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Office of the Attorney General
Washington, D. C. 20530

September 24, 2014

TO: DEPARTMENT OF JUSTICE ATTORNEYS
FROM: *EX* THE ATTORNEY GENERAL
RE: Guidance Regarding § 851 Enhancements In Plea Negotiations

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RECORDED
DEPT. OF JUSTICE
EXECUTIVE SECRETARIAT

The Department of Justice's charging policies are clear that in all cases, prosecutors must individually evaluate the unique facts and circumstances and select charges and seek sentences that are fair and proportional based upon this individualized assessment. "Department Policy on Charging and Sentencing," May 10, 2010. The Department provided more specific guidance for charging mandatory minimums and recidivist enhancements in drug cases in the August 12, 2013, "Department Policy on Charging Mandatory Minimum Sentences and Recidivist Enhancements in Certain Drug Cases." That memorandum provides that prosecutors should decline to seek an enhancement pursuant to 21 U.S.C. § 851 unless the "defendant is involved in conduct that makes the case appropriate for severe sanctions," and sets forth factors that prosecutors should consider in making that determination. Whether a defendant is pleading guilty is not one of the factors enumerated in the charging policy. Prosecutors are encouraged to make the § 851 determination at the time the case is charged, or as soon as possible thereafter. An § 851 enhancement should not be used in plea negotiations for the sole or predominant purpose of inducing a defendant to plead guilty. This is consistent with long-standing Department policy that "[c]harges should not be filed simply to exert leverage to induce a plea, nor should charges be abandoned to arrive at a plea bargain that does not reflect the seriousness of the defendant's conduct." "Department Policy on Charging and Sentencing," May 19, 2010.

While the fact that a defendant may or may not exercise his right to a jury trial should ordinarily not govern the determination of whether to file or forego an § 851 enhancement, certain circumstances -- such as new information about the defendant, a reassessment of the strength of the government's case, or recognition of cooperation -- may make it appropriate to forego or dismiss a previously filed § 851 information in connection with a guilty plea. A practice of routinely premising the decision to file an § 851 enhancement solely on whether a defendant is entering a guilty plea, however, is inappropriate and inconsistent with the spirit of the policy.