



U.S. Department of Justice

Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

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MEMORANDUM FOR HOLDERS OF THE UNITED STATES ATTORNEYS' MANUAL

FROM: Mark Filip *Mark Filip*
Deputy Attorney General

SUBJECT: USAM 9-16.325: Plea Agreements, Deferred Prosecution Agreements,
Non-Prosecution Agreements and "Extraordinary Restitution."

The following is an addition to USAM 9-16.000, which covers pleas and Federal Rule of Criminal Procedure 11. Section 9-16.325 sets forth guidance on the issue of extraordinary restitution for plea agreements, deferred prosecution agreements and non-prosecution agreements.

9-16.325 Plea Agreements, Deferred Prosecution Agreements, Non-Prosecution Agreements and "Extraordinary Restitution."

Plea agreements, deferred prosecution agreements and non-prosecution agreements should not include terms requiring the defendant to pay funds to a charitable, educational, community, or other organization or individual that is not a victim of the criminal activity or is not providing services to redress the harm caused by the defendant's criminal conduct.

Such payments have sometimes been referred to as "extraordinary restitution." This is a misnomer, however, as restitution is intended to restore the victim's losses caused by the criminal conduct, not to provide funds to an unrelated third party.

Apart from the limited circumstances described below, this practice is restricted because it can create actual or perceived conflicts of interest and/or other ethical issues.

This section does not, of course, restrict a defendant's own decision, outside the context of a plea agreement, deferred prosecution agreement or a non-prosecution agreement, to unilaterally pay monies to a charitable, educational, community, or other organization or individual, and then to request leniency from the judge at sentencing based upon such action.

This section also does not restrict "community restitution" payments made pursuant to 18 U.S.C. § 3663(c). That section provides guidance for such payments where the defendant is

convicted under 21 U.S.C. § 841, § 848(a), § 849, § 856, § 861 or § 863. Among other factors, that section requires the absence of identifiable victims, as well as a nexus between the payment and the offense.

Neither does this section restrict the use of community service as a condition of probation for environmental prosecutions. United States Attorneys' Offices contemplating such community service as a condition of probation in a case involving environmental crimes shall consult with the Environmental Crimes Section of the Environmental and Natural Resources Division, which has issued guidance to ensure that the community service requirements are narrowly tailored to the facts of the case. The guidance also requires that any funds paid by a defendant as part of the community service portion of a sentence be directed to an entity in which the prosecutors have no interest that could give rise to a conflict and that is legally authorized to receive funds. See: <http://10.173.2.12/ecs/policies/sentencingguidance.html>.