds. Public and professional responsibility sometimes will require the choosing of a particularly unpopular course.

Economic, physical, and psychological considerations are also important in assessing the impact of the offense on the victim. In this connection, it is appropriate for the prosecutor to take into account such matters as the victim's age or health, and whether full or partial restitution has been made. Care should be taken in weighing the matter of restitution, however, to ensure against contributing to an impression that an offender can escape prosecution merely by returning the spoils of his/her crime.

3. **Deterrent Effect of Prosecution.** Deterrence of criminal conduct, whether it be criminal activity generally or a specific type of criminal conduct, is one of the primary goals of the criminal law. This purpose should be kept in mind, particularly when deciding whether a prosecution is warranted for an offense that appears to be relatively minor; some offenses, although seemingly not of great importance by themselves, if commonly committed would have a substantial cumulative impact on the community.

4. **The Person's Culpability.** Although the prosecutor has sufficient evidence of guilt, it is nevertheless appropriate for him/her to give consideration to the degree of the person's culpability in connection with the offenses, both in the abstract and in comparison with any others involved in the offense. If for example, the person was a relatively minor participant in a criminal enterprise conducted by others, or his/her motive was worthy, and no other circumstances require prosecution, the prosecutor might reasonably conclude that some course other than prosecution would be appropriate.

5. **The Person's Criminal History.** If a person is known to have a prior conviction or is reasonably believed to have engaged in criminal activity at an earlier time, this should, be considered in determining whether to initiate or recommend Federal prosecution. In this connection particular attention should be given to the nature of the person's prior criminal involvement, when it occurred, its relationship if any to the present offense, and whether he/she previously avoided prosecution as a result of an agreement not to prosecute in return for cooperation or as a result of an order compelling his/her testimony. By the same token, a person's lack of prior criminal involvement or his/her previous cooperation with the law enforcement officials should be given due consideration in appropriate cases.

6. **The Person's Willingness to Cooperate.** A person's willingness to cooperate in the investigation or prosecution of others is another appropriate consideration in the determination whether a Federal prosecution should be undertaken. Generally speaking, a willingness to cooperate should not by itself relieve a person of criminal liability. There may be some cases, however, in which the value of a person's cooperation clearly outweighs the Federal interest in prosecuting him/her. These matters are discussed more fully below, in connection with plea agreements and non-prosecution agreements in return for cooperation.

7. **The Person's Personal Circumstances.** In some cases, the personal circumstances of an accused may be relevant in determining whether to prosecute or to take other action. Some circumstances peculiar to the accused, such as extreme youth, advanced age, or mental or physical impairment, may

suggest that prosecution is not the most appropriate response to his/her offense; other circumstances, such as the fact that the accused occupied a position of trust or responsibility which he/she violated in committing the offense, might weigh in favor of prosecution.

8. **The Probable Sentence.** In assessing the strength of the Federal interest in prosecution, the attorney for the government should consider the sentence, or other consequence, that is likely to be imposed if prosecution is successful, and whether such a sentence or other consequence would justify the time and effort of prosecution. If the offender is already subject to a substantial sentence, or is already incarcerated, as a result of a conviction for another offense, the prosecutor should weigh the likelihood that another conviction will result in a meaningful addition to his/her sentence, might otherwise have a deterrent effect, or is necessary to ensure that the offender's record accurately reflects the extent of his/her criminal conduct. For example, it might be desirable to commence a bail-jumping prosecution against a person who already has been convicted of another offense so that law enforcement personnel and judicial officers who encounter him/her in the future wil l be aware of the risk of releasing him/her on bail. On the other hand, if the person is on probation or parole as a result of an earlier conviction, the prosecutor should consider whether the public interest might better be served by instituting a proceeding for violation of probation or revocation of parole, than by commencing a new prosecution. The prosecutor should also be alert to the desirability of instituting prosecution to prevent the running of the statute of limitations and to preserve the availability of a basis for an adequate sentence if there appears to be a chance that an offender's prior conviction may be reversed on appeal or collateral attack. Finally, if a person previously has been prosecuted in another jurisdiction for the same offense or a closely related offense, the attorney for the government should consult existing departmental policy statements on the subject of "successive prosecution" or "dual prosecution," depending on whether the earlier prosecution w as Federal or nonfederal. See USAM 9-2.031 (Petite Policy).

   Just as there are factors that are appropriate to consider in determining whether a substantial Federal interest would be served by prosecution in a particular case, there are considerations that deserve no weight and should not influence the decision. These include the time and resources expended in Federal investigation of the case. No amount of investigative effort warrants commencing a Federal prosecution that is not fully justified on other grounds.

[cited in USAM 9-2.031; USAM 9-27.220]

9-27.240 Initiating and Declining Charges—Prosecution in Another Jurisdiction

A. In determining whether prosecution should be declined because the person is subject to effective prosecution in another jurisdiction, the attorney for the government should weigh all relevant considerations, including:

   1. The strength of the other jurisdiction's interest in prosecution;

   2. The other jurisdictions ability and willingness to prosecute effectively; and

   3. The probable sentence or other consequences if the person is convicted in the other jurisdiction.

B. Comment. In many instances, it may be possible to prosecute criminal conduct in more than one jurisdiction. Although there may be instances in which a Federal prosecutor may wish to consider deferring to prosecution in another Federal district, in most instances the choice will probably be between Federal prosecution and prosecution by state or local authorities. USAM 9-27.240 sets forth three general considerations to be taken into account in determining whether a person is likely to be prosecuted effectively in another jurisdiction: the strength of the jurisdiction's interest in prosecution; its ability and willingness to prosecute effectively; and the probable sentence or other consequences if the person is

convicted. As indicated with respect to the considerations listed in paragraph 3, these factors are illustrative only, and the attorney for the government should also consider any others that appear relevant to his/her in a particular cas e.

1. **The Strength of the Jurisdiction's Interest.** The attorney for the government should consider the relative Federal and state characteristics of the criminal conduct involved. Some offenses, even though in violation of Federal law, are of particularly strong interest to the authorities of the state or local jurisdiction in which they occur, either because of the nature of the offense, the identity of the offender or victim, the fact that the investigation was conducted primarily by state or local investigators, or some other circumstance. Whatever the reason, when it appears that the Federal interest in prosecution is less substantial than the interest of state or local authorities, consideration should be given to referring the case to those authorities rather than commencing or recommending a Federal prosecution.

2. **Ability and Willingness to Prosecute Effectively.** In assessing the likelihood of effective prosecution in another jurisdiction, the attorney for the government should also consider the intent of the authorities in that jurisdiction and whether that jurisdiction has the prosecutorial and judicial resources necessary to undertake prosecution promptly and effectively. Other relevant factors might be legal or evidentiary problems that might attend prosecution in the other jurisdiction. In addition, the Federal prosecutor should be alert to any local conditions, attitudes, relationships, or other circumstances that might cast doubt on the likelihood of the state or local authorities conducting a thorough and successful prosecution.

3. **Probable Sentence Upon Conviction.** The ultimate measure of the potential for effective prosecution in another jurisdiction is the sentence, or other consequence, that is likely to be imposed if the person is convicted. In considering this factor, the attorney for the government should bear in mind not only the statutory penalties in the jurisdiction and sentencing patterns in similar cases, but also, the particular characteristics of the offense or, of the offender that might be relevant to sentencing. He/she should also be alert to the possibility that a conviction under state law may, in some cases result in collateral consequences for the defendant, such as disbarment, that might not follow upon a conviction under Federal law.

[cited in USAM 5-11.113; USAM 9-27.220; USAM 9-28.1100]

9-27.250 Non-Criminal Alternatives to Prosecution

A. In determining whether prosecution should be declined because there exists an adequate, non-criminal alternative to prosecution, the attorney for the government should consider all relevant factors, including:

   1. The sanctions available under the alternative means of disposition;

   2. The likelihood that an effective sanction will be imposed; and

   3. The effect of non-criminal disposition on Federal law enforcement interests.

B. Comment. When a person has committed a Federal offense, it is important that the law respond promptly, fairly, and effectively. This does not mean, however, that a criminal prosecution must be initiated. In recognition of the fact that resort to the criminal process is not necessarily the only appropriate response to serious forms of antisocial activity, Congress and state legislatures have provided civil and administrative remedies for many types of conduct that may also be subject to criminal sanction. Examples of such non-criminal approaches include civil tax proceedings; civil actions under the securities, customs, antitrust, or other regulatory laws; and reference of complaints to licensing authorities or to professional organizations such as bar associations. Another potentially useful alternative to prosecution in some cases is pretrial

diversion. See USAM 9-22.000.

> Attorneys for the government should familiarize themselves with these alternatives and should consider pursuing them if they are available in a particular case. Although on some occasions they should be pursued in addition to the criminal law procedures, on other occasions they can be expected to provide an effective substitute for criminal prosecution. In weighing the adequacy of such an alternative in a particular case, the prosecutor should consider the nature and severity of the sanctions that could be imposed, the likelihood that an adequate sanction would in fact be imposed, and the effect of such a non-criminal disposition on Federal law enforcement interests. It should be noted that referrals for non-criminal disposition may not include the transfer of grand jury material unless an order under Rule 6(e), Federal Rules of Criminal Procedure, has been obtained. *See United States v. Sells Engineering, Inc.*, 463 U.S. 418 (1983).

[cited in USAM 9-27.220; USAM 9-28.1100]

9-27.260 Initiating and Declining Charges—Impermissible Considerations

A. In determining whether to commence or recommend prosecution or take other action against a person, the attorney for the government should not be influenced by:

1. The person's race, religion, sex, national origin, or political association, activities or beliefs;

2. The attorney's own personal feelings concerning the person, the person's associates, or the victim; or

3. The possible affect of the decision on the attorney's own professional or personal circumstances.

B. Comment. USAM 9-27.260 sets forth various matters that plainly should not influence the determination whether to initiate or recommend prosecution or take other action. They are listed here not because it is anticipated that any attorney for the government might allow them to affect his/her judgment, but in order to make clear that Federal prosecutors will not be influenced by such improper considerations. Of course, in a case in which a particular characteristic listed in subparagraph (1) is pertinent to the offense (for example, in an immigration case the fact that the offender is not a United States national, or in a civil rights case the fact that the victim and the offender are of different races), the provision would not prohibit the prosecutor from considering it for the purpose intended by the Congress.

[cited in USAM 8-3.300]

9-27.270 Records of Prosecutions Declined

A. Whenever the attorney for the government declines to commence or recommend Federal prosecution, he/she should ensure that his/her decision and the reasons therefore are communicated to the investigating agency involved and to any other interested agency, and are reflected in the office files.

B. Comment. USAM 9-27.270 is intended primarily to ensure an adequate record of disposition of matters that are brought to the attention of the government attorney for possible criminal prosecution, but that do not result in Federal prosecution. When prosecution is declined in serious cases on the understanding that action will be taken by other authorities, appropriate steps should be taken to ensure that the matter receives their attention and to ensure coordination or follow-up.

9-27.300 Selecting Charges—Charging Most Serious Offenses

A. Except as provided in USAM 9-27.330, (precharge plea agreements), once the decision to prosecute has been made, the attorney for the government should charge, or should recommend that the grand jury charge, the most serious offense that is consistent with the nature of the defendant's conduct, and that is likely to result in a sustainable conviction. If mandatory minimum sentences are also involved, their effect must be considered, keeping in mind the fact that a mandatory minimum is statutory and generally overrules a guideline. The "most serious" offense is generally that which yields the highest range under the sentencing guidelines.

However, a faithful and honest application of the Sentencing Guidelines is not incompatible with selecting charges or entering into plea agreements on the basis of an individualized assessment of the extent to which particular charges fit the specific circumstances of the case, are consistent with the purposes of the Federal criminal code, and maximize the impact of Federal resources on crime. Thus, for example, in determining "the most serious offense that is consistent with the nature of the defendant's conduct that is likely to result in a sustainable conviction," it is appropriate that the attorney for the government consider, inter alia, such factors as the Sentencing Guideline range yielded by the charge, whether the penalty yielded by such sentencing range (or potential mandatory minimum charge, if applicable) is proportional to the seriousness of the defendant's conduct, and whether the charge achieves such purposes of the criminal law as punishment, protection of the pub lic, specific and general deterrence, and rehabilitation. Note that these factors may also be considered by the attorney for the government when entering into plea agreements. USAM 9-27.400.

To ensure consistency and accountability, charging and plea agreement decisions must be made at an appropriate level of responsibility and documented with an appropriate record of the factors applied.

B. Comment. Once it has been determined to initiate prosecution, either by filing a complaint or an information, or by seeking an indictment from the grand jury, the attorney for the government must determine what charges to file or recommend. When the conduct in question consists of a single criminal act, or when there is only one applicable statute, this is not a difficult task. Typically, however, a defendant will have committed more than one criminal act and his/her conduct may be prosecuted under more than one statute. Moreover, selection of charges may be complicated further by the fact that different statutes have different proof requirements and provide substantially different penalties. In such cases, considerable care is required to ensure selection of the proper charge or charges. In addition to reviewing the concerns that prompted the decision to prosecute in the first instance, particular attention should be given to the need to ensure that the prosecution will be b oth fair and effective.

At the outset, the attorney for the government should bear in mind that at trial he/she will have to produce admissible evidence sufficient to obtain and sustain a conviction or else the government will suffer a dismissal. For this reason, he/she should not include in an information or recommend in an indictment charges that he/she cannot reasonably expect to prove beyond a reasonable doubt by legally sufficient evidence at trial.

In connection with the evidentiary basis for the charges selected, the prosecutor should also be particularly mindful of the different requirements of proof under different statutes covering similar conduct. For example, the bribe provisions of 18 U.S.C. § 201 require proof of "corrupt intent," while the '"gratuity" provisions do not. Similarly, the "two witness" rule applies to perjury prosecutions under 18 U.S.C. § 1621 but not under 18 U.S.C. § 1623.

As stated, a Federal prosecutor should initially charge the most serious, readily provable offense or offenses consistent with the defendant's conduct. Charges should not be filed simply to exert leverage to induce a plea, nor should charges be abandoned in an effort to arrive at a bargain that fails to reflect the seriousness of the defendant's conduct.

USAM 9-27.300 expresses the principle that the defendant should be charged with the most serious offense that is encompassed by his/her conduct and that is readily provable. Ordinarily, as noted

above this will be the offense for which the most severe penalty is provided by law and the guidelines. Where two crimes have the same statutory maximum and the same guideline range, but only one contains a mandatory minimum penalty, the one with the mandatory minimum is the more serious. This principle provides the framework for ensuring equal justice in the prosecution of Federal criminal offenders. It guarantees that every defendant will start from the same position, charged with the most serious criminal act he/she commits. Of course, he/she may also be charged with other criminal acts (as provided in USAM 9-27.320), if the proof and the government's legitimate law enforcement objectives warrant additional charges .

Current drug laws provide for increased maximum, and in some cases minimum, penalties for many offenses on the basis of a defendant's prior criminal convictions. *See, e.g.*, 21 U.S.C. §§ 841 (b)(1)(A),(B), and (C), 848(a), 960 (b)(1), (2), and (3), and 962. However, a court may not impose such an increased penalty unless the United States Attorney has filed an information with the court, before trial or before entry of a plea of guilty, setting forth the previous convictions to be relied upon 21 U.S.C. § 851.

Every prosecutor should regard the filing of an information under 21 U.S.C. § 851 concerning prior convictions as equivalent to the filing of charges. Just as a prosecutor must file a readily provable charge, he or she must file an information under 21 U.S.C. § 851 regarding prior convictions that are readily provable and that are known to the prosecutor prior to the beginning of trial or entry of plea. The only exceptions to this requirement are where: (1) the failure to file or the dismissal of such pleadings would not affect the applicable guideline range from which the sentence may be imposed; or (2) in the context of a negotiated plea, the United States Attorney, the Chief Assistant United States Attorney, the senior supervisory Criminal Assistant United States Attorney or within the Department of Justice, a Section Chief or Office Director has approved the negotiated agreement. The reasons for such an agreement must be set forth in writing. Such a reason might i nclude, for example, that the United States Attorney's office is particularly overburdened, the case would be time-consuming to try, and proceeding to trial would significantly reduce the total number of cases disposed of by the office. The permissible agreements within this context include: (1) not filing an enhancement; (2) filing an enhancement which does not allege all relevant prior convictions, thereby only partially enhancing a defendant's potential sentence; and (3) dismissing a previously filed enhancement.

A negotiated plea which uses any of the options described in this section must be made known to the sentencing court. In addition, the sentence which can be imposed through the negotiated plea must adequately reflect the seriousness of the offense.

Prosecutors are reminded that when a defendant commits an armed bank robbery or other crime of violence or drug trafficking crime, appropriate charges include 18 U.S.C. § 924 (c).

[cited in USAM 9-27.400; USAM 9-28.1200; USAM 9-100.020]

9-27.320 Additional Charges

A. Except as hereafter provided, the attorney for the government should also charge, or recommend that the grand jury charge, other offenses only when, in his/her judgement, additional charges:

1. Are necessary to ensure that the information or indictment:

   a. Adequately reflects the nature and extent of the criminal conduct involved; and

   b. Provides the basis for an appropriate sentence under all the circumstances of the case; or

2. Will significantly enhance the strength of the government's case against the defendant or a codefendant.

B. Comment. It is important to the fair and efficient administration of justice in the Federal system that the government bring as few charges as are necessary to ensure that justice is done. The bringing of unnecessary charges not only complicates and prolongs trials, it constitutes an excessive—and potentially unfair—exercise of power. To ensure appropriately limited exercises of the charging power, USAM 9-27.320 outlines three general situations in which additional charges may be brought: (1) when necessary adequately to reflect the nature and extent of the criminal conduct involved; (2) when necessary to provide the basis for an appropriate sentence under all the circumstances of the case; and (3) when an additional charge or charges would significantly strengthen the case against the defendant or a codefendant.

1. **Nature and Extent of Criminal Conduct.** Apart from evidentiary considerations, the prosecutor's initial concern should be to select charges that adequately reflect the nature and extent of the criminal conduct involved. This means that the charges selected should fairly describe both the kind and scope of unlawful activity; should be legally sufficient; should provide notice to the public of the seriousness of the conduct involved; and should negate any impression that, after committing one offense, an offender can commit others with impunity.

2. **Basis for Sentencing.** Proper charge selection also requires consideration of the end result of successful prosecution—the imposition of an appropriate sentence under all the circumstances of the case. In order to achieve this result, it ordinarily should not be necessary to charge a person with every offense for which he/she, may technically be liable (indeed, charging every such offense may in some cases be perceived as an unfair attempt to induce a guilty plea). What is important is that the person be charged in such a manner that, if he/she is convicted, the court may impose an appropriate sentence. Under the sentencing guidelines, if the offense actually charged bears a true relationship with the defendant's conduct, an appropriate guideline sentence will follow. However, the prosecutor must take care to be sure that the charges brought allow the guidelines to operate properly. For instance, charging a significant participant in a major drug conspiracy only with u sing a communication facility would result in a sentence which, even if it were the maximum possible under the charged offense, would be artificially low given the defendant's actual conduct.

3. **Effect on the Government's Case.** When considering whether to include a particular charge in the indictment or information, the attorney for the government should bear in mind the possible effects of inclusion or exclusion of the charge on the government's case against the defendant or a codefendant. If the evidence is available, it is proper to consider the tactical advantages of bringing certain charges. For example, in a case in which a substantive offense was committed pursuant to an unlawful agreement, inclusion of a conspiracy count is permissible and may be desirable to ensure the introduction of all relevant evidence at trial. Similarly, it might be important to include a perjury or false statement count in an indictment charging other offenses, in order to give the jury a complete picture of the defendant's criminal conduct. Failure to include appropriate charges for which the proof is sufficient may not only result in the exclusion, of relevant evidence, but ma y impair the prosector's ability to prove a coherent case, and lead to jury confusion as well. In this connection, it is important to remember that, in multi-defendant cases, the presence or absence of a particular charge against one defendant may affect the strength of the case against another defendant. In short, when the evidence exists, the charges should be structured so as to permit proof of the strongest case possible without undue burden on the administration of justice.

[cited in USAM 6-4.210; USAM 9-27.300]

9-27.330 Pre-Charge Plea Agreements

Before filing or recommending charges pursuant to a precharge plea agreement, the attorney for the

government should consult the plea agreement provisions of USAM 9-27.430, thereof, relating to the selection of charges to which a defendant should be required to plead guilty.

[cited in USAM 9-27.300]

9-27.400 Plea Agreements Generally

A. The attorney for the government may, in an appropriate case, enter into an agreement with a defendant that, upon the defendant's plea of guilty or nolo contendere to a charged offense or to a lesser or related offense, he/she will move for dismissal of other charges, take a certain position with respect to the sentence to be imposed, or take other action. Plea agreements, and the role of the courts in such agreements, are addressed in Chapter Six of the Sentencing Guidelines. See also USAM 9-27.300 which discusses the individualized assessment by prosecutors of the extent to which particular charges fit the specific circumstances of the case, are consistent with the purposes of the Federal criminal code, and maximize the impact of Federal resources on crime.

B. Comment. USAM 9-27.400 permits, in appropriate cases, the disposition of Federal criminal charges pursuant to plea agreements between defendants and government attorneys. Such negotiated dispositions should be distinguished from situations in which a defendant pleads guilty or nolo contendere to fewer than all counts of an information or indictment in the absence of any agreement with the government. Only the former type of disposition is covered by the provisions of USAM 9-27.400 et seq.

> Negotiated plea dispositions are explicitly sanctioned by Rule 11(e)(1), Fed. R. Crim. P., which provides that:
>
> > The attorney for the government and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching an agreement that upon the entering of a plea of guilty or nolo contendere to a charged offense or to a lesser or related offense, the attorney for the government will do any of the following:
> >
> > A. Move for dismissal of other charges; or
> >
> > B. Make a recommendation, or agree not to oppose, the defendant's request for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court; or
> >
> > C. Agree that a specific sentence is the appropriate disposition of the case.

Three types of plea agreements are encompassed by the language of USAM 9-27.400, agreements whereby in return for the defendant's plea to a charged offense or to a lesser or related offense, other charges are dismissed ("charge agreements"); agreements pursuant to which the government takes a certain position regarding the sentence to be imposed ("sentence agreements"); and agreements that combine a plea with a dismissal of charges and an undertaking by the prosecutor concerning the government's position at sentencing ("mixed agreements").

Once prosecutors have indicted, they should find themselves bargaining about charges which they have determined are readily provable and reflect the seriousness of the defendant's conduct. Charge agreements envision dismissal of counts in exchange for a plea. As with the indictment decision, the prosecutor should seek a plea to the most serious readily provable offense charged. Should a prosecutor determine in good faith after indictment that, as a result of a change in the evidence or for another reason (e.g., a need has arisen to protect the identity of a particular witness until he or she testifies against a more significant defendant), a charge is not readily provable or that an indictment exaggerates the seriousness of an offense or offenses, a plea bargain may reflect the prosecutor's reassessment. There should be documentation,

however, in a case in which charges originally brought are dropped.

The language of USAM 9-27.400 with respect to sentence agreements is intended to cover the entire range of positions that the government might wish to take at the time of sentencing. Among the options are: taking no position regarding the sentence; not opposing the defendant's request; requesting a specific type of sentence (e.g., a fine or probation), a specific fine or term of imprisonment, or not more than a specific fine or term of imprisonment; and requesting concurrent rather than consecutive sentences. Agreement to any such option must be consistent with the guidelines.

There are only two types of sentence bargains. Both are permissible, but one is more complicated than the other. First, prosecutors may bargain for a sentence that is within the specified United States Sentencing Commission's guideline range. This means that when a guideline range is 18 to 24 months, the prosecutor has discretion to agree to recommend a sentence of 18 to 20 months rather than to argue for a sentence at the top of the range. Such a plea does not require that the actual sentence range be determined in advance. The plea agreement may have wording to the effect that once the range is determined by the court, the United States will recommend a low point in that range. Similarly, the prosecutor may agree to recommend a downward adjustment for acceptance of responsibility if he or she concludes in good faith that the defendant is entitled to the adjustment. Second, the prosecutor may seek to depart from the guidelines. This is more complicated than a bargain invo lving a sentence within a guideline range. Departures are discussed more generally below.

Department policy requires honesty in sentencing; Federal prosecutors are expected to identify for the court departures when they agree to support them. For example, it would be improper for a prosecutor to agree that a departure is in order, but to conceal the agreement in a charge bargain that is presented to a court as a fait accompli so that there is neither a record of nor judicial review of the departure.

Plea bargaining, both charge bargaining and sentence bargaining, must honestly reflect the totality and seriousness of the defendant's conduct and any departure to which the prosecutor is agreeing, and must be accomplished through appropriate guideline provisions.

The basic policy is that charges are not to be bargained away or dropped, unless the prosecutor has a good faith doubt as to the government's ability readily to prove a charge for legal or evidentiary reasons. There are, however, two exceptions.

First, if the applicable guideline range from which a sentence may be imposed would be unaffected, readily provable charges may be dismissed or dropped as part of a plea bargain. It is important to know whether dropping a charge may affect a sentence. For example, the multiple offense rules in Part D of Chapter 3 of the guidelines and the relevant conduct standard set forth in Sentencing Guideline 1B1.3(a)(2) will mean that certain dropped charges will be counted for purposes of determining the sentence, subject to the statutory maximum for the offense or offenses of conviction. It is vital that Federal prosecutors understand when conduct that is not charged in an indictment or conduct that is alleged in counts that are to be dismissed pursuant to a bargain may be counted for sentencing purposes and when it may not be. For example, in the case of a defendant who could be charged with five bank robberies, a decision to charge only one or to dismiss four counts pursuant to a bar gain precludes any consideration of the four uncharged or dismissed robberies in determining a guideline range, unless the plea agreement included a stipulation as to the other robberies. In contrast, in the case of a defendant who could be charged with five counts of fraud, the total amount of money involved in a fraudulent scheme will be considered in determining a guideline range even if the defendant pleads guilty to a single count and there is no stipulation as to the other counts.

Second, Federal prosecutors may drop readily provable charges with the specific approval of the United States Attorney or designated supervisory level official for reasons set forth in the file of the case. This exception recognizes that the aims of the Sentencing Reform Act must be sought without ignoring other, critical aspects of the Federal criminal justice system. For example, approvals to drop charges in a

particular case might be given because the United States Attorney's office is particularly over-burdened, the case would be time-consuming to try, and proceeding to trial would significantly reduce the total number of cases disposed of by the office.

In Chapter 5, Part K of the Sentencing Guidelines, the Commission has listed departures that may be considered by a court in imposing a sentence. Moreover, Guideline 5K2.0 recognizes that a sentencing court may consider a ground for departure that has not been adequately considered by the Commission. A departure requires approval by the court. It violates the spirit of the guidelines and Department policy for prosecutor to enter into a plea bargain which is based upon the prosecutor's and the defendant's agreement that a departure is warranted, but that does not reveal to the court the existence of the departure and thereby afford the court an opportunity to reject it.

The Commission has recognized those bases for departure that are commonly justified. Accordingly, before the government may seek a departure based on a factor other than one set forth in Chapter 5, Part X, approval of the United States Attorney or designated supervisory officials is required. This approval is required whether or not a case is resolved through a negotiated plea.

Section 5K1.1 of the Sentencing Guidelines allows the United States to file a pleading with the sentencing court which permits the court to depart below the indicated guideline, on the basis that the defendant provided substantial assistance in the investigation or prosecution of another. Authority to approve such pleadings is limited to the United States Attorney, the Chief Assistant United States Attorney, and supervisory criminal Assistant United States Attorneys, or a committee including at least one of these individuals. Similarly, for Department of Justice attorneys, approval authority should be vested in a Section Chief or Office Director, or such official's deputy, or in a committee which includes at least one of these individuals.

Every United States Attorney or Department of Justice Section Chief or Office Director shall maintain documentation of the facts behind and justification for each substantial assistance pleading. The repository or repositories of this documentation need not be the case file itself. Freedom of Information Act considerations may suggest that a separate form showing the final decision be maintained.

The procedures described above shall also apply to Motions filed pursuant to Rule 35(b), Federal Rules of Criminal Procedure, where the sentence of a cooperating defendant is reduced after sentencing on motion of the United States. Such a filing is deemed for sentencing purposes to be the equivalent of a substantial assistance pleading.

The concession required by the government as part of a plea agreement, whether it be a "charge agreement," a "sentence agreement," or a "mixed agreement," should be weighed by the responsible government attorney in the light of the probable advantages and disadvantages of the plea disposition proposed in the particular case. Particular care should be exercised in considering whether to enter into a plea agreement pursuant to which the defendant will enter a nolo contendere plea. As discussed in USAM 9-27.500 and USAM 9-16.000, there are serious objections to such pleas and they should be opposed unless the responsible Assistant Attorney General concluded that the circumstances are so unusual that acceptance of such a plea would be in the public interest.

[updated September 2000] [cited in USAM 9-16.300; USAM 9-16.320; USAM 9-27.300; USAM 9-28.1300]

9-27.420 Plea Agreements—Considerations to be Weighed

A. In determining whether it would be appropriate to enter into a plea agreement, the attorney for the government should weigh all relevant considerations, including:

1. The defendant's willingness to cooperate in the investigation or prosecution of others;

2. The defendant's history with respect to criminal activity;
3. The nature and seriousness of the offense or offenses charged;
4. The defendant's remorse or contrition and his/her willingness to assume responsibility for his/her conduct;
5. The desirability of prompt and certain disposition of the case;
6. The likelihood of obtaining a conviction at trial;
7. The probable effect on witnesses;
8. The probable sentence or other consequences if the defendant is convicted;
9. The public interest in having the case tried rather than disposed of by a guilty plea;
10. The expense of trial and appeal;
11. The need to avoid delay in the disposition of other pending cases; and
12. The effect upon the victim's right to restitution.

B. Comment. USAM 9-27.420 sets forth some of the appropriate considerations to be weighed by the attorney for the government in deciding whether to enter into a plea agreement with a defendant pursuant to the provisions of Rule 11(e), Fed. R. Crim. P. The provision is not intended to suggest the desirability or lack of desirability of a plea agreement in any particular case or to be construed as a reflection on the merits of any plea agreement that actually may be reached; its purpose is solely to assist attorneys for the government in exercising their judgement as to whether some sort of plea agreement would be appropriate in a particular case. Government attorneys should consult the investigating agency involved and the victim, if appropriate or required by law, in any case in which it would be helpful to have their views concerning the relevance of particular factors or the weight they deserve.

1. **Defendant's Cooperation.** The defendant's willingness to provide timely and useful cooperation as part of his/her plea agreement should be given serious consideration. The weight it deserves will vary, of course, depending on the nature and value of the cooperation offered and whether the same benefit can be obtained without having to make the charge or sentence concession that would be involved in a plea agreement. In many situations, for example, all necessary cooperation in the form of testimony can be obtained through a compulsion order under 18 U.S.C.§§ 6001-6003. In such cases, that approach should be attempted unless, under the circumstances, it would seriously interfere with securing the person's conviction. If the defendant's cooperation is sufficiently substantial to justify the filing of a 5K1.1 Motion for a downward departure, the procedures set out in USAM 9-27.400(B) shall be followed.

2. **Defendant's Criminal History.** One of the principal arguments against the practice of plea bargaining is that it results in leniency that reduces the deterrent impact of the law and leads to recidivism on the part of some offenders. Although this concern is probably most relevant in non-federal jurisdictions that must dispose of large volumes of routine cases with inadequate resources, nevertheless it should be kept in mind by Federal prosecutors, especially when dealing with repeat offenders or "career criminals." Particular care should be taken in the case of a defendant with a prior criminal record to ensure that society's need for protection is not sacrificed in the process of arriving at a plea disposition. In this connection, it is proper for the government attorney to consider not only the defendant's past, but also facts of other criminal involvement not resulting in conviction. By the same token, of course, it is also proper to consider a defendant's absence of past criminal involvement and his/her past cooperation with law enforcement officials. Note that 18

U.S.C.§ 924(e), as well as Sentencing Guidelines 4B1.1 and 4B1.4 address "career criminals" and "armed career criminals." 18 U.S.C. § 3559(c)—the so-called "three strikes" statute—addresses serious violent recidivist offenders. The application of these provisions to a particular case may affect the plea negotiation posture of the parties.

3. **Nature and Seriousness of Offense Charged.** Important considerations in determining whether to enter into a plea agreement may be the nature and seriousness of the offense or offenses charged. In weighing those factors, the attorney for the government should bear in mind the interests sought to be protected by the statute defining the offense (e.g., the national defense, constitutional rights, the governmental process, personal safety, public welfare, or property), as well as nature and degree of harm caused or threatened to those interests and any attendant circumstances that aggravate or mitigate the seriousness of the offense in the particular case.

4. **Defendant's Attitude.** A defendant may demonstrate apparently genuine remorse or contrition, and a willingness to take responsibility for his/her criminal conduct by, for example, efforts to compensate the victim for injury or loss, or otherwise to ameliorate the consequences of his/her acts. These are factors that bear upon the likelihood of his/her repetition of the conduct involved and that may properly be considered in deciding whether a plea agreement would be appropriate. Sentencing Guideline 3E1.1 allows for a downward adjustment upon acceptance of responsibility by the defendant. It is permissible for a prosecutor to enter a plea agreement which approves such an adjustment if the defendant otherwise meets the requirements of the section.

   It is particularly important that the defendant not be permitted to enter a guilty plea under circumstances that will allow him/her later to proclaim lack of culpability or even complete innocence. Such consequences can be avoided only if the court and the public are adequately informed of the nature and scope of the illegal activity and of the defendant's complicity and culpability. To this end, the attorney for the government is strongly encouraged to enter into a plea agreement only with the defendant's assurance that he/she will admit, the facts of the offense and of his/her culpable participation therein. A plea agreement may be entered into in the absence of such an assurance, but only if the defendant is willing to accept without contest a statement by the government in open court of the facts it could prove to demonstrate his/her guilt beyond a reasonable doubt. Except as provided in USAM 9-27.440, the attorney for the government should not enter into a plea agreement with a defendant who admits his/her guilt but disputes an essential element of the government's case.

5. **Prompt Disposition.** In assessing the value of prompt disposition of a criminal case, the attorney for the government should consider the timing of a proffered plea. A plea offer by a defendant on the eve of trial after the case has been fully prepared is hardly as advantageous from the standpoint of reducing public expense as one offered months or weeks earlier. In addition, a last minute plea adds to the difficulty of scheduling cases efficiently and may even result in wasting the prosecutorial and Judicial time reserved for the aborted trial. For these reasons, governmental attorneys should make clear to defense counsel at an early stage in the proceedings that, if there are to be any plea discussions, they must be concluded prior to a certain date well in advance of the trial date. *See* USSG § 3E1.1(b)(1). However, avoidance of unnecessary trial preparation and scheduling disruptions are not the only benefits to be gained from prompt disposition of a case by means of a guilty plea. Such a disposition also saves the government and the court the time and expense of trial and appeal. In addition, a plea agreement facilitates prompt imposition of sentence, thereby promoting the overall goals of the criminal justice system. Thus, occasionally it may be appropriate to enter into a plea agreement even after the usual time for making such agreements has passed.

6. **Likelihood of Conviction.** The trial of a criminal case inevitably involves risks and uncertainties, both for the prosecution and for the defense. Many factors, not all of which can be anticipated, can affect the outcome. To the extent that these factors can be identified, they should be considered in deciding whether to accept a plea or go to trial. In this connection, the prosecutor should weigh the

strength of the government's case relative to the anticipated defense case, bearing in mind legal and evidentiary problems that might be expected, as well as the importance of the credibility of witnesses. However, although it is proper to consider factors bearing upon the likelihood of conviction in deciding whether to enter into a plea agreement, it obviously is improper for the prosecutor to attempt to dispose of a case by means of a plea agreement if he/she is not satisfied that the legal standards for guilt are met.

7. **Effect on Witnesses.** Attorneys for the government should bear in mind that it is often burdensome for witnesses to appear at trial and that sometimes to do so may cause them serious embarrassment or even place them in jeopardy of physical or economic retaliation. The possibility of such adverse consequences to witnesses should not be overlooked in determining whether to go to trial or attempt to reach a plea agreement. Another possibility that may have to be considered is revealing the identity of informants. When an informant testifies at trial, his/her identity and relationship to the government become matters of public record. As a result, in addition to possible adverse consequences to the informant, there is a strong likelihood that the informant's usefulness in other investigations will be seriously diminished or destroyed. These are considerations that should be discussed with the investigating agency involved, as well as with any other agencies known to have an interest in using the informant in their investigations.

8. **Probable Sentence.** In determining whether to enter into a plea agreement, the attorney for the government may properly consider the probable outcome of the prosecution in terms of the sentence or other consequences for the defendant in the event that a plea agreement is reached. If the proposed agreement is a "sentence agreement" or a "mixed agreement," the prosecutor should realize that the position he/she agrees to take with respect to sentencing may have a significant effect on the sentence that is actually imposed. If the proposed agreement is a "charge agreement," the prosecutor should bear in mind the extent to which a plea to fewer or lesser offenses may reduce the sentence that otherwise could be imposed. In either event, it is important that the attorney for the government be aware of the need to preserve the basis for an appropriate sentence under all the circumstances of the case. Thorough knowledge of the Sentencing Guidelines, any applicable statutory minim um sentences, and any applicable sentence enhancements is clearly necessary to allow the prosecutor to accurately and adequately evaluate the effect of any plea agreement.

9. **Trial Rather Than Plea.** There may be situations in which the public interest might better be served by having a case tried rather than by having it disposed of by means of a guilty plea. These include situations in which it is particularly important to permit a clear public understanding that "justice is done" through exposing the exact nature of the defendant's wrongdoing at trial, or in which a plea agreement might be misconstrued to the detriment of public confidence in the criminal justice system. For this reason, the prosecutor should be careful not to place undue emphasis on factors which favor disposition of a case pursuant to a plea agreement.

10. **Expense of Trial and Appeal.** In assessing the expense of trial and appeal that would be saved by a plea disposition, the attorney for the government should consider not only such monetary costs as juror and witness fees, but also the time spent by judges, prosecutors, and law enforcement personnel who may be needed to testify or provide other assistance at trial. In this connection, the prosecutor should bear in mind the complexity of the case, the number of trial days and witnesses required, and any extraordinary expenses that might be incurred such as the cost of sequestering the jury.

11. **Prompt Disposition of Other Cases.** A plea disposition in one case may facilitate the prompt disposition of other cases, including cases in which prosecution might otherwise be declined. This may occur simply because prosecutorial, judicial, or defense resources will become available for use in other cases, or because a plea by one of several defendants may have a "domino effect," leading to pleas by other defendants. In weighing the importance of these possible consequences, the attorney for the government should consider the state of the criminal docket and the speedy trial requirements in the district, the desirability of handling a larger volume of criminal cases, and the work loads of

prosecutors, judges, and defense attorneys in the district.

[cited in USAM 9-28.1300]

9-27.430 Selecting Plea Agreement Charges

A. If a prosecution is to be concluded pursuant to a plea agreement, the defendant should be required to plead to a charge or charges:

1. That is the most serious readily provable charge consistent with the nature and extent of his/her criminal conduct;

2. That has an adequate factual basis;

3. That makes likely the imposition of an appropriate sentence and order of restitution, if appropriate, under all the circumstances of the case; and

4. That does not adversely affect the investigation or prosecution of others.

B. Comment. USAM 9-27.430 sets forth the considerations that should be taken into account in selecting the charge or charges to which a defendant should be required to plead guilty once it has been decided to dispose of the case pursuant to a plea agreement. The considerations are essentially the same as those governing the selection of charges to be included in the original indictment or information. See USAM 9-27.300.

1. **Relationship to Criminal Conduct.** The charge or charges to which a defendant pleads guilty should be consistent with the defendant's criminal conduct, both in nature and in scope. Except in unusual circumstances, this charge will be the most serious one, as defined in USAM 9-27.300. This principle governs the number of counts to which a plea should be required in cases involving different offenses, or in cases involving a series of familiar offenses. Therefore the prosecutor must be familiar with the Sentencing Guideline rules applicable to grouping offenses (Guideline 3D) and to relevant conduct (USSG § 1B1.3) among others. In regard to the seriousness of the offense, the guilty plea should assure that the public record of conviction provides an adequate indication of the defendant's conduct. With respect to the number of counts, the prosecutor should take care to assure that no impression is given that multiple offenses are li kely to result in no greater a potential penalty than is a single offense. The requirement that a defendant plead to a charge, that is consistent with the nature and extent of his/her criminal conduct is not inflexible. Although cooperation is usually acknowledged through a Sentencing Guideline 5K1.1 filing, there may be situations involving cooperating defendants in which considerations such as those discussed in USAM 9-27.600, take precedence. Such situations should be approached cautiously, however. Unless the government has strong corroboration for the cooperating defendant's testimony, his/her credibility may be subject to successful impeachment if he/she is permitted to plead to an offense that appears unrelated in seriousness or scope to the charges against the defendants on trial. It is also doubly important in such situations for the prosecutor to ensure that the public record of the plea demonstrates, the full extent of the defendant's i nvolvement in the criminal activity, giving rise to the prosecution.

2. **Factual Basis.** The attorney for the government should also bear in mind the legal requirement that there be a factual basis for the charge or charges to which a guilty plea is entered. This requirement is intended to assure against conviction after a guilty plea of. a person who is not in fact guilty. Moreover, under Rule 11(f) of the Fed. R. Crim. P., a court may not enter a judgment upon a guilty plea "without making such inquiry as shall satisfy it that, there is a factual basis for the plea." For this reason, it is essential that the charge or charges selected as the subject of a plea agreement be such as could be prosecuted independently of the plea under these principles. However, as noted, in

cases in which Alford or nolo contendere pleas are tendered, the attorney for the government may wish to make a stronger factual showing. In such cases there may remain some doubt as to the defendant's guilt even after the entry of his/her plea. Consequently, in order to a void such a misleading impression, the government should ask leave of the court to make a proffer of the facts available to it that show the defendant's guilt beyond a reasonable doubt.

In addition, the Department's policy is only to stipulate to facts that accurately represent the defendant's conduct. If a prosecutor wishes to support a departure from the guidelines, he or she should candidly do so and not stipulate to facts that are untrue. Stipulations to untrue facts are unethical. If a prosecutor has insufficient facts to contest a defendant's effort to seek a downward departure or to claim an adjustment, the prosecutor can say so. If the presentence report states facts that are inconsistent with a stipulation in which a prosecutor has joined, the prosecutor should object to the report or add a statement explaining the prosecutor's understanding of the facts or the reason for the stipulation.

Recounting the true nature of the defendant's involvement in a case will not always lead to a higher sentence. Where a defendant agrees to cooperate with the government by providing information concerning unlawful activities of others and the government agrees that self-incriminating information so provided will not be used against the defendant, Sentencing Guideline 1B1.8 provides that the information shall not be used in determining the applicable guideline range, except to the extent provided in the agreement. The existence of an agreement not to use information should be clearly reflected in the case file, the applicability of Guideline 1B1.8 should be documented, and the incriminating information must be disclosed to the court or the probation officer, even though it may not be used in determining a guideline sentence. Note that such information may still be used by the court in determining whether to depart from the guidelines and the extent of the departure. *See* US SG § 1B1.8.

3. **Basis for Sentencing.** In order to guard against inappropriate restriction of the court's sentencing options, the plea agreement should provide adequate scope for sentencing under all the circumstances of the case. To the extent that the plea agreement requires the government to take a position with respect to the sentence to be imposed, there should be little danger since the court will not be bound by the government's position. When a "charge agreement" is involved, however, the court will be limited to imposing the maxim term authorized by statue as well as the Sentencing Guideline range for the offense, to which the guilty plea is entered. Thus, as noted in USAM 9-27.320 above the prosecutor should take care to avoid a "charge agreement" that would unduly restrict the court's sentencing authority. In this connection, as in the initial selection of charges, the prosecutor should take into account the purposes of sentencing, the penalti es provided in the applicable statutes (including mandatory minimum penalties), the gravity of the offense, any aggravating or mitigating factors, and any post conviction consequences to which the defendant may be subject. In addition, if restitution is appropriate under the circumstances of the case, the plea agreement should specify the amount of restitution. *See* 18 U.S.C. § 3663 *et seq.*; 18 U.S.C. §§ 2248, 2259, 2264 and 2327; *United States v. Arnold*, 947 F.2d 1236, 1237-38 (5th Cir. 1991); *and* USAM 9-16.320.

4. **Effect on Other Cases.** In a multiple-defendant case, care must be taken to ensure that the disposition of the charges against one defendant does not adversely affect the investigation or prosecution of co-defendants. Among the possible adverse consequences to be avoided are the negative jury appeal that may result when relatively less culpable defendants are tried in the absence of a more culpable defendant or when a principal prosecution witness appears to be equally culpable as the defendants but has been permitted to plead to a significantly less serious offense; the possibility that one defendant's absence from the case will render useful evidence inadmissible at the trial of co-defendants; and the giving of questionable exculpatory testimony on behalf of the other defendants by the defendant who has pled guilty.

9-27.440 Plea Agreements When Defendant Denies Guilt

A. The attorney for the government should not, except with the approval of the Assistant Attorney General with supervisory responsibility over the subject matter, enter into a plea agreement if the defendant maintains his/her innocence with respect to the charge or charges to which he/she offers to plead guilty. In a case in which the defendant tenders a plea of guilty but denies committing the offense to which he/she offers to plead guilty, the attorney for the government should make an offer of proof of all facts known to the government to support the conclusion that the defendant is in fact guilty. See also USAM 9-16.015, which discusses the approval requirement.

B. Comment. USAM 9-27.440 concerns plea agreements involving "Alford" pleas—guilty pleas entered by defendants who nevertheless claim to be innocent. In *North Carolina v. Alford*, 400 U.S. 25 (1970), the Supreme Court held that the Constitution does not prohibit a court from accepting a guilty plea from a defendant who simultaneously maintains his/her innocence, so long as the plea is entered voluntarily and intelligently and there is a strong factual basis for it. The Court reasoned that there is no material difference between a plea of nolo contendere, where the defendant does not expressly admit his/her guilt, and a plea of guilty by a defendant who affirmatively denies his/her guilt.

Despite the constitutional validity of Alford pleas, such pleas should be avoided except in the most unusual circumstances, even if no plea agreement is involved and the plea would cover all pending charges. Such pleas are particularly undesirable when entered as part of an agreement with the government. Involvement by attorneys for the government in the inducement of guilty pleas by defendants who protest their innocence may create an appearance of prosecutorial overreaching. As one court put it, "the public might well not understand or accept the fact that a defendant who denied his guilt was nonetheless placed in a position of pleading guilty and going to jail." *See United States v. Bednarski*, 445 F.2d 364, 366 (1st Cir. 1971). Consequently, it is preferable to have a jury resolve the factual and legal dispute between the government and the defendant, rather than have government attorneys encourage defendants to plead guilty under circumstances that the public might regard as questionable or unfair. For this reason, government attorneys should not enter into Alford plea agreements, without the approval of the responsible Assistant Attorney General. Apart from refusing to enter into a plea agreement, however, the degree to which the Department can express its opposition to Alford pleas may be limited. Although a court may accept a proffered plea of nolo contendere "only after due consideration of the views of the parties and the interest of the public in the effective administration of justice" (Rule 11 (b), Fed. R. Crim. P.), at least one court has concluded that it is an abuse of discretion to refuse to accept a guilty plea "solely because the defendant does not admit the alleged facts of the crime." *United States v. Gaskins*, 485 F.2d 1046, 1048 (D.C. Cir. 1973); *see United States v. Bednarski*, *supra*; *United States v. Boscoe*, 518 F.2d 95 (1st Cir. 1975). Nevertheless, government attorneys can and should discourage Alford pleas by refusing to agree to terminate prosecutions where an Alford plea is proffered to fewer than all of the charges pending. As is the case with guilty pleas generally, if such a plea to fewer than all the charges is tendered and accepted over the government's objection, the attorney for the government should proceed to trial on any remaining charges not barred on double jeopardy grounds unless the United States Attorney or in cases handled by Departmental attorneys, the responsible Assistant Attorney General, approves dismissal of those charges.

Government attorneys should also take full advantage of the opportunity afforded by Rule 11(f) of the Fed. R. Crim. P. in an Alford case to thwart the defendant's efforts to project a public image of innocence. Under Rule 11(f) of the Fed. R. Crim. P. the court must be satisfied that there is "a factual basis" for a guilty plea. However, the Rule does not require that the factual basis for the plea be provided only by the defendant. *See United States v. Navedo*, 516 F.2d 29 (2d Cir. 1975); *Irizarry v. United States*, 508 F.2d 960 (2d Cir. 1974); *United States v. Davis*, 516 F.2d 574 (7th Cir. 1975). Accordingly, attorneys for the government in Alford cases should endeavor to establish as strong a factual basis for the plea as possible not only to satisfy the requirement of Rule 11(f) Fed. R. Crim.

P., but also to minimize the adverse effects of Alford pleas on public perceptions of the administration of justice.

[updated September 2006] [cited in USAM 6-4.330; USAM 9-28.1300]

9-27.450 Records of Plea Agreements

A. All negotiated plea agreements to felonies or to misdemeanors negotiated from felonies shall be in writing and filed with the court.

B. Comment. USAM 9-27.450 is intended to facilitate compliance with Rule 11 of the Federal Rules of Criminal Procedure and to provide a safeguard against misunderstandings that might arise concerning the terms of a plea agreement. Rule 11(e) (2), Fed. R. Crim. P., requires that a plea agreement be disclosed in open court (except upon a showing of good cause in which case disclosure may be made in camera), while Rule 11(e)(3) Fed. R. Crim. P. requires that the disposition provided for in the agreement be embodied in the judgment and sentence. Compliance with these requirements will be facilitated if the agreement has been reduced to writing in advance, and the defendant will be precluded from successfully contesting the terms of the agreement at the time he/she pleads guilty, or at the time of sentencing, or at a later date. Any time a defendant enters into a negotiated plea, that fact and the conditions of the agreement should also be maintained i n the office case file. Written agreements will facilitate efforts by the Department or the Sentencing Commission to monitor compliance by prosecutors with Department policies and the guidelines. Documentation may include a copy of the court transcript at the time the plea is taken in open court.

There shall be within each office a formal system for approval of negotiated pleas. The approval authority shall be vested in at least a supervisory criminal Assistant United States Attorney, or a supervisory attorney of a litigating division in the Department of Justice, who will have the responsibility of assessing the appropriateness of the plea agreement under the policies of the Department of Justice pertaining to pleas. Where certain predictable fact situations arise with great frequency and are given identical treatment, the approval requirement may be met by a written instruction from the appropriate supervisor which describes with particularity the standard plea procedure to be followed, so long as that procedure is otherwise within Departmental guidelines. An example would be a border district which routinely deals with a high volume of illegal alien cases daily.

The plea approval process will be part of the office evaluation procedure.

The United States Attorney in each district, or a supervisory representative, should, if feasible, meet regularly with a representative of the district's Probation Office for the purpose of discussing guideline cases.

9-27.500 Offers to Plead Nolo Contendere—Opposition Except in Unusual Circumstances

A. The attorney for the government should oppose the acceptance of a plea of nolo contendere unless the Assistant Attorney General with supervisory responsibility over the subject matter concludes that the circumstances of the case are so unusual that acceptance of such a plea would be in the public interest. See USAM 9-16.010, which discusses the approval requirement.

B. Comment. Rule 11(b) of the Federal Rules of Criminal Procedure, requires the court to consider "the views of the parties and the interest of the public in the effective administration of justice" before it accepts a plea of nolo contendere. Thus it is clear that a criminal defendant has no absolute right to enter a nolo

contendere plea. The Department has long attempted to discourage the disposition of criminal cases by means of nolo pleas. The basic objections to nolo pleas were expressed by Attorney General Herbert Brownell, Jr. in a Departmental directive in 1953.

> One of the factors which has tended to breed contempt for Federal law enforcement in recent times has been the practice of permitting as a matter of course in many criminal indictments the plea of nolo contendere. While it may serve a legitimate purpose in a few extraordinary situations and where civil litigation is also pending, I can see no justification for it as an everyday practice, particularly where it is used to avoid certain indirect consequences of pleading guilty, such as loss of license or sentencing as a multiple offender. Uncontrolled use of the plea has led to shockingly low sentences and insignificant fines which are not deterrent to crime. As a practical matter it accomplished little that is useful even where the Government has civil litigation pending. Moreover, a person permitted to plead nolo contendere admits his guilt for the purpose of imposing punishment for his acts and yet, for all other purposes, and as far as the public is concerned, persists in th is denial of wrongdoing. It is no wonder that the public regards consent to such a plea by the Government as an admission that it has only a technical case at most and that the whole proceeding was just a fiasco.
>
> For these reasons, government attorneys have been instructed for many years not to consent to nolo pleas except in the most unusual circumstances, and to do so then only with Departmental approval. Federal prosecutors should oppose the acceptance of a nolo plea, unless the responsible Assistant Attorney General concludes that the circumstances are so unusual that acceptance of the plea would be in the public interest.

[updated September 2006] [cited in USAM 6-2.000; USAM 6-4.320; USAM 9-28.1300]

9-27.520 Offers to Plead Nolo Contendere—Offer of Proof

A. In any case in which a defendant seeks to enter a plea of nolo contendere, the attorney for the government should make an offer of proof of the facts known to the government to support the conclusion that the defendant has in fact committed the offense charged. See also USAM 9-16.010.

B. Comment. If a defendant seeks to avoid admitting guilt by offering to plead nolo contendere, the attorney for the government should make an offer of proof of the facts known to the government to support the conclusion that the defendant has in fact committed the offense charged. This should be done even in the rare case in which the government does not oppose the entry of a nolo plea. In addition, as is the case with respect to guilty pleas, the attorney for the government should urge the court to require the defendant to admit publicly the facts underlying the criminal charges. These precautions should minimize the effectiveness of any subsequent efforts by the defendant to portray himself/herself as technically liable perhaps, but not seriously culpable.

9-27.530 Argument in Opposition of Nolo Contendere Plea

A. If a plea of nolo contendere is offered over the government's objection, the attorney for the government should state for the record why acceptance of the plea would not be in the public interest; and should oppose the dismissal of any charges to which the defendant does not plead nolo contendere.

B. Comment. When a plea of nolo contendere is offered over the government's objection, the prosecutor should take full advantage of Rule 11(b), Federal Rules of Criminal Procedure, to state for the record why acceptance of the plea would not be in the public interest. In addition to reciting the facts that could be proved to show the defendant's guilt, the prosecutor should bring to the court's attention whatever

arguments exist for rejecting the plea. At the very least, such a forceful presentation should make it clear to the public that the government is unwilling to condone the entry of a special plea that may help the defendant avoid legitimate consequences of his/her guilt. If the nolo plea is offered to fewer than all charges, the prosecutor should also oppose the dismissal of the remaining charges.

[cited in USAM 6-4.320]

9-27.600 Entering into Non-prosecution Agreements in Return for Cooperation—Generally

A. Except as hereafter provided, the attorney for the government may, with supervisory approval, enter into a non-prosecution agreement in exchange for a person's cooperation when, in his/her judgment, the person's timely cooperation appears to be necessary to the public interest and other means of obtaining the desired cooperation are unavailable or would not be effective.

B. Comment.

1. In many cases, it may be important to the success of an investigation or prosecution to obtain the testimonial or other cooperation of a person who is himself/herself implicated in the criminal conduct being investigated or prosecuted. However, because of his/her involvement, the person may refuse to cooperate on the basis of his/her Fifth Amendment privilege against compulsory self-incrimination. In this situation, there are several possible approaches the prosecutor can take to render the privilege inapplicable or to induce its waiver.

   a. First, if time permits, the person may be charged, tried, and convicted before his/her cooperation is sought in the investigation or prosecution of others. Having already been convicted himself/herself, the person ordinarily will no longer have a valid privilege to refuse to testify and will have a strong incentive to reveal the truth in order to induce the sentencing judge to impose a lesser sentence than that which otherwise might be found appropriate.

   b. Second, the person may be willing to cooperate if the charges or potential charge against him/her are reduced in number or degree in return for his/her cooperation and his/her entry of a guilty plea to the remaining charges. An agreement to file a motion pursuant to Sentencing Guideline 5K1.1 or Rule 35 of the Federal Rules of Criminal Procedure after the defendant gives full and complete cooperation is the preferred method for securing such cooperation. Usually such a concession by the government will be all that is necessary, or warranted, to secure the cooperation sought. Since it is certainly desirable as a matter of policy that an offender be required to incur at least some liability for his/her criminal conduct, government attorneys should attempt to secure this result in all appropriate cases, following the principles set forth in USAM 9-27.430 to the extent practicable.

   c. The third method for securing the cooperation of a potential defendant is by means of a court order under 18 U.S.C. §§ 6001-6003. Those statutory provisions govern the conditions under which uncooperative witnesses may be compelled to testify or provide information notwithstanding their invocation of the privilege against compulsory self incrimination. In brief, under the so-called "use immunity" provisions of those statutes, the court may order the person to testify or provide other information, but neither his/her testimony nor the information he/she provides may be used against him/her, directly or indirectly, in any criminal case except a prosecution for perjury or other failure to comply with the order. Ordinarily, these "use immunity" provisions should be relied on in cases in which attorneys for the government need to obtain sworn testimony or the production of information before a grand jury or at trial, and in which there is reason to believe that the person will refuse to testify or provide the information on the basis of his/her privilege against compulsory self-incrimination. See USAM

9-23.000. Offers of immunity and immunity agreements should be in writing. Consideration should be given to documenting the evidence available prior to the immunity offer.

d. Finally, there may be cases in which it is impossible or impractical to employ the methods described above to secure the necessary information or other assistance, and in which the person is willing to cooperate only in return for an agreement that he/she will not be prosecuted at all for what he/she has done. The provisions set forth hereafter describe the conditions that should be met before such an agreement is made, as well as the procedures recommended for such cases.

It is important to note that these provisions apply only if the case involves an agreement with a person who might otherwise be prosecuted. If the person reasonably is viewed only as a potential witness rather than a potential defendant, and the person is willing to cooperate, there is no need to consult these provisions.

USAM 9-27.600 describes three circumstances that should exist before government attorneys enter into non-prosecution agreements in return for cooperation: the unavailability or ineffectiveness of other means of obtaining the desired cooperation; the apparent necessity of the cooperation to the public interest; and the approval of such a course of action by an appropriate supervisory official

2. **Unavailability or Ineffectiveness of Other Means.** As indicated above, non-prosecution agreements are only one of several methods by which the prosecutor can obtain the cooperation of a person whose criminal involvement makes him/her a potential subject of prosecution. Each of the other methods—seeking cooperation after trial and conviction, bargaining for cooperation as part of a plea agreement, and compelling cooperation under a "use immunity" order—involves prosecuting the person or at least leaving open the possibility of prosecuting him/her on the basis of independently obtained evidence. Since these outcomes are clearly preferable to permitting an offender to avoid any liability for his/her conduct, the possible use of an alternative to a non-prosecution agreement should be given serious consideration in the first instance.

   Another reason for using an alternative to a non-prosecution agreement to obtain cooperation concerns the practical advantage in terms of the person's credibility if he/she testifies at trial. If the person already has been convicted, either after trial or upon a guilty plea, for participating in the events about which he/she testifies, his/her testimony is apt to be far more credible than if it appears to the trier of fact that he/she is getting off "scot free." Similarly, if his/her testimony is compelled by a court order, he/she cannot properly be portrayed by the defense as a person who has made a "deal" with the government and whose testimony is, therefore, suspect; his/her testimony will have been forced from him/her, not bargained for.

   In some cases, however, there may be no effective means of obtaining the person's timely cooperation short of entering into a non-prosecution agreement. The person may be unwilling to cooperate fully in return for a reduction of charges, the delay involved in bringing him/her to trial might prejudice the investigation or prosecution in connection with which his/her cooperation is sought and it may be impossible or impractical to rely on the statutory provisions for compulsion of testimony or production of evidence. One example of the latter situation is a case in which the cooperation needed does not consist of testimony under oath or the production of information before a grand jury or at trial. Other examples are cases in which time is critical, or where use of the procedures of 18 U.S.C. §?-6003 would unreasonably disrupt the presentation of evidence to the grand jury or the expeditious development of an investigation, or where compliance with the statute of limitat ions or the Speedy Trial Act precludes timely application for a court order.

   Only when it appears that the person's timely cooperation cannot be obtained by other means, or cannot be obtained effectively, should the attorney for the government consider entering into a non-prosecution agreement.

3. **Public Interest.** If he/she concludes that a non-prosecution agreement would be the only effective method for obtaining cooperation, the attorney for the government should consider whether, balancing the cost of foregoing prosecution against the potential benefit of the person's cooperation, the cooperation sought appears necessary to the public interest. This "public interest" determination is one of the conditions precedent to an application under 18 U.S.C. § 6003 for a court order compelling testimony. Like a compulsion order, a non-prosecution agreement limits the government's ability to undertake a subsequent prosecution of the witness. Accordingly, the same "public interest" test should be applied in this situation as well. Some of the considerations that may be relevant to the application of this test are set forth in USAM 9-27.620.

4. **Supervisory Approval.** Finally, the prosecutor should secure supervisory approval before entering into a non-prosecution agreement. Prosecutors working under the direction of a United States Attorney must seek the approval of the United States Attorney or a supervisory Assistant United States Attorney. Departmental attorneys not supervised by a United States Attorney should obtain the approval of the appropriate Assistant Attorney General or his/her designee, and should notify the United States Attorney or Attorneys concerned. The requirement of approval by a superior is designed to provide review by an attorney experienced in such matters, and to ensure uniformity of policy and practice with respect to such agreements. This section should be read in conjunction with USAM 9-27.640, concerning particular types of cases in which an Assistant Attorney General or his/her designee must concur in or approve an agreement not to prosecute in ret urn for cooperation.

9-27.620 Entering into Non-prosecution Agreements in Return for Cooperation—Considerations to be Weighed

A. In determining whether, a person's cooperation may be necessary to the public interest, the attorney for the government, and those whose approval is necessary, should weigh all relevant considerations, including:

   1. The importance of the investigation or prosecution to an effective program of law enforcement;

   2. The value of the person's cooperation to the investigation or prosecution; and

   3. The person's relative culpability in connection with the offense or offenses being investigated or prosecuted and his/her history with respect to criminal activity.

B. Comment. This paragraph is intended to assist Federal prosecutors, and those whose approval they must secure, in deciding whether a person's cooperation appears to be necessary to the public interest. The considerations listed here are not intended to be all-inclusive or to require a particular decision in a particular case. Rather they are meant to focus the decision-maker's attention on factors that probably will be controlling in the majority of cases.

   1. **Importance of Case.** Since the primary function of a Federal prosecutor is to enforce the criminal law, he/she should not routinely or indiscriminately enter into non-prosecution agreements, which are, in essence, agreements not to enforce the law under particular conditions. Rather, he/she should reserve the use of such agreements for cases in which the cooperation sought concerns the commission of a serious offense or in which successful prosecution is otherwise important in achieving effective enforcement of the criminal laws. The relative importance or unimportance of the contemplated case is therefore a significant threshold consideration.

   2. **Value of Cooperation.** An agreement not to prosecute in return for a person's cooperation binds the government to the extent that the person carries out his/her part of the bargain. *See Santobello v. New York* 404 U.S. 257 (1971); *Wade v. United States*, 112 S. Ct. 1840 (1992). Since such an agreement forecloses enforcement of the criminal law against a person who otherwise may be liable to prosecution, it should not be entered into without a clear understanding of the nature of the quid pro

quo and a careful assessment of its probable value to the government. In order to be in a position adequately to assess the potential value of a person's cooperation, the prosecutor should insist on an "offer of proof" or its equivalent from the person or his/her attorney. The prosecutor can then weigh the offer in terms of the investigation or prosecution in connection with which cooperation is sought. In doing so, he/she should consider such questions as whether the cooperation will in fact be forthcoming, whether the testimony or other information provided will be credible, whether it can be corroborated by other evidence, whether it will materially assist the investigation or prosecution, and whether substantially the same benefit can be obtained from someone else without an agreement not to prosecute. After assessing all of these factors, together with any others that may be relevant, the prosecutor can judge the strength of his/her case with and without the person's cooperation, and determine whether it may be in the public interest to agree to forego prosecution under the circumstances.

3. **Relative Culpability and Criminal History.** In determining whether it may be necessary to the public interest to agree to forego prosecution of a person who may have violated the law in return for that person's cooperation, it is also important to consider the degree of his/her apparent culpability relative to others who are subjects of the investigation or prosecution as well as his/her history of criminal involvement. Of course, ordinarily it would not be in the public interest to forego prosecution of a high-ranking member of a criminal enterprise in exchange for his/her cooperation against one of his/her subordinates, nor would the public interest be served by bargaining away the opportunity to prosecute a person with a long history of serious criminal involvement in order to obtain the conviction of someone else on less serious charges. These are matters with regard to which the attorney for the government may find it helpful to consult with the investigating agenc y or with other prosecuting authorities who may have an interest in the person or his/her associates.

It is also important to consider whether the person has a background of cooperation with law enforcement officials, either as a witness or an informant, and whether he/she has previously been the subject of a compulsion order under 18 U.S.C. §?-6003 or has escaped prosecution by virtue of an agreement not to prosecute. The information regarding compulsion orders may be available by telephone from the Immunity Unit in the Office of Enforcement Operations of the Criminal Division.

9-27.630 Entering into Non-prosecution Agreements in Return for Cooperation—Limiting the Scope of Commitment

A. In entering into a non-prosecution agreement, the attorney for the government should, if practicable, explicitly limit the scope of the government's commitment to:

   1. Non-prosecution based directly or indirectly on the testimony or other information provided; or

   2. Non-prosecution within his/her district with respect to a pending charge, or to a specific offense then known to have been committed by the person.

B. Comment. The attorney for the government should exercise extreme caution to ensure that his/her non-prosecution agreement does not confer "blanket" immunity on the witness. To this end, he/she should, in the first instance, attempt to limit his/her agreement to non-prosecution based on the testimony or information provided. Such an "informal use immunity" agreement has two advantages over an agreement not to prosecute the person in connection with a particular transaction: first, it preserves the prosecutor's option to prosecute on the basis of independently obtained evidence if it later appears that the person's criminal involvement was more serious than it originally appeared to be; and second, it encourages the witness to be as forthright as possible since the more he/she reveals the more protection he/she will have against a future prosecution. To further encourage full disclosure by the witness, it should be made clear in the agreement that the government's forbearance from prosecution is conditioned upon the witness's

testimony or production of information being complete and truthful, and that failure to testify truthfully may result in a perjury prosecution.

Even if it is not practicable to obtain the desired cooperation pursuant to an "informal use immunity" agreement, the attorney for the government should attempt to limit the scope of the agreement in terms of the testimony and transactions covered, bearing in mind the possible effect of his/her agreement on prosecutions in other districts.

It is important that non-prosecution agreements be drawn in terms that will not bind other Federal prosecutors or agencies without their consent. Thus, if practicable, the attorney for the government should explicitly limit the scope of his/her agreement to non-prosecution within his/her district. If such a limitation is not practicable and it can reasonably be anticipated that the agreement may affect prosecution of the person in other districts, the attorney for the government contemplating such an agreement shall communicate the relevant facts to the Assistant Attorney General with supervisory responsibility for the subject matter. United States Attorneys may not make agreements which prejudice civil or tax liability without the express agreement of all affected Divisions and/or agencies. See also 9-16.000 et seq. for more information regarding plea agreements.

Finally, the attorney for the government should make it clear that his/her agreement relates only to non-prosecution and that he/she has no independent authority to promise that the witness will be admitted into the Department's Witness Security program or that the Marshal's Service will provide any benefits to the witness in exchange for his/her cooperation. This does not mean, of course, that the prosecutor should not cooperate in making arrangements with the Marshal's Service necessary for the protection of the witness in appropriate cases. The procedures to be followed in such cases are set forth in USAM 9-21.000.

9-27.640 Agreements Requiring Assistant Attorney General Approval

A. The attorney for the government should not enter into a non-prosecution agreement in exchange for a person's cooperation without first obtaining the approval of the Assistant Attorney General with supervisory responsibility over the subject matter, or his/her designee, when:

   1. Prior consultation or approval would be required by a statute or by Departmental policy for a declination of prosecution or dismissal of a charge with regard to which the agreement is to be made; or

   2. The person is:

      a. A high-level Federal, state, or local official;

      b. An official or agent of a Federal investigative or law enforcement agency; or

      c. A person who otherwise is, or is likely to become of major public interest.

B. Comment. USAM 9-27.640 sets forth special cases that require approval of non-prosecution agreements by the responsible Assistant Attorney General or his/her designee. Subparagraph (1) covers cases in which existing statutory provisions and departmental policies require that, with respect to certain types of offenses, the Attorney General or an Assistant Attorney General be consulted or give his/her approval before prosecution is declined or charges are dismissed. For example, see USAM 6-4.245 (tax offenses); USAM 9-41.010 (bankruptcy frauds); USAM 9-90.020 (internal security offenses); (see USAM 9-2.400 for a complete listing of all prior approval and consultation requirements). An agreement not to prosecute resembles a declination of prosecution or the dismissal of a charge in that the end resu lt in each case is similar: a person who has engaged in criminal activity is not prosecuted or is not prosecuted fully for his/her offense. Accordingly, attorneys for the government should obtain the approval of the appropriate

Assistant Attorney General, or his/her designee, before agreeing not to prosecute in any case in which consultation or approval would be required for a declination of prosecution or dismissal of a charge.

Subparagraph (2) sets forth other situations in which the attorney for the government should obtain the approval of an Assistant Attorney General, or his/her designee, of a proposed agreement not to prosecute in exchange for cooperation. Generally speaking, the situations described will be cases of an exceptional or extremely sensitive nature, or cases involving individuals or matters of major public interest. In a case covered by this provision that appears to be of an especially sensitive nature, the Assistant Attorney General should, in turn, consider whether it would be appropriate to notify the Attorney General or the Deputy Attorney General.

9-27.641 Multi-District (Global) Agreement Requests

A. No district or division shall make any agreement, including any agreement not to prosecute, which purports to bind any other district(s) or division without the express written approval of the United States Attorney(s) in each affected district and/or the Assistant Attorney General of the Criminal Division.

The requesting district/division shall make known to each affected district/division the following information:

1. The specific crimes allegedly committed in the affected district(s) as disclosed by the defendant. (No agreement should be made as to any crime(s) not disclosed by the defendant.)

2. Identification of victims of crimes committed by the defendant in any affected district, insofar as possible.

3. The proposed agreement to be made with the defendant and the applicable Sentencing Guideline range.

See USAM 16.030 for a discussion of the requirement for consultation with investigative agencies and victims regarding pleas.

[cited in USAM 9-28.1000]

9-27.650 Records of Non-Prosecution Agreements

A. In a case in which a non-prosecution agreement is reached in return for a person's cooperation, the attorney for the government should ensure that the case file contains a memorandum or other written record setting forth the terms of the agreement. The memorandum or record should be signed or initialed by the person with whom the agreement is made or his/her attorney.

B. Comment. The provisions of this section are intended to serve two purposes. First, it is important to have a written record in the event that questions arise concerning the nature or scope of the agreement. Such questions are certain to arise during cross-examination of the witness, particularly if the existence of the agreement has been disclosed to defense counsel pursuant to the requirements of *Brady v. Maryland*, 373 U.S. 83 (1963) and *Giglio v. United States*, 405 U.S. 150 (1972). The exact terms of the agreement may also become relevant if the government attempts to prosecute the witness for some offense in the future. Second, such a record will facilitate identification by government attorneys (in the course of weighing future agreements not to prosecute, plea agreements, pre-trial diversion, and other discretionary actions) of persons whom the government has agreed not to prosecute.

The principal requirements of the written record are that it be sufficiently detailed that it leaves no doubt as

to the obligations of the parties to the agreement, and that it be signed or initialed by the person with whom the agreement is made and his/her attorney, or at least by one of them.

9-27.710 Participation in Sentencing—Generally

A. During the sentencing phase of a Federal criminal case, the attorney for the government should assist the sentencing court by:

1. Attempting to ensure that the relevant facts are brought to the court's attention fully and accurately; and

2. Making sentencing recommendations in appropriate cases.

B. Comment. Sentencing in Federal criminal cases is primarily the function and responsibility of the court. This does not mean, however, that the prosecutor's responsibility in connection with a criminal case ceases upon the return of a guilty verdict or the entry of a guilty plea; to the contrary, the attorney for the government has a continuing obligation to assist the court in its determination of the sentence to be imposed. The prosecutor must be familiar with the guidelines generally and with the specific guideline provisions applicable to his or her case. In discharging these duties, the attorney for the government should, as provided in USAM 9-27.720 and 9-27.750, endeavor to ensure the accuracy and completeness of the information upon which the sentencing decisions will be based. In addition, as provided in USAM 9-27.730, in appropriate cases the prosecutor should offer recommendations with respect to the sentence to be imposed.

9-27.720 Establishing Factual Basis for Sentence

A. In order to ensure that the relevant facts are brought to the attention of the sentencing court fully and accurately, the attorney for the government should:

1. Cooperate with the Probation Service in its preparation of the presentence investigation report;

2. Review material in the presentence investigation report;

3. Make a factual presentation to the court when:

a. Sentence is imposed without a presentence investigation and report;

b. It is necessary to supplement or correct the presentence investigation report;

c. It is necessary in light of the defense presentation to the court; or

d. It is requested by the court; and

4. Be prepared to substantiate significant factual allegations disputed by the defense.

B. Comment.

1. **Cooperation with Probation Service.** To begin with, if sentence is to be imposed following a presentence investigation and report, the prosecutor should cooperate with the Probation Service in its preparation of the presentence report for the court. Under Rule 32(b), Federal Rules of Criminal Procedure, the report should contain information about the history and characteristics of the defendant, including any prior criminal record, financial condition, and any circumstances affecting

the defendant's behavior that may be helpful in imposing sentence or in the correctional treatment of the defendant. While much of this information may be available to the Probation Service from sources other than the government, some of it may be obtainable only from prosecutorial or investigative files to which probation officers do not have access. For this reason, it is important that the attorney for the government respond promptly to Probation Service requests by providing the reque sted information whenever possible. The attorney for the government should also recognize the occasional desirability of volunteering information to the Probation Service especially in a district where the Probation Office is overburdened. Doing so may be the best way to ensure that important facts about the defendant come to its attention. In addition, the prosecutor should be particularly alert to the need to volunteer relevant information to the Probation Service in complex cases, since it cannot be expected that probation officers will obtain a full understanding of the facts of such cases simply by questioning the prosecutor or examining his/her files.

The relevant information can be communicated orally, or by making portions of the case file available to the probation officer, or by submitting a sentencing memorandum or other written presentation for inclusion in the presentence report. Whatever method he/she uses, however, the attorney for the government should bear in mind that since the report will be shown to the defendant and defense counsel, care should be taken to prevent disclosures that might be harmful to law enforcement interests.

2. **Review of Presentence Report.** Before the sentencing hearing, the prosecutor should always review the presentence report, which is prepared pursuant to Rule 32, Federal Rules of Criminal Procedure. Not only must the prosecutor be satisfied that the report is factually accurate, he or she must also pay attention to the initial determination of the base offense level. Further, the prosecutor must also consider all adjustments reflected in the report, as well as any recommendations for departure made by the probation office. These adjustments and potential departures can have a profound effect on the defendant's sentence. As advocates for the United States, prosecutors should be prepared to argue concerning those adjustments (and, if necessary, departures allowed by the guidelines) in order to arrive at a final result which adequately and accurately describes the defendant's conduct of offense, criminal history, and other factors related to sentencing.

3. **Factual Presentation to Court.** In addition to assisting the Probation Service with its presentence investigation, the attorney for the government may find it necessary in some cases to make a factual presentation directly to the court. Such a presentation is authorized by Rule 32(c), Federal Rules of Criminal Procedure, which requires the court to "afford counsel for the defendant and for the Government an opportunity to comment on the probation officer's determinations and on other matters relating to the appropriate sentence."

   The need to address the court concerning the facts relevant to sentencing may arise in four situations: (a) when sentence is imposed without a presentence investigation and report; (b) when necessary to correct or supplement the presentence report; (c) when necessary in light of the defense presentation to the court; and (d) when requested by the court.

   a. **Furnishing Information in Absence of Presentence Report.** Rule 32(b), Federal Rules of Criminal Procedure, authorizes the imposition of sentence without a presentence investigation and report, if the court finds that the record contains sufficient information to permit the meaningful exercise of sentencing authority under 18 U.S.C. § 3553. Imposition of sentence pursuant to this provision usually occurs when the defendant has been found guilty by the court after a non-jury trial, when the case is relatively simple and straightforward, when the defendant has taken the stand and has been cross-examined, and when it is the court's intention not to impose a prison sentence. In such cases, and any others in which sentence is to be imposed without benefit of a presentence investigation and report (such as when a report on the defendant has recently been prepared in connection with another case), it may be particularly important that the attorney for the governme nt take advantage of the opportunity

afforded by Rule 32(c), Federal Rules of Criminal Procedure, to address the court, since there will be no later opportunity to correct or supplement the record. Moreover, even if government counsel is satisfied that all facts relevant to the sentencing decision are already before the court, he/she may wish to make a factual presentation for the record that makes clear the government's view of the defendant, the offense, or both.

b. **Correcting or Supplementing Presentence Report.** The attorney for the government should bring any significant inaccuracies or omissions to the Court's attention at the sentencing hearing, together with the correct or complete information.

c. **Responding to Defense Assertions.** Having read the presentence report before the sentencing hearing the defendant or his/her attorney may dispute specific factual statements made therein. More likely, without directly challenging the accuracy of the report, the defense presentation at the hearing may omit reference to the derogatory information in the report while stressing any favorable information and drawing all inferences beneficial to the defendant. Some degree of selectivity in the defense presentation is probably to be expected, and will be recognized by the court. There may be instances, however, in which the defense presentation, if not challenged, will leave the court with a view of the defendant or of the offense significantly different from that appearing in the presentence report. If this appears to be a possibility, the attorney for the government may respond by correcting factual errors in the defense presentation, pointing out facts and inferences, igno red by the defense, and generally reinforcing the objective view of the defendant and his/her offense as expressed in the presentence report.

d. **Responding to Court's Requests.** There may be occasions when the court will request specific information from government counsel at the sentencing hearing (as opposed to asking generally whether the government wishes to be heard). When this occurs, the attorney for the government should, of course, furnish the requested information if it is readily available and no prejudice to law enforcement interests is likely to result from its disclosure.

4. **Substantiation of Disputed Facts.** In addition to providing the court with relevant factual material at the sentencing hearing when necessary, the attorney for the government should be prepared to substantiate significant factual allegations disputed by the defense. This can be done by making the source of the information available for cross examination or if there is good cause for nondisclosure of his/her identity, by presenting the information as hearsay and providing other guarantees of its reliability, such as corroborating testimony by others. *See United States v. Fatico*, 579 F.2d 707, 713 (2d Cir. 1978).

9-27.730 Conditions for Making Sentencing Recommendations

A. The attorney for the government should make a recommendation with respect to the sentence to be imposed when:

1. The terms of a plea agreement so require it;

2. The public interest warrants an expression of the government's view concerning the appropriate sentence.

B. Comment. USAM 9-27.730 describes two situations in which an attorney for the government should make a recommendation with respect to the sentence to be imposed: when the terms of a plea agreement require it, and when the public interest warrants an expression of the government's view concerning the appropriate sentence. The phrase "make a recommendation with respect to the sentence to be imposed" is intended to cover tacit recommendations (i.e., agreeing to the defendant's request or not opposing the defendant's request) as well as explicit recommendations for a specific type of sentence (e.g., probation or a fine), for a

specific condition of probation, a specific fine, or a specific term of imprisonment; and for concurrent or consecutive sentences.

The attorney for the government should be guided by the circumstances of the case and the wishes of the court concerning the manner and form in which sentencing recommendations are made. If the government's position with respect to the sentence to be imposed is related to a plea agreement with the defendant, that position must be made known to the court at the time the plea is entered. In other situations, the government's position might be conveyed to the probation officer, orally or in writing, during the presentence investigation; to the court in the form of a sentencing memorandum filed in advance of the sentencing hearing; or to the court orally at the time of the hearing.

1. **Recommendations Required by Plea Agreement.** ule 11(e)(1), Federal Rules of Criminal Procedure, authorizing plea negotiations, implicitly permits the prosecutor, pursuant to a plea agreement, to make a sentence recommendation, agree not to oppose the defendant's request for a specific sentence, or agree that a specific sentence is the appropriate disposition of the case. If the prosecutor has entered into a plea agreement calling for the government to take a certain position with respect to the sentence to be imposed, and the defendant has entered a guilty plea in accordance with the terms of the agreement, the prosecutor must perform his/her part of the bargain or risk having the plea invalidated. *Machibroda v. United States*, 368 U.S. 487, 493 (1962); *Santobello v. United States*, 404 U.S. 257, 262 (1971).

2. **Recommendations Reflecting Defendant's Cooperation.** Section 5K1.1 of the Sentencing Guidelines provides that, upon motion by the government, a court may depart below the guidelines to reflect a defendant's cooperation. Title 18 U.S.C. § 3553(e) permits the court to impose a sentence below an otherwise applicable statutory minimum sentence upon motion of the government based upon a defendant's cooperation in the investigation or prosecution of another. The Supreme Court held in *Melendez v. United States*, 116 S.Ct. 2057 (1996) that a district court may not reduce a sentence below the statutory mandatory minimum based on a motion pursuant to 5K1.1 unless the government specifically sought a reduction in the mandatory minimum. *See also* Fed. R. Crim. P. Rule 35(b).

3. **Recommendations Warranted by the Public Interest.** From time to time, unusual cases may arise in which the public interest warrants an expression of the government's view concerning the appropriate sentence, irrespective of the absence of a plea agreement. In some such cases, the court may invite or request a recommendation by the prosecutor, while in others the court may not wish to have a sentencing recommendation from the government. In either event, whether the public interest requires an expression of the government's view concerning the appropriate sentence in a particular case is a matter to be determined with care, preferably after consultation between the prosecutor handling the case and his/her supervisor—the United States Attorney or a Supervisory Assistant United States Attorney, or the responsible Assistant Attorney General or his/her designee.

The prosecutor should bear in mind the attitude of the court toward sentencing recommendations by the government, and should weigh the desirability of maintaining a clear separation of judicial and prosecutorial responsibilities against the likely consequences of making no recommendation. If the prosecutor has good reason to anticipate the imposition of a sanction that would be unfair to the defendant or inadequate in terms of society's needs, he/she may conclude that it would be in the public interest to attempt to avert such an outcome by offering a sentencing recommendation. For example, if the case is one in which the Sentencing Guidelines allow but do not require the imposition of a term of imprisonment, the imposition of a term of imprisonment plainly would be inappropriate, and the court has requested the government's view, the prosecutor should not hesitate to recommend or agree to the imposition of probation. On the other hand, if the responsible government attorney be lieves that a term of imprisonment is plainly warranted and that, under all the circumstances, the public interest would be served by making a recommendation to that effect, he/she

should make such a recommendation even though the court has not invited it. Recognizing, however, that the primary responsibility for sentencing lies with the judiciary, government attorneys should avoid routinely taking positions with respect to sentencing, reserving their recommendations instead for those unusual cases in which the public interest warrants an expression of the government's view.

In connection with sentencing recommendations, the prosecutor should also bear in mind the potential value in some cases of the imposition of innovative conditions of probation if consistent with the Sentencing Guidelines. For example, in a case in which a sentencing recommendation would be appropriate and in which it can be anticipated that a term of probation will be imposed, the responsible government attorney may conclude that it would be appropriate to recommend, as a specific condition of probation, that the defendant participate in community service activities, or that he/she desist from engaging in a particular type of business.

9-27.740 Consideration to be Weighed in Determining Sentencing Recommendations

A. Consideration to be Weighed in Determining Sentencing

1. If the prosecutor makes a recommendation as to the sentence to be imposed within the applicable guideline range determined by the court, the prosecutor should consider the various purposes of sentencing, as noted below.

2. If the prosecutor makes a recommendation as to a sentence to be imposed after the court grants a motion for downward departure under Sentencing Guideline 5K1.1, the prosecutor should also consider the timeliness of the cooperation, the results of the cooperation, and the nature and extent of the cooperation when compared to other defendants in the same or similar cases in that district.

B. Comment. The Sentencing Reform Act was enacted to eliminate unwarranted disparity in sentencing. Both judicial discretion and the scope of prosecutorial recommendations have been limited, in those cases in which no departure is made from the applicable guideline range. The prosecutor, however, still has a significant role to play in making appropriate recommendations in cases involving either a sentence within the applicable range or a departure. In making a sentencing recommendation, the prosecutor should bear in mind that, by offering a recommendation, he/she shares with the court the responsibility for avoiding unwarranted sentence disparities among defendants with similar backgrounds who have been found guilty of similar conduct.

Applicable Sentencing Purposes. The attorney for the government should consider the seriousness of the defendant's conduct, and his/her background and personal circumstances, in light of the four purposes or objectives of the imposition of criminal sanctions:

1. To deter the defendant and others from committing crime;

2. To protect the public from further offenses by the defendant;

3. To assure just punishment for the defendant's conduct; and

4. To promote the correction and rehabilitation of the defendant.

The attorney for the government should recognize that not all of these objectives may be relevant in every case and that, for a particular offense committed by a particular offender, one of the purposes, or a combination of purposes, may be of overriding importance. For example, in the case of a young first offender who commits a minor, non-violent offense, the primary or sole purpose of sentencing might be rehabilitation. On the other hand, the primary purpose of sentencing a repeat violent offender might be to protect the public, and the perpetrator of a massive fraud might be sentenced

primarily to deter others from engaging in similar conduct.

9-27.745 Unwarranted Sentencing Departures by the Court

A. If the court is considering a departure for a reason not allowed by the guidelines, the prosecutor should resist.

B. Comment. The prosecutor, with Departmental approval, may appeal a sentence which is unlawful or in violation of the Sentencing Guidelines. 18 U.S.C. § 3742(b). If such a sentence is imposed, the Appellate Section of the Criminal Division should be promptly notified so that an appeal can be considered.

9-27.750 Disclosing Factual Material to Defense

A. The attorney for the government should disclose to defense counsel, reasonably in advance of the sentencing hearing, any factual material not reflected in the presentence investigation report that he/she intends to bring to the attention of the court.

B. Comment. Due process requires that the sentence in a criminal case be based on accurate information. *See, e.g.*, *Moore v. United States*, 571 F.2d 179, 182-84 (3d Cir. 1978). Accordingly, the defense should have access to all material relied upon by the sentencing judge, including memoranda from the prosecution (to the extent that considerations of informant safety permit), as well as sufficient time to review such material and an opportunity to present any refutation that can be mustered. *See, e.g.*, *United States v. Perri*, 513 F.2d 572, 575 (9th Cir. 1975); *United States v. Rosner*, 485 F.2d 1213, 1229-30 (2d Cir. 1973), *cert. denied*, 417 U.S. 950 (1974); *United States v. Robin*, 545 F.2d 775 (2d Cir. 1976). USAM 9-27.750 is intended to facilitate satisfaction of these requirements by providing the defendant with notice of information not contained in the presentence report that the government plans to bring to the attention of the sentencing court.

9-27.760 Limitation on Identifying Uncharged Third-Parties Publicly

In all public filings and proceedings, federal prosecutors should remain sensitive to the privacy and reputation interests of uncharged third-parties. In the context of public plea and sentencing proceedings, this means that, in the absence of some significant justification, it is not appropriate to identify (either by name or unnecessarily-specific description), or cause a defendant to identify, a third-party wrongdoer unless that party has been officially charged with the misconduct at issue. In the unusual instance where identification of an uncharged third-party wrongdoer during a plea or sentencing hearing is justified, the express approval of the United States Attorney or his designee should be obtained prior to the hearing absent exigent circumstances. See USAM 9-16.500. In other less predictable contexts, federal prosecutors should strive to avoid unnecessary public references to wrongdoing by uncharged third-parties. With respect to bills of particulars that identify unindicted co-conspirators, prosecutors generally should seek leave to file such documents under seal. Prosecutors shall comply, however, with any court order directing the public filing of a bill of particulars.

As a series of cases make clear, there is ordinarily "no legitimate governmental interest served" by the government's public allegation of wrongdoing by an uncharged party, and this is true "[r]egardless of what criminal charges may . . . b[e] contemplated by the Assistant United States Attorney against the [third-party] for the future." *In re Smith*, 656 F.2d 1101, 1106-07 (5th Cir. 1981). Courts have applied this reasoning to preclude the public identification of unindicted third-party wrongdoers in plea hearings, sentencing memoranda, and other government pleadings. *See Finn v. Schiller*, 72 F.3d 1182 (4th Cir.

1996); *United States v. Briggs*, 513 F.2d 794 (5th Cir. 1975); *United States. v Anderson*, 55 F.Supp.2d 1163 (D. Kan 1999); *United States v. Smith*, 992 F. Supp. 743 (D.N.J. 1998); see also USAM 9-11.130.

In all but the unusual case, any legitimate governmental interest in referring to uncharged third-party wrongdoers can be advanced through means other than those condemned in this line of cases. For example, in those cases where the offense to which a defendant is pleading guilty requires as an element that a third-party have a particular status (*e.g.*, 18 U.S.C. § 203(a)(2)), the third-party can usually be referred to generically ("a Member of Congress"), rather than identified specifically ("Senator Jones"), at the defendant's plea hearing. Similarly, when the defendant engaged in joint criminal conduct with others, generic references ("another individual") to the uncharged third-party wrongdoers can be used when describing the factual basis for the defendant's guilty plea.

[new August 2002]

9-28.000
PRINCIPLES OF FEDERAL PROSECUTION OF BUSINESS ORGANIZATIONS [FN1]

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9-28.1300 Plea Agreements with Corporations

9-28.100 Duties of Federal Prosecutors and Duties of Corporate Leaders

The prosecution of corporate crime is a high priority for the Department of Justice. By investigating allegations of wrongdoing and by bringing charges where appropriate for criminal misconduct, the Department promotes critical public interests. These interests include, to take just a few examples: (1) protecting the integrity of our free economic and capital markets; (2) protecting consumers, investors, and business entities that compete only through lawful means; and (3) protecting the American people from

misconduct that would violate criminal laws safeguarding the environment.

In this regard, federal prosecutors and corporate leaders typically share common goals. For example, directors and officers owe a fiduciary duty to a corporation's shareholders, the corporation's true owners, and they owe duties of honest dealing to the investing public in connection with the corporation's regulatory filings and public statements. The faithful execution of these duties by corporate leadership serves the same values in promoting public trust and confidence that our criminal cases are designed to serve.

A prosecutor's duty to enforce the law requires the investigation and prosecution of criminal wrongdoing if it is discovered. In carrying out this mission with the diligence and resolve necessary to vindicate the important public interests discussed above, prosecutors should be mindful of the common cause we share with responsible corporate leaders. Prosecutors should also be mindful that confidence in the Department is affected both by the results we achieve and by the real and perceived ways in which we achieve them. Thus, the manner in which we do our job as prosecutors—including the professionalism we demonstrate, our willingness to secure the facts in a manner that encourages corporate compliance and self- regulation, and also our appreciation that corporate prosecutions can potentially harm blameless investors, employees, and others—affects public perception of our mission. Federal prosecutors recognize that they must maintain public confidence in the way in which they exercise their charging discretion. This endeavor requires the thoughtful analysis of all facts and circumstances presented in a given case. As always, professionalism and civility play an important part in the Department's discharge of its responsibilities in all areas, including the area of corporate investigations and prosecutions.

[new August 2008]

9-28.200 General Considerations of Corporate Liability

A. **General Principle:** Corporations should not be treated leniently because of their artificial nature nor should they be subject to harsher treatment. Vigorous enforcement of the criminal laws against corporate wrongdoers, where appropriate, results in great benefits for law enforcement and the public, particularly in the area of white collar crime. Indicting corporations for wrongdoing enables the government to be a force for positive change of corporate culture, and a force to prevent, discover, and punish serious crimes.

B. **Comment:** In all cases involving corporate wrongdoing, prosecutors should consider the factors discussed further below. In doing so, prosecutors should be aware of the public benefits that can flow from indicting a corporation in appropriate cases. For instance, corporations are likely to take immediate remedial steps when one is indicted for criminal misconduct that is pervasive throughout a particular industry, and thus an indictment can provide a unique opportunity for deterrence on a broad scale. In addition, a corporate indictment may result in specific deterrence by changing the culture of the indicted corporation and the behavior of its employees. Finally, certain crimes that carry with them a substantial risk of great public harm—*e.g.*, environmental crimes or sweeping financial frauds—may be committed by a business entity, and there may therefore be a substantial federal interest in indicting a corporation under such circumstances.

> In certain instances, it may be appropriate, upon consideration of the factors set forth herein, to resolve a corporate criminal case by means other than indictment. Non-prosecution and deferred prosecution agreements, for example, occupy an important middle ground between declining prosecution and obtaining the conviction of a corporation. These agreements are discussed further in USAM 9-28.1000. Likewise, civil and regulatory alternatives may be appropriate in certain cases, as discussed in USAM 9-28.1100.
>
> Where a decision is made to charge a corporation, it does not necessarily follow that individual directors, officers, employees, or shareholders should not also be charged. Prosecution of a

corporation is not a substitute for the prosecution of criminally culpable individuals within or without the corporation. Because a corporation can act only through individuals, imposition of individual criminal liability may provide the strongest deterrent against future corporate wrongdoing. Only rarely should provable individual culpability not be pursued, particularly if it relates to high-level corporate officers, even in the face of an offer of a corporate guilty plea or some other disposition of the charges against the corporation.

Corporations are "legal persons," capable of suing and being sued, and capable of committing crimes. Under the doctrine of *respondeat superior*, a corporation may be held criminally liable for the illegal acts of its directors, officers, employees, and agents. To hold a corporation liable for these actions, the government must establish that the corporate agent's actions (i) were within the scope of his duties and (ii) were intended, at least in part, to benefit the corporation. In all cases involving wrongdoing by corporate agents, prosecutors should not limit their focus solely to individuals or the corporation, but should consider both as potential targets.

Agents may act for mixed reasons—both for self-aggrandizement (both direct and indirect) and for the benefit of the corporation, and a corporation may be held liable as long as one motivation of its agent is to benefit the corporation. *See United States v. Potter*, 463 F.3d 9, 25 (1st Cir. 2006) (stating that the test to determine whether an agent is acting within the scope of employment is "whether the agent is performing acts of the kind which he is authorized to perform, and those acts are motivated, at least in part, by an intent to benefit the corporation."). In *United States v. Automated Medical Laboratories, Inc.*, 770 F.2d 399 (4th Cir. 1985), for example, the Fourth Circuit affirmed a corporation's conviction for the actions of a subsidiary's employee despite the corporation's claim that the employee was acting for his own benefit, namely his "ambitious nature and his desire to ascend the corporate ladder." *Id.* at 407. The court stated, "Partucci was clearly acting in part to benefit AML since his advancement within the corporation depended on AML's well-being and its lack of difficulties with the FDA." *Id.*; *see also United States v. Cincotta*, 689 F.2d 238, 241-42 (1st Cir. 1982) (upholding a corporation's conviction, notwithstanding the substantial personal benefit reaped by its miscreant agents, because the fraudulent scheme required money to pass through the corporation's treasury and the fraudulently obtained goods were resold to the corporation's customers in the corporation's name).

Moreover, the corporation need not even necessarily profit from its agent's actions for it to be held liable. In *Automated Medical Laboratories*, the Fourth Circuit stated:

> [B]enefit is not a "touchstone of criminal corporate liability; benefit at best is an evidential, not an operative, fact." Thus, whether the agent's actions ultimately redounded to the benefit of the corporation is less significant than whether the agent acted with the intent to benefit the corporation. The basic purpose of requiring that an agent have acted with the intent to benefit the corporation, however, is to insulate the corporation from criminal liability for actions of its agents which may be *inimical* to the interests of the corporation or which may have been undertaken solely to advance the interests of that agent or of a party other than the corporation.

770 F.2d at 407 (internal citation omitted) (quoting *Old Monastery Co. v. United States*, 147 F.2d 905, 908 (4th Cir. 1945)).

[new August 2008]

9-28.300 Factors to Be Considered

A. **General Principle:** Generally, prosecutors apply the same factors in determining whether to charge a corporation as they do with respect to individuals. *See* USAM 9-27.220 *et seq*. Thus, the prosecutor must

weigh all of the factors normally considered in the sound exercise of prosecutorial judgment: the sufficiency of the evidence; the likelihood of success at trial; the probable deterrent, rehabilitative, and other consequences of conviction; and the adequacy of noncriminal approaches. *See id.* However, due to the nature of the corporate "person," some additional factors are present. In conducting an investigation, determining whether to bring charges, and negotiating plea or other agreements, prosecutors should consider the following factors in reaching a decision as to the proper treatment of a corporate target:

1. the nature and seriousness of the offense, including the risk of harm to the public, and applicable policies and priorities, if any, governing the prosecution of corporations for particular categories of crime (see USAM 9-28.400);

2. the pervasiveness of wrongdoing within the corporation, including the complicity in, or the condoning of, the wrongdoing by corporate management (see USAM 9-28.500);

3. the corporation's history of similar misconduct, including prior criminal, civil, and regulatory enforcement actions against it (see USAM 9-28.600);

4. the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents (see USAM 9-28.700);

5. the existence and effectiveness of the corporation's pre-existing compliance program (see USAM 9-28.800);

6. the corporation's remedial actions, including any efforts to implement an effective corporate compliance program or to improve an existing one, to replace responsible management, to discipline or terminate wrongdoers, to pay restitution, and to cooperate with the relevant government agencies (see USAM 9-28.900);

7. collateral consequences, including whether there is disproportionate harm to shareholders, pension holders, employees, and others not proven personally culpable, as well as impact on the public arising from the prosecution (see USAM 9-28.1000);

8. the adequacy of the prosecution of individuals responsible for the corporation's malfeasance; and

9. the adequacy of remedies such as civil or regulatory enforcement actions (see USAM 9-28.1100).

B. **Comment:** The factors listed in this section are intended to be illustrative of those that should be evaluated and are not an exhaustive list of potentially relevant considerations. Some of these factors may not apply to specific cases, and in some cases one factor may override all others. For example, the nature and seriousness of the offense may be such as to warrant prosecution regardless of the other factors. In most cases, however, no single factor will be dispositive. In addition, national law enforcement policies in various enforcement areas may require that more or less weight be given to certain of these factors than to others. Of course, prosecutors must exercise their thoughtful and pragmatic judgment in applying and balancing these factors, so as to achieve a fair and just outcome and promote respect for the law.

In making a decision to charge a corporation, the prosecutor generally has substantial latitude in determining when, whom, how, and even whether to prosecute for violations of federal criminal law. In exercising that discretion, prosecutors should consider the following statements of principles that summarize the considerations they should weigh and the practices they should follow in discharging their prosecutorial responsibilities. In doing so, prosecutors should ensure that the general purposes of the criminal law—assurance of warranted punishment, deterrence of further criminal conduct, protection of the public from dangerous and fraudulent conduct, rehabilitation of offenders, and restitution for victims and affected communities—are adequately met, taking into account the special nature of the corporate "person."

[new August 2008]

9-28.400 Special Policy Concerns

A. **General Principle:** The nature and seriousness of the crime, including the risk of harm to the public from the criminal misconduct, are obviously primary factors in determining whether to charge a corporation. In addition, corporate conduct, particularly that of national and multi-national corporations, necessarily intersects with federal economic, tax, and criminal law enforcement policies. In applying these Principles, prosecutors must consider the practices and policies of the appropriate Division of the Department, and must comply with those policies to the extent required by the facts presented.

B. **Comment:** In determining whether to charge a corporation, prosecutors should take into account federal law enforcement priorities as discussed above. See USAM 9-27.230. In addition, however, prosecutors must be aware of the specific policy goals and incentive programs established by the respective Divisions and regulatory agencies. Thus, whereas natural persons may be given incremental degrees of credit (ranging from immunity to lesser charges to sentencing considerations) for turning themselves in, making statements against their penal interest, and cooperating in the government's investigation of their own and others' wrongdoing, the same approach may not be appropriate in all circumstances with respect to corporations. As an example, it is entirely proper in many investigations for a prosecutor to consider the corporation's pre-indictment conduct, *e.g.*, voluntary disclosure, cooperation, remediation or restitution, in determining whether to seek an indictment. However, this would not necessarily be appropriate in an antitrust investigation, in which antitrust violations, by definition, go to the heart of the corporation's business. With this in mind, the Antitrust Division has established a firm policy, understood in the business community, that credit should not be given at the charging stage for a compliance program and that amnesty is available only to the first corporation to make full disclosure to the government. As another example, the Tax Division has a strong preference for prosecuting responsible individuals, rather than entities, for corporate tax offenses. Thus, in determining whether or not to charge a corporation, prosecutors must consult with the Criminal, Antitrust, Tax, Environmental and Natural Resources, and National Security Divisions, as appropriate.

[new August 2008]

9-28.500 Pervasiveness of Wrongdoing Within the Corporation

A. **General Principle:** A corporation can only act through natural persons, and it is therefore held responsible for the acts of such persons fairly attributable to it. Charging a corporation for even minor misconduct may be appropriate where the wrongdoing was pervasive and was undertaken by a large number of employees, or by all the employees in a particular role within the corporation, or was condoned by upper management. On the other hand, it may not be appropriate to impose liability upon a corporation, particularly one with a robust compliance program in place, under a strict *respondeat superior* theory for the single isolated act of a rogue employee. There is, of course, a wide spectrum between these two extremes, and a prosecutor should exercise sound discretion in evaluating the pervasiveness of wrongdoing within a corporation.

B. **Comment:** Of these factors, the most important is the role and conduct of management. Although acts of even low-level employees may result in criminal liability, a corporation is directed by its management and management is responsible for a corporate culture in which criminal conduct is either discouraged or tacitly encouraged. As stated in commentary to the Sentencing Guidelines:

> Pervasiveness [is] case specific and [will] depend on the number, and degree of responsibility, of individuals [with] substantial authority ... who participated in, condoned, or were willfully ignorant of the offense. Fewer individuals need to be involved for a finding of pervasiveness if

those individuals exercised a relatively high degree of authority. Pervasiveness can occur either within an organization as a whole or within a unit of an organization.

USSG § 8C2.5, cmt. (n. 4).

[new August 2008]

9-28.600 The Corporation's Past History

A. **General Principle:** Prosecutors may consider a corporation's history of similar conduct, including prior criminal, civil, and regulatory enforcement actions against it, in determining whether to bring criminal charges and how best to resolve cases.

B. **Comment:** A corporation, like a natural person, is expected to learn from its mistakes. A history of similar misconduct may be probative of a corporate culture that encouraged, or at least condoned, such misdeeds, regardless of any compliance programs. Criminal prosecution of a corporation may be particularly appropriate where the corporation previously had been subject to non-criminal guidance, warnings, or sanctions, or previous criminal charges, and it either had not taken adequate action to prevent future unlawful conduct or had continued to engage in the misconduct in spite of the warnings or enforcement actions taken against it. The corporate structure itself (*e.g.*, the creation or existence of subsidiaries or operating divisions) is not dispositive in this analysis, and enforcement actions taken against the corporation or any of its divisions, subsidiaries, and affiliates may be considered, if germane. *See* USSG § 8C2.5(c), cmt. (n. 6).

[new August 2008]

9-28.700 The Value of Cooperation

A. **General Principle:** In determining whether to charge a corporation and how to resolve corporate criminal cases, the corporation's timely and voluntary disclosure of wrongdoing and its cooperation with the government's investigation may be relevant factors. In gauging the extent of the corporation's cooperation, the prosecutor may consider, among other things, whether the corporation made a voluntary and timely disclosure, and the corporation's willingness to provide relevant information and evidence and identify relevant actors within and outside the corporation, including senior executives.

Cooperation is a potential mitigating factor, by which a corporation—just like any other subject of a criminal investigation—can gain credit in a case that otherwise is appropriate for indictment and prosecution. Of course, the decision not to cooperate by a corporation (or individual) is not itself evidence of misconduct, at least where the lack of cooperation does not involve criminal misconduct or demonstrate consciousness of guilt (*e.g.*, suborning perjury or false statements, or refusing to comply with lawful discovery requests). Thus, failure to cooperate, in and of itself, does not support or require the filing of charges with respect to a corporation any more than with respect to an individual.

B. **Comment:** In investigating wrongdoing by or within a corporation, a prosecutor is likely to encounter several obstacles resulting from the nature of the corporation itself. It will often be difficult to determine which individual took which action on behalf of the corporation. Lines of authority and responsibility may be shared among operating divisions or departments, and records and personnel may be spread throughout the United States or even among several countries. Where the criminal conduct continued over an extended period of time, the culpable or knowledgeable personnel may have been promoted, transferred, or fired, or they may have quit or retired. Accordingly, a corporation's cooperation may be critical in identifying potentially relevant actors and locating relevant evidence, among other things, and in doing so

expeditiously.

This dynamic—*i.e.*, the difficulty of determining what happened, where the evidence is, and which individuals took or promoted putatively illegal corporate actions—can have negative consequences for both the government and the corporation that is the subject or target of a government investigation. More specifically, because of corporate attribution principles concerning actions of corporate officers and employees (*see, e.g.*, *supra* section II), uncertainty about exactly who authorized or directed apparent corporate misconduct can inure to the detriment of a corporation. For example, it may not matter under the law which of several possible executives or leaders in a chain of command approved of or authorized criminal conduct; however, that information if known might bear on the propriety of a particular disposition short of indictment of the corporation. It may not be in the interest of a corporation or the government for a charging decision to be made in the absence of such information, which might occur if, for example, a statute of limitations were relevant and authorization by any one of the officials were enough to justify a charge under the law. Moreover, and at a minimum, a protracted government investigation of such an issue could, as a collateral consequence, disrupt the corporation's business operations or even depress its stock price.

For these reasons and more, cooperation can be a favorable course for both the government and the corporation. Cooperation benefits the government—and ultimately shareholders, employees, and other often blameless victims—by allowing prosecutors and federal agents, for example, to avoid protracted delays, which compromise their ability to quickly uncover and address the full extent of widespread corporate crimes. With cooperation by the corporation, the government may be able to reduce tangible losses, limit damage to reputation, and preserve assets for restitution. At the same time, cooperation may benefit the corporation by enabling the government to focus its investigative resources in a manner that will not unduly disrupt the corporation's legitimate business operations. In addition, and critically, cooperation may benefit the corporation by presenting it with the opportunity to earn credit for its efforts.

[new August 2008]

9-28.710 Attorney-Client and Work Product Protections

The attorney-client privilege and the attorney work product protection serve an extremely important function in the American legal system. The attorney-client privilege is one of the oldest and most sacrosanct privileges under the law. *See Upjohn v. United States*, 449 U.S. 383, 389 (1981). As the Supreme Court has stated, "[i]ts purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Id.* The value of promoting a corporation's ability to seek frank and comprehensive legal advice is particularly important in the contemporary global business environment, where corporations often face complex and dynamic legal and regulatory obligations imposed by the federal government and also by states and foreign governments. The work product doctrine serves similarly important goals.

For these reasons, waiving the attorney-client and work product protections has never been a prerequisite under the Department's prosecution guidelines for a corporation to be viewed as cooperative. Nonetheless, a wide range of commentators and members of the American legal community and criminal justice system have asserted that the Department's policies have been used, either wittingly or unwittingly, to coerce business entities into waiving attorney-client privilege and work-product protection. Everyone agrees that a corporation may freely waive its own privileges if it chooses to do so; indeed, such waivers occur routinely when corporations are victimized by their employees or others, conduct an internal investigation, and then disclose the details of the investigation to law enforcement officials in an effort to seek prosecution of the offenders. However, the contention, from a broad array of voices, is that the Department's position on attorney-client privilege and work product protection waivers has promoted an environment in which those

protections are being unfairly eroded to the detriment of all.

The Department understands that the attorney-client privilege and attorney work product protection are essential and long- recognized components of the American legal system. What the government seeks and needs to advance its legitimate (indeed, essential) law enforcement mission is not waiver of those protections, but rather the facts known to the corporation about the putative criminal misconduct under review. In addition, while a corporation remains free to convey non-factual or "core" attorney-client communications or work product—if and only if the corporation voluntarily chooses to do so—prosecutors should not ask for such waivers and are directed not to do so. The critical factor is whether the corporation has provided the facts about the events, as explained further herein.

[new August 2008]

9-28.720 Cooperation: Disclosing the Relevant Facts

Eligibility for cooperation credit is not predicated upon the waiver of attorney-client privilege or work product protection. Instead, the sort of cooperation that is most valuable to resolving allegations of misconduct by a corporation and its officers, directors, employees, or agents is disclosure of the relevant *facts* concerning such misconduct. In this regard, the analysis parallels that for a non-corporate defendant, where cooperation typically requires disclosure of relevant factual knowledge and not of discussions between an individual and his attorneys.

Thus, when the government investigates potential corporate wrongdoing, it seeks the relevant facts. For example, how and when did the alleged misconduct occur? Who promoted or approved it? Who was responsible for committing it? In this respect, the investigation of a corporation differs little from the investigation of an individual. In both cases, the government needs to know the facts to achieve a just and fair outcome. The party under investigation may choose to cooperate by disclosing the facts, and the government may give credit for the party's disclosures. If a corporation wishes to receive credit for such cooperation, which then can be considered with all other cooperative efforts and circumstances in evaluating how fairly to proceed, then the corporation, like any person, must disclose the relevant facts of which it has knowledge.[FN2]

(a) Disclosing the Relevant Facts—Facts Gathered Through Internal Investigation

Individuals and corporations often obtain knowledge of facts in different ways. An individual knows the facts of his or others' misconduct through his own experience and perceptions. A corporation is an artificial construct that cannot, by definition, have personal knowledge of the facts. Some of those facts may be reflected in documentary or electronic media like emails, transaction or accounting documents, and other records. Often, the corporation gathers facts through an internal investigation. Exactly how and by whom the facts are gathered is for the corporation to decide. Many corporations choose to collect information about potential misconduct through lawyers, a process that may confer attorney-client privilege or attorney work product protection on at least some of the information collected. Other corporations may choose a method of fact- gathering that does not have that effect—for example, having employee or other witness statements collected after interviews by non-attorney personnel. Whichever process the corporation selects, the government's key measure of cooperation must remain the same as it does for an individual: has the party timely disclosed the relevant facts about the putative misconduct? That is the operative question in assigning cooperation credit for the disclosure of information—*not* whether the corporation discloses attorney-client or work product materials. Accordingly, a corporation should receive the same credit for disclosing facts contained in materials that are not protected by the attorney- client privilege or attorney work product as it would for disclosing identical facts contained in materials that are so protected.[FN3] On this point the Report of the House Judiciary Committee, submitted in connection with the attorney-client privilege bill passed by the House of Representatives (H.R. 3013), comports with the approach required here:

> [A]n ... attorney of the United States may base cooperation credit on the facts that are disclosed, but is prohibited from basing cooperation credit upon whether or not the materials are protected by attorney-client privilege or attorney work product. As a result, an entity that voluntarily discloses should receive the same amount of cooperation credit for disclosing facts that happen to be contained in materials not protected by attorney-client privilege or attorney work product as it would receive for disclosing identical facts that are contained in materials protected by attorney-client privilege or attorney work product. There should be no differentials in an assessment of cooperation (i.e., neither a credit nor a penalty) based upon whether or not the materials disclosed are protected by attorney-client privilege or attorney work product.
>
> H.R. Rep. No. 110-445 at 4 (2007).

In short, so long as the corporation timely discloses relevant facts about the putative misconduct, the corporation may receive due credit for such cooperation, regardless of whether it chooses to waive privilege or work product protection in the process.[FN4] Likewise, a corporation that does not disclose the relevant facts about the alleged misconduct—for whatever reason—typically should not be entitled to receive credit for cooperation.

Two final and related points bear noting about the disclosure of facts, although they should be obvious. First, the government cannot compel, and the corporation has no obligation to make, such disclosures (although the government can obviously compel the disclosure of certain records and witness testimony through subpoenas). Second, a corporation's failure to provide relevant information does not mean the corporation will be indicted. It simply means that the corporation will not be entitled to mitigating credit for that cooperation. Whether the corporation faces charges will turn, as it does in any case, on the sufficiency of the evidence, the likelihood of success at trial, and all of the other factors identified in Section III above. If there is insufficient evidence to warrant indictment, after appropriate investigation has been completed, or if the other factors weigh against indictment, then the corporation should not be indicted, irrespective of whether it has earned cooperation credit. The converse is also true: The government may charge even the most cooperative corporation pursuant to these Principles if, in weighing and balancing the factors described herein, the prosecutor determines that a charge is required in the interests of justice. Put differently, even the most sincere and thorough effort to cooperate cannot necessarily absolve a corporation that has, for example, engaged in an egregious, orchestrated, and widespread fraud. Cooperation is a relevant potential mitigating factor, but it alone is not dispositive.

(b) Legal Advice and Attorney Work Product

Separate from (and usually preceding) the fact-gathering process in an internal investigation, a corporation, through its officers, employees, directors, or others, may have consulted with corporate counsel regarding or in a manner that concerns the legal implications of the putative misconduct at issue. Communications of this sort, which are both independent of the fact-gathering component of an internal investigation and made for the purpose of seeking or dispensing legal advice, lie at the core of the attorney-client privilege. Such communications can naturally have a salutary effect on corporate behavior—facilitating, for example, a corporation's effort to comply with complex and evolving legal and regulatory regimes.[FN5] Except as noted in subparagraphs (b)(i) and (b)(ii) below, a corporation need not disclose and prosecutors may not request the disclosure of such communications as a condition for the corporation's eligibility to receive cooperation credit.

Likewise, non-factual or core attorney work product—for example, an attorney's mental impressions or legal theories—lies at the core of the attorney work product doctrine. A corporation need not disclose, and prosecutors may not request, the disclosure of such attorney work product as a condition for the corporation's eligibility to receive cooperation credit.

(i) Advice of Counsel Defense in the Instant Context

Occasionally a corporation or one of its employees may assert an advice-of-counsel defense, based upon communications with in- house or outside counsel that took place prior to or contemporaneously with the underlying conduct at issue. In such situations, the defendant must tender a legitimate factual basis to support the assertion of the advice-of-counsel defense. *See*, *e.g.*, *Pitt v. Dist. of Columbia*, 491 F.3d 494, 504-05 (D.C. Cir. 2007); *United States v. Wenger*, 427 F.3d 840, 853-54 (10th Cir. 2005); *United States v. Cheek*, 3 F.3d 1057, 1061-62 (7th Cir. 1993). The Department cannot fairly be asked to discharge its responsibility to the public to investigate alleged corporate crime, or to temper what would otherwise be the appropriate course of prosecutive action, by simply accepting on faith an otherwise unproven assertion that an attorney—perhaps even an unnamed attorney—approved potentially unlawful practices. Accordingly, where an advice-of-counsel defense has been asserted, prosecutors may ask for the disclosure of the communications allegedly supporting it.

(ii) Communications in Furtherance of a Crime or Fraud

Communications between a corporation (through its officers, employees, directors, or agents) and corporate counsel that are made in furtherance of a crime or fraud are, under settled precedent, outside the scope and protection of the attorney- client privilege. *See United States v. Zolin*, 491 U.S. 554, 563 (1989); *United States v. BDO Seidman, LLP*, 492 F.3d 806, 818 (7th Cir. 2007). As a result, the Department may properly request such communications if they in fact exist.

[new August 2008]

9-28.730 Obstructing the Investigation

Another factor to be weighed by the prosecutor is whether the corporation has engaged in conduct intended to impede the investigation. Examples of such conduct could include: inappropriate directions to employees or their counsel, such as directions not to be truthful or to conceal relevant facts; making representations or submissions that contain misleading assertions or material omissions; and incomplete or delayed production of records.

In evaluating cooperation, however, prosecutors should not take into account whether a corporation is advancing or reimbursing attorneys' fees or providing counsel to employees, officers, or directors under investigation or indictment. Likewise, prosecutors may not request that a corporation refrain from taking such action. This prohibition is not meant to prevent a prosecutor from asking questions about an attorney's representation of a corporation or its employees, officers, or directors, where otherwise appropriate under the law.[FN6] Neither is it intended to limit the otherwise applicable reach of criminal obstruction of justice statutes such as 18 U.S.C. § 1503. If the payment of attorney fees were used in a manner that would otherwise constitute criminal obstruction of justice—for example, if fees were advanced on the condition that an employee adhere to a version of the facts that the corporation and the employee knew to be false—these Principles would not (and could not) render inapplicable such criminal prohibitions.

Similarly, the mere participation by a corporation in a joint defense agreement does not render the corporation ineligible to receive cooperation credit, and prosecutors may not request that a corporation refrain from entering into such agreements. Of course, the corporation may wish to avoid putting itself in the position of being disabled, by virtue of a particular joint defense or similar agreement, from providing some relevant facts to the government and thereby limiting its ability to seek such cooperation credit. Such might be the case if the corporation gathers facts from employees who have entered into a joint defense agreement with the corporation, and who may later seek to prevent the corporation from disclosing the facts it has acquired. Corporations may wish to address this situation by crafting or participating in joint defense agreements, to the extent they choose to enter them, that provide such flexibility as they deem

appropriate.

Finally, it may on occasion be appropriate for the government to consider whether the corporation has shared with others sensitive information about the investigation that the government provided to the corporation. In appropriate situations, as it does with individuals, the government may properly request that, if a corporation wishes to receive credit for cooperation, the information provided by the government to the corporation not be transmitted to others—for example, where the disclosure of such information could lead to flight by individual subjects, destruction of evidence, or dissipation or concealment of assets.

[new August 2008]

9-28.740 Offering Cooperation: No Entitlement to Immunity

A corporation's offer of cooperation or cooperation itself does not automatically entitle it to immunity from prosecution or a favorable resolution of its case. A corporation should not be able to escape liability merely by offering up its directors, officers, employees, or agents. Thus, a corporation's willingness to cooperate is not determinative; that factor, while relevant, needs to be considered in conjunction with all other factors.

[new August 2008]

9-28.750 Qualifying for Immunity, Amnesty, or Reduced Sanctions Through Voluntary Disclosures

In conjunction with regulatory agencies and other executive branch departments, the Department encourages corporations, as part of their compliance programs, to conduct internal investigations and to disclose the relevant facts to the appropriate authorities. Some agencies, such as the Securities and Exchange Commission and the Environmental Protection Agency, as well as the Department's Environmental and Natural Resources Division, have formal voluntary disclosure programs in which self-reporting, coupled with remediation and additional criteria, may qualify the corporation for amnesty or reduced sanctions. Even in the absence of a formal program, prosecutors may consider a corporation's timely and voluntary disclosure in evaluating the adequacy of the corporation's compliance program and its management's commitment to the compliance program. However, prosecution and economic policies specific to the industry or statute may require prosecution notwithstanding a corporation's willingness to cooperate. For example, the Antitrust Division has a policy of offering amnesty only to the first corporation to agree to cooperate. Moreover, amnesty, immunity, or reduced sanctions may not be appropriate where the corporation's business is permeated with fraud or other crimes.

[new August 2008]

9-28.760 Oversight Concerning Demands for Waivers of Attorney-Client Privilege or Work Product Protection By Corporations Contrary to This Policy

The Department underscores its commitment to attorney practices that are consistent with Department policies like those set forth herein concerning cooperation credit and due respect for the attorney-client privilege and work product protection. Counsel for corporations who believe that prosecutors are violating such guidance are encouraged to raise their concerns with supervisors, including the appropriate United States Attorney or Assistant Attorney General. Like any other allegation of attorney misconduct, such allegations are subject to potential investigation through established mechanisms.

[new August 2008]

9-28.800 Corporate Compliance Programs

A. **General Principle:** Compliance programs are established by corporate management to prevent and detect misconduct and to ensure that corporate activities are conducted in accordance with applicable criminal and civil laws, regulations, and rules. The Department encourages such corporate self-policing, including voluntary disclosures to the government of any problems that a corporation discovers on its own. However, the existence of a compliance program is not sufficient, in and of itself, to justify not charging a corporation for criminal misconduct undertaken by its officers, directors, employees, or agents. In addition, the nature of some crimes, *e.g.*, antitrust violations, may be such that national law enforcement policies mandate prosecutions of corporations notwithstanding the existence of a compliance program.

B. **Comment:** The existence of a corporate compliance program, even one that specifically prohibited the very conduct in question, does not absolve the corporation from criminal liability under the doctrine of *respondeat superior*. *See United States v. Basic Constr. Co*., 711 F.2d 570, 573 (4th Cir. 1983) ("[A] corporation may be held criminally responsible for antitrust violations committed by its employees if they were acting within the scope of their authority, or apparent authority, and for the benefit of the corporation, even if ... such acts were against corporate policy or express instructions."). As explained in *United States v. Potter*, 463 F.3d 9 (1st Cir. 2006), a corporation cannot "avoid liability by adopting abstract rules" that forbid its agents from engaging in illegal acts, because "[e]ven a specific directive to an agent or employee or honest efforts to police such rules do not automatically free the company for the wrongful acts of agents." *Id.* at 25-26. *See also United States v. Hilton Hotels Corp.*, 467 F.2d 1000, 1007 (9th Cir. 1972) (noting that a corporation "could not gain exculpation by issuing general instructions without undertaking to enforce those instructions by means commensurate with the obvious risks"); *United States v. Beusch*, 596 F.2d 871, 878 (9th Cir. 1979) ("[A] corporation may be liable for acts of its employees done contrary to express instructions and policies, but ...the existence of such instructions and policies may be considered in determining whether the employee in fact acted to benefit the corporation.").

> While the Department recognizes that no compliance program can ever prevent all criminal activity by a corporation's employees, the critical factors in evaluating any program are whether the program is adequately designed for maximum effectiveness in preventing and detecting wrongdoing by employees and whether corporate management is enforcing the program or is tacitly encouraging or pressuring employees to engage in misconduct to achieve business objectives. The Department has no formulaic requirements regarding corporate compliance programs. The fundamental questions any prosecutor should ask are: Is the corporation's compliance program well designed? Is the program being applied earnestly and in good faith? Does the corporation's compliance program work? In answering these questions, the prosecutor should consider the comprehensiveness of the compliance program; the extent and pervasiveness of the criminal misconduct; the number and level of the corporate employees involved; the seriousness, duration, and frequency of the misconduct; and any remedial actions taken by the corporation, including, for example, disciplinary action against past violators uncovered by the prior compliance program, and revisions to corporate compliance programs in light of lessons learned.[FN7] Prosecutors should also consider the promptness of any disclosure of wrongdoing to the government. In evaluating compliance programs, prosecutors may consider whether the corporation has established corporate governance mechanisms that can effectively detect and prevent misconduct. For example, do the corporation's directors exercise independent review over proposed corporate actions rather than unquestioningly ratifying officers' recommendations; are internal audit functions conducted at a level sufficient to ensure their independence and accuracy; and have the directors established an information and reporting system in the organization reasonably designed to provide management and directors with timely and accurate information sufficient to allow them to reach an informed decision regarding the organization's compliance with the law. *See*, *e.g.*, *In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959, 968-70 (Del. Ch. 1996).

Prosecutors should therefore attempt to determine whether a corporation's compliance program is merely a "paper program" or whether it was designed, implemented, reviewed, and revised, as appropriate, in an effective manner. In addition, prosecutors should determine whether the corporation has provided for a staff sufficient to audit, document, analyze, and utilize the results of the corporation's compliance efforts. Prosecutors also should determine whether the corporation's employees are adequately informed about the compliance program and are convinced of the corporation's commitment to it. This will enable the prosecutor to make an informed decision as to whether the corporation has adopted and implemented a truly effective compliance program that, when consistent with other federal law enforcement policies, may result in a decision to charge only the corporation's employees and agents or to mitigate charges or sanctions against the corporation.

Compliance programs should be designed to detect the particular types of misconduct most likely to occur in a particular corporation's line of business. Many corporations operate in complex regulatory environments outside the normal experience of criminal prosecutors. Accordingly, prosecutors should consult with relevant federal and state agencies with the expertise to evaluate the adequacy of a program's design and implementation. For instance, state and federal banking, insurance, and medical boards, the Department of Defense, the Department of Health and Human Services, the Environmental Protection Agency, and the Securities and Exchange Commission have considerable experience with compliance programs and can be helpful to a prosecutor in evaluating such programs. In addition, the Fraud Section of the Criminal Division, the Commercial Litigation Branch of the Civil Division, and the Environmental Crimes Section of the Environment and Natural Resources Division can assist United States Attorneys' Offices in finding the appropriate agency office(s) for such consultation.

[new August 2008]

9-28.900 Restitution and Remediation

A. **General Principle:** Although neither a corporation nor an individual target may avoid prosecution merely by paying a sum of money, a prosecutor may consider the corporation's willingness to make restitution and steps already taken to do so. A prosecutor may also consider other remedial actions, such as improving an existing compliance program or disciplining wrongdoers, in determining whether to charge the corporation and how to resolve corporate criminal cases.

B. **Comment:** In determining whether or not to prosecute a corporation, the government may consider whether the corporation has taken meaningful remedial measures. A corporation's response to misconduct says much about its willingness to ensure that such misconduct does not recur. Thus, corporations that fully recognize the seriousness of their misconduct and accept responsibility for it should be taking steps to implement the personnel, operational, and organizational changes necessary to establish an awareness among employees that criminal conduct will not be tolerated.

Among the factors prosecutors should consider and weigh are whether the corporation appropriately disciplined wrongdoers, once those employees are identified by the corporation as culpable for the misconduct. Employee discipline is a difficult task for many corporations because of the human element involved and sometimes because of the seniority of the employees concerned. Although corporations need to be fair to their employees, they must also be committed, at all levels of the corporation, to the highest standards of legal and ethical behavior. Effective internal discipline can be a powerful deterrent against improper behavior by a corporation's employees. Prosecutors should be satisfied that the corporation's focus is on the integrity and credibility of its remedial and disciplinary measures rather than on the protection of the wrongdoers.

In addition to employee discipline, two other factors used in evaluating a corporation's remedial efforts are restitution and reform. As with natural persons, the decision whether or not to prosecute

should not depend upon the target's ability to pay restitution. A corporation's efforts to pay restitution even in advance of any court order is, however, evidence of its acceptance of responsibility and, consistent with the practices and policies of the appropriate Division of the Department entrusted with enforcing specific criminal laws, may be considered in determining whether to bring criminal charges. Similarly, although the inadequacy of a corporate compliance program is a factor to consider when deciding whether to charge a corporation, that corporation's quick recognition of the flaws in the program and its efforts to improve the program are also factors to consider as to appropriate disposition of a case.

[new August 2008]

9-28.1000 Collateral Consequences

A. **General Principle:** Prosecutors may consider the collateral consequences of a corporate criminal conviction or indictment in determining whether to charge the corporation with a criminal offense and how to resolve corporate criminal cases.

B. **Comment:** One of the factors in determining whether to charge a natural person or a corporation is whether the likely punishment is appropriate given the nature and seriousness of the crime. In the corporate context, prosecutors may take into account the possibly substantial consequences to a corporation's employees, investors, pensioners, and customers, many of whom may, depending on the size and nature of the corporation and their role in its operations, have played no role in the criminal conduct, have been unaware of it, or have been unable to prevent it. Prosecutors should also be aware of non-penal sanctions that may accompany a criminal charge, such as potential suspension or debarment from eligibility for government contracts or federally funded programs such as health care programs. Determining whether or not such non-penal sanctions are appropriate or required in a particular case is the responsibility of the relevant agency, and is a decision that will be made based on the applicable statutes, regulations, and policies.

Virtually every conviction of a corporation, like virtually every conviction of an individual, will have an impact on innocent third parties, and the mere existence of such an effect is not sufficient to preclude prosecution of the corporation. Therefore, in evaluating the relevance of collateral consequences, various factors already discussed, such as the pervasiveness of the criminal conduct and the adequacy of the corporation's compliance programs, should be considered in determining the weight to be given to this factor. For instance, the balance may tip in favor of prosecuting corporations in situations where the scope of the misconduct in a case is widespread and sustained within a corporate division (or spread throughout pockets of the corporate organization). In such cases, the possible unfairness of visiting punishment for the corporation's crimes upon shareholders may be of much less concern where those shareholders have substantially profited, even unknowingly, from widespread or pervasive criminal activity. Similarly, where the top layers of the corporation's management or the shareholders of a closely-held corporation were engaged in or aware of the wrongdoing, and the conduct at issue was accepted as a way of doing business for an extended period, debarment may be deemed not collateral, but a direct and entirely appropriate consequence of the corporation's wrongdoing.

On the other hand, where the collateral consequences of a corporate conviction for innocent third parties would be significant, it may be appropriate to consider a non-prosecution or deferred prosecution agreement with conditions designed, among other things, to promote compliance with applicable law and to prevent recidivism. Such agreements are a third option, besides a criminal indictment, on the one hand, and a declination, on the other. Declining prosecution may allow a corporate criminal to escape without consequences. Obtaining a conviction may produce a result that seriously harms innocent third parties who played no role in the criminal conduct. Under appropriate circumstances, a deferred prosecution or non-prosecution agreement can help restore the integrity of

a company's operations and preserve the financial viability of a corporation that has engaged in criminal conduct, while preserving the government's ability to prosecute a recalcitrant corporation that materially breaches the agreement. Such agreements achieve other important objectives as well, like prompt restitution for victims.[FN8] Ultimately, the appropriateness of a criminal charge against a corporation, or some lesser alternative, must be evaluated in a pragmatic and reasoned way that produces a fair outcome, taking into consideration, among other things, the Department's need to promote and ensure respect for the law.

[new August 2008]

9-28.1100 Other Civil or Regulatory Alternatives

A. **General Principle:** Non-criminal alternatives to prosecution often exist and prosecutors may consider whether such sanctions would adequately deter, punish, and rehabilitate a corporation that has engaged in wrongful conduct. In evaluating the adequacy of non-criminal alternatives to prosecution—*e.g.*, civil or regulatory enforcement actions—the prosecutor may consider all relevant factors, including:

1. the sanctions available under the alternative means of disposition;

2. the likelihood that an effective sanction will be imposed; and

3. the effect of non-criminal disposition on federal law enforcement interests.

B. **Comment:** The primary goals of criminal law are deterrence, punishment, and rehabilitation. Non-criminal sanctions may not be an appropriate response to a serious violation, a pattern of wrongdoing, or prior non-criminal sanctions without proper remediation. In other cases, however, these goals may be satisfied through civil or regulatory actions. In determining whether a federal criminal resolution is appropriate, the prosecutor should consider the same factors (modified appropriately for the regulatory context) considered when determining whether to leave prosecution of a natural person to another jurisdiction or to seek non-criminal alternatives to prosecution. These factors include: the strength of the regulatory authority's interest; the regulatory authority's ability and willingness to take effective enforcement action; the probable sanction if the regulatory authority's enforcement action is upheld; and the effect of a non-criminal disposition on federal law enforcement interests. See USAM 9-27.240, 9-27.250.

[new August 2008]

9-28.1200 Selecting Charges

A. **General Principle:** Once a prosecutor has decided to charge a corporation, the prosecutor at least presumptively should charge, or should recommend that the grand jury charge, the most serious offense that is consistent with the nature of the defendant's misconduct and that is likely to result in a sustainable conviction.

B. **Comment:** Once the decision to charge is made, the same rules as govern charging natural persons apply. These rules require "a faithful and honest application of the Sentencing Guidelines" and an "individualized assessment of the extent to which particular charges fit the specific circumstances of the case, are consistent with the purposes of the Federal criminal code, and maximize the impact of Federal resources on crime." See USAM 9-27.300. In making this determination, "it is appropriate that the attorney for the government consider, *inter alia*, such factors as the [advisory] sentencing guideline range yielded by the charge, whether the penalty yielded by such sentencing range ...is proportional to the seriousness of the defendant's conduct, and whether the charge achieves such purposes of the criminal law as punishment, protection of the public, specific and general deterrence, and rehabilitation." *Id.*

[new August 2008]

9-28.1300 Plea Agreements with Corporations

A. **General Principle:** In negotiating plea agreements with corporations, as with individuals, prosecutors should generally seek a plea to the most serious, readily provable offense charged. In addition, the terms of the plea agreement should contain appropriate provisions to ensure punishment, deterrence, rehabilitation, and compliance with the plea agreement in the corporate context. Although special circumstances may mandate a different conclusion, prosecutors generally should not agree to accept a corporate guilty plea in exchange for non-prosecution or dismissal of charges against individual officers and employees.

B. **Comment:** Prosecutors may enter into plea agreements with corporations for the same reasons and under the same constraints as apply to plea agreements with natural persons. See USAM 9-27.400-530. This means, *inter alia*, that the corporation should generally be required to plead guilty to the most serious, readily provable offense charged. In addition, any negotiated departures or recommended variances from the advisory Sentencing Guidelines must be justifiable under the Guidelines or 18 U.S.C. § 3553 and must be disclosed to the sentencing court. A corporation should be made to realize that pleading guilty to criminal charges constitutes an admission of guilt and not merely a resolution of an inconvenient distraction from its business. As with natural persons, pleas should be structured so that the corporation may not later "proclaim lack of culpability or even complete innocence." See USAM 9-27.420(b)(4), 9-27.440, 9-27.500. Thus, for instance, there should be placed upon the record a sufficient factual basis for the plea to prevent later corporate assertions of innocence.

A corporate plea agreement should also contain provisions that recognize the nature of the corporate "person" and that ensure that the principles of punishment, deterrence, and rehabilitation are met. In the corporate context, punishment and deterrence are generally accomplished by substantial fines, mandatory restitution, and institution of appropriate compliance measures, including, if necessary, continued judicial oversight or the use of special masters or corporate monitors. *See* USSG §§ 8B1.1, 8C2.1, *et seq*. In addition, where the corporation is a government contractor, permanent or temporary debarment may be appropriate. Where the corporation was engaged in fraud against the government (*e.g.*, contracting fraud), a prosecutor may not negotiate away an agency's right to debar or delist the corporate defendant.

In negotiating a plea agreement, prosecutors should also consider the deterrent value of prosecutions of individuals within the corporation. Therefore, one factor that a prosecutor may consider in determining whether to enter into a plea agreement is whether the corporation is seeking immunity for its employees and officers or whether the corporation is willing to cooperate in the investigation of culpable individuals as outlined herein. Prosecutors should rarely negotiate away individual criminal liability in a corporate plea.

Rehabilitation, of course, requires that the corporation undertake to be law-abiding in the future. It is, therefore, appropriate to require the corporation, as a condition of probation, to implement a compliance program or to reform an existing one. As discussed above, prosecutors may consult with the appropriate state and federal agencies and components of the Justice Department to ensure that a proposed compliance program is adequate and meets industry standards and best practices. See USAM 9-28.800.

In plea agreements in which the corporation agrees to cooperate, the prosecutor should ensure that the cooperation is entirely truthful. To do so, the prosecutor may request that the corporation make appropriate disclosures of relevant factual information and documents, make employees and agents available for debriefing, file appropriate certified financial statements, agree to governmental or third-party audits, and take whatever other steps are necessary to ensure that the full scope of the

corporate wrongdoing is disclosed and that the responsible personnel are identified and, if appropriate, prosecuted. See generally USAM 9-28.700. In taking such steps, Department prosecutors should recognize that attorney-client communications are often essential to a corporation's efforts to comply with complex regulatory and legal regimes, and that, as discussed at length above, cooperation is not measured by the waiver of attorney-client privilege and work product protection, but rather is measured by the disclosure of facts and other considerations identified herein such as making witnesses available for interviews and assisting in the interpretation of complex documents or business records.

These Principles provide only internal Department of Justice guidance. They are not intended to, do not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal. Nor are any limitations hereby placed on otherwise lawful litigative prerogatives of the Department of Justice.

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FN 1. While these guidelines refer to corporations, they apply to the consideration of the prosecution of all types of business organizations, including partnerships, sole proprietorships, government entities, and unincorporated associations.

FN 2. There are other dimensions of cooperation beyond the mere disclosure of facts, of course. These can include, for example, providing non-privileged documents and other evidence, making witnesses available for interviews, and assisting in the interpretation of complex business records. This section of the Principles focuses solely on the disclosure of facts and the privilege issues that may be implicated thereby.

FN 3. By way of example, corporate personnel are typically interviewed during an internal investigation. If the interviews are conducted by counsel for the corporation, certain notes and memoranda generated from the interviews may be subject, at least in part, to the protections of attorney-client privilege and/or attorney work product. To receive cooperation credit for providing factual information, the corporation need not produce, and prosecutors may not request, protected notes or memoranda generated by the lawyers' interviews. To earn such credit, however, the corporation does need to produce, and prosecutors may request, relevant factual information—including relevant factual information acquired through those interviews, unless the identical information has otherwise been provided—as well as relevant non-privileged evidence such as accounting and business records and emails between non-attorney employees or agents.

FN 4. In assessing the timeliness of a corporation's disclosures, prosecutors should apply a standard of reasonableness in light of the totality of circumstances.

FN 5. These privileged communications are not necessarily limited to those that occur contemporaneously with the underlying misconduct. They would include, for instance, legal advice provided by corporate counsel in an internal investigation report. Again, the key measure of cooperation is the disclosure of factual information known to the corporation, not the disclosure of legal advice or theories rendered in connection with the conduct at issue (subject to the two exceptions noted in USAM 9-28.720(b)(i-ii)).

FN 6. Routine questions regarding the representation status of a corporation and its employees, including how and by whom attorneys' fees are paid, sometimes arise in the course of an investigation under certain circumstances—to take one example, to assess conflict-of-interest issues. Such questions can be appropriate and this guidance is not intended to prohibit such limited inquiries.

FN 7. For a detailed review of these and other factors concerning corporate compliance programs, see USSG § 8B2.1.

FN 8. Prosecutors should note that in the case of national or multi-national corporations, multi-district or global agreements may be necessary. Such agreements may only be entered into with the approval of each affected district or the appropriate Department official. See USAM 9-27.641.

CORPORATE COMPLIANCE PROGRAM

In order to address deficiencies in its internal controls, policies, and procedures regarding compliance with the Foreign Corrupt Practices Act ("FCPA"), 15 U.S.C. §§ 78dd-1, *et seq.,* and other applicable anti-corruption laws, Company and its subsidiaries (collectively, "Company") agree to continue to conduct, in a manner consistent with all of its obligations under this Agreement, appropriate reviews of its existing internal controls, policies, and procedures.

Where necessary and appropriate, Company agrees to adopt new or to modify existing internal controls, policies, and procedures in order to ensure that it maintains: (a) a system of internal accounting controls designed to ensure that Company makes and keeps fair and accurate books, records, and accounts; and (b) a rigorous anti-corruption compliance code, standards, and procedures designed to detect and deter violations of the FCPA and other applicable anti-corruption laws. At a minimum, this should include, but not be limited to, the following elements:

1. Company will develop and promulgate a clearly articulated and visible corporate policy against violations of the FCPA, including its anti-bribery, books and records, and internal controls provisions, and other applicable counterparts (collectively, the "anti-corruption laws,"), including strong, explicit, and visible support and commitment from senior management to the program.

2. Company will develop and promulgate compliance standards and procedures designed to reduce the prospect of violations of the anti-corruption laws and Company's compliance code and will take appropriate measures to encourage and support the observance of ethics and compliance standards and procedures against foreign bribery at all levels of the company. These standards and procedures shall apply to all directors, officers, and employees and, where necessary and appropriate, outside parties acting on behalf of Company in a foreign jurisdiction, including but not limited to, agents and intermediaries, consultants, representatives, distributors, teaming partners, contractors and suppliers, consortia, and joint venture partners (collectively, "agents and business partners"), and shall notify all employees that compliance with the standards and procedures is the duty of individuals at all levels of the company. Such standards and procedures shall include policies governing:

   a. Gifts;
   b. Hospitality, entertainment, and expenses;
   c. Customer travel;
   d. Political contributions;
   e. Charitable donations and sponsorships;
   f. Facilitation payments; and
   g. Solicitation and extortion.

3. Company will develop these compliance standards and procedures, including internal controls, ethics, and compliance programs on the basis of a risk assessment addressing the individual circumstances of the company, in particular the foreign bribery risks facing the

company, including, but not limited to, its geographical organization, interaction with governments, and industrial sector of operation.

4. Company shall review its compliance standards and procedures, including internal controls, ethics, and compliance programs, no less than annually, and updated as appropriate, taking into account relevant developments in the field and evolving international and industry standards, and update and adapt as necessary to ensure the continued effectiveness of the company's internal controls, ethics, and compliance programs.

5. Company will assign responsibility to one or more senior corporate executives of Company for the implementation and oversight of compliance with policies, standards, and procedures regarding the anti-corruption laws. Such corporate official(s) shall have direct reporting obligations to independent monitoring bodies, including internal audit, Company's Board of Directors, or any appropriate committee of the Board of Directors, and shall have an adequate level of autonomy from management as well as sufficient resources and authority to maintain such autonomy.

6. Company will ensure that it has a system of financial and accounting procedures, including a system of internal controls, reasonably designed to ensure the maintenance of fair and accurate books, records, and accounts to ensure that they cannot be used for the purpose of foreign bribery or concealing such bribery.

7. Company will implement mechanisms designed to ensure that the policies, standards, and procedures of Company regarding the anti-corruption laws are effectively communicated to all directors, officers, employees, and, where appropriate, agents and business partners. These mechanisms shall include: (a) periodic training for all directors, officers, and employees, and, where necessary and appropriate, agents and business partners; and (b) annual certifications by all such directors, officers, and employees, and, where necessary and appropriate, agents, and business partners, certifying compliance with the training requirements.

8. Company will establish an effective system for:

   a. Providing guidance and advice to directors, officers, employees, and, where appropriate, agents and business partners, on complying with Company's compliance policies, standards, and procedures, including when they need advice on an urgent basis on difficult situations in foreign jurisdictions;
   b. Internal and, where possible, confidential reporting by, and protection of, directors, officers, employees, and, where appropriate, agents and business partners, not willing to violate professional standards or ethics under instructions or pressure from hierarchical superiors, as well as for directors, officers, employee, and, where appropriate, agents and business partners, willing to report breaches of the law or professional standards or ethics concerning anti-corruption occurring within the company, suspected criminal conduct, and/or violations of the compliance policies, standards,

and procedures regarding the anti-corruption laws for directors, officers, employees, and, where necessary and appropriate, agents and business partners; and

c. Responding to such requests and undertaking appropriate action in response to such reports.

9. Company will institute appropriate disciplinary procedures to address, among other things, violations of the anti-corruption laws and Company's compliance and ethics program by Company's directors, officers, and employees. Company shall implement procedures to ensure that where misconduct is discovered, reasonable steps are taken to remedy the harm resulting from such misconduct, and to ensure that appropriate steps are taken to prevent further similar misconduct, including assessing the internal controls, ethics, and compliance program and making modifications necessary to ensure the program is effective.

10. Company will institute appropriate due diligence and compliance requirements pertaining to the retention and oversight of all agents and business partners, including:

a. Properly documented risk-based due diligence pertaining to the hiring and appropriate and regular oversight of agents and business partners;

b. Informing agents and business partners of Company's commitment to abiding by laws on the prohibitions against foreign bribery, and of Company's ethics and compliance standards and procedures or other measures for preventing and detecting such bribery; and

c. Seeking a reciprocal commitment from agents and business partners.

11. Where appropriate, Company will include standard provisions in agreements, contracts, and renewals thereof with all agents and business partners that are reasonably calculated to prevent violations of the anti-corruption laws, which may, depending upon the circumstances, include: (a) anti-corruption representations and undertakings relating to compliance with the anti-corruption laws; (b) rights to conduct audits of the books and records of the agent or business partner to ensure compliance with the foregoing; and (c) rights to terminate an agent or business partner as a result of any breach of anti-corruption laws, and regulations or representations and undertakings related to such matters.

12. Company will conduct periodic review and testing of the compliance code, standards, and procedures designed to evaluate and improve their effectiveness in preventing and detecting violations of anti-corruption laws and Company's compliance and ethics programs, taking into account relevant developments in the field and evolving international and industry standards.