

SENTENCING GUIDELINES

Expert Analysis

2011 Guideline Amendments: A Mixed Bag

On April 28, 2011, the U.S. Sentencing Commission submitted to Congress a series of proposed amendments to the Sentencing Guidelines.¹ Absent congressional action, the amendments will take effect on Nov. 1, 2011.

The changes address a wide variety of factors and respond to a series of mandates in recently enacted laws. Several stand out.² First, the commission responded to a provision in the Patient Protection and Affordable Care Act of 2010,³ which directed it to amend the guidelines to provide for sentencing enhancements based on the amount of loss in health care fraud cases. Second, the commission re-promulgated the temporary amendments that implemented the directives in the Fair Sentencing Act of 2010.⁴ These include the reduction of statutory penalties for crack cocaine offenses, the elimination of the mandatory minimum for simple possession of crack cocaine, and the addition of multiple adjustments in §2D1.1(b)—both enhancing and mitigating—for drug trafficking crimes. And third, the commission made it somewhat easier for minimal participants in crimes to receive a downward adjustment.

The changes reflect the Sentencing Commission's balancing of multiple interests: Congress' and the Department of Justice's push for increased penalties to "mitigate the risks posed by our nation's most serious, and most destructive" criminals and criminal activities,⁵ and a more lenient approach for lower-risk crack offenders and minor players involved in high-quantity offenses. The amendments also reflect increased legislative intrusion into the realm of the commission in formulating sentencing guideline policy.

Health Care Fraud Offenses

Section 10606(a)(2)(C) of the Patient Protection Act directed the commission to amend the guidelines by providing 2, 3, and 4-level enhancements if the loss resulting from a health care offense is between \$1 million and \$7 million, \$7 million and \$20 million, and over \$20 million, respectively. These statutorily prescribed, loss-driven changes to health care fraud sentences are regrettably consistent with dramatic increases to



By
**Alan
Vinegrad**



And
**Jason
Levine**

the fraud guidelines from the early 2000s,⁶ which have been criticized by both judges and the bar for years,⁷ and will inevitably result in unjustifiably harsh sentencing ranges for many health care fraud offenders.

For instance, imagine a mid-level officer of a company convicted of a federal health care offense, resulting in a \$25 million loss to the government. We start with a base level of 7, add 22 for a loss greater than \$20 million, and now, as a result of the new

The guideline changes will reduce the base offense level for crack cocaine offenses to proportionally correspond to the new 18:1 ratio.

amendments, another 4-level adjustment for the same loss factor. Assuming a 2-level enhancement for sophisticated means, and that the executive had some supervisory role but didn't lead or organize the offense, the resulting adjusted offense level is 37. Ignoring other potential enhancing and mitigating factors, and assuming the defendant is a first-time offender, the guidelines call for 17 to 22 years in jail—a result that we cannot imagine most judges taking seriously.

Drug Trafficking Amendments

The commission has proposed making permanent the temporary emergency amendments, effective on Nov. 1, 2010, which implemented the directives in the Fair Sentencing Act of 2010.⁸ The act eliminated the five-year mandatory minimum for simple possession of crack cocaine and reduced the 100:1 punishment ratio between cocaine powder and crack cocaine offenses to 18:1. The guideline changes will reduce the base offense level for crack cocaine offenses to proportionally correspond to the new 18:1 ratio.

These changes were long overdue. As early as

1995, the commission recognized the disparate impact of crack cocaine sentences, predominantly on African-Americans, and recommended that Congress equalize the penalties for distributing crack and powder cocaine. Congress promptly passed a law rejecting the commission's proposed amendments before they became effective.⁹ In 2007, the commission amended the Drug Quantity Table with a two-level reduction to the base offense levels for crack offenses and again urged Congress to address the problems associated with the 100:1 ratio.¹⁰ Congress finally heeded the commission's, along with the Justice Department's, advice when it voted overwhelmingly in favor of the Fair Sentencing Act.

The act also directed the commission to make a series of other changes to the guidelines, adding multiple aggravating and mitigating factors for drug trafficking offenses. On the aggravating side, the amendments create new offense characteristics, each of which provide a 2-level enhancement, when the defendant (1) used, threatened or directed the use of violence during a drug trafficking offense; (2) bribed, or attempted to bribe, a law enforcement officer to facilitate commission of the offense, (3) maintained premises to manufacture or distribute a controlled substance; or (4) was the leader, organizer or supervisor of criminal activity and (a) used a relatively innocent person to facilitate the crime by means of fear, impulse, friendship, or affection; (b) took advantage of one's age (old or young) or vulnerabilities (physical or mental); (c) directly imported narcotics, (d) obstructed justice, or (e) engaged in drug trafficking as a livelihood.¹¹

In two separate ways, Congress directed the commission to adjust the minimal role criteria to alleviate the harshness of drug sentences for bit players. The proposed amendments follow this directive. First, the amendments provide that if a defendant's base offense level based solely on drug quantity is greater than 32, and the defendant receives a 4-level reduction for minimal participation, the offense level must be decreased to 32. Second, the amendments create a new 2-level downward adjustment if the defendant receives the 4-level minimal participant reduction and each of three statutorily enumerated factors apply: (1) "the defendant was motivated by an intimate or familial relationship or by threats or fear to commit the offense and was otherwise unlikely to commit such an offense"; (2) "the defendant was to receive no monetary compensation from the illegal purchase, sale, transport, or storage of controlled substances"; and (3) "the defendant had minimal knowledge of the scope and structure of the enterprise."¹²

ALAN VINEGRAD, former U.S. Attorney for the Eastern District of New York, is a partner at Covington & Burling. JASON LEVINE is an associate at the firm in the Washington, D.C. office.

These changes provide a sensible approach to sentencing for drug trafficking offenses by trying to separate the most culpable from the low-level players. However, the guidelines, in part pursuant to congressional mandates, are getting awfully detailed in directing sentencing discretion—not just what factors to consider, but to what degree to consider them. With these new amendments, the drug guideline now has 16 specific offense characteristics (many with sub-parts) that a sentencing judge must consider—all with specified quantities of adjustments to the guideline range.

The commission also requested public comment on whether the amendments should be made retroactive to previously sentenced defendants and held a hearing earlier this month on this issue.¹³ At the hearing, U.S. Attorney General Eric Holder and Stephanie Rose, the U.S. Attorney for the Northern District of Iowa, announced the Justice Department's support for retroactively applying only the crack cocaine amendments. And even here, the support was somewhat limited. Mr. Holder explained that defendants who used weapons in committing their crimes or had significant criminal histories should not receive the benefits of retroactivity. But, he added, those who were "sentenced pursuant to the old statutory disparity...should be alleviated to the extent possible to reflect the new law."¹⁴ As support for his position, he noted that the 2007 guideline amendment—what he called the "crack minus two" amendment—was applied retroactively and, according to a recent commission study,¹⁵ did not result in a higher rate of recidivism.

The Justice Department's approach is a blend of fairness and pragmatism. Retroactive application of all of the new enhancing and mitigating factors would likely cause enormous burdens on the criminal justice system by forcing courts to adjudicate what would inevitably be a hailstorm of motions for re-sentencing from what is the single-largest category of offenders in the federal system.¹⁶ But the Justice Department also recognized the long-standing, increasingly indefensible sentencing disparity between cocaine powder and crack cocaine offenses, and the need to ameliorate it for both current and past offenders.

Minimal Role Adjustments

The commission also amended §3B1.2, which authorizes reductions based on a defendant's minimal role in the offense, in two ways. First, it deletes from Application Note 3(C) the statement that "the court...is not required to find, based solely on the defendant's bare assertion, that such a role adjustment is warranted."¹⁷ Second, the amendment deletes the following sentence in Application Note 4: "It is intended that the downward adjustment for a minimal participant will be used infrequently."¹⁸ The commission explained that these two sentences were unnecessary and may have been "discouraging courts from applying the mitigating role adjustment in otherwise appropriate circumstances."¹⁹

The commission's changes to the minimal role guideline reflect the often-harsh results of a sentencing regime that is heavily focused on quantities of drugs and money. These changes give courts more flexibility to award minimal role reductions to minor players in major cases. The commission's goal is also reflected in the addition it made to Application Note 3(A), which emphasizes that minor players who are held accountable for a loss that greatly exceeds their personal gain are not precluded from receiving a

downward adjustment under §3B1.2. And in what is a clear effort to ameliorate the harshness of the new congressionally mandated health care fraud adjustments, the amendment provides, as an example of a deserving recipient of a minimal role adjustment, a lower-level defendant in a health care fraud scheme.²⁰

Will Hybrid Approach Matter?

The guideline amendments reflect a mixed approach to sentencing. On the one hand, the changes will provide relief to those who need it most: (1) non-violent, first-time crack cocaine offenders who are behind bars for far more years than their powder-dealing counterparts; and (2) minor players who are sentenced in a system that prioritizes quantity above all else. On the other hand, the amendments call for harsher sentences in perceived areas of concern, including violent or otherwise-more-culpable drug offenses and health care fraud offenses that result in significant financial loss.

The commission's changes to the minimal role guideline reflect the often-harsh results of a sentencing regime that is heavily focused on quantities of drugs and money. These changes give courts more flexibility to award minimal role reductions to minor players in major cases.

In theory, the changes are an understandable addition to the guidelines, as the commission seeks to enhance deterrence for more serious crimes while simultaneously trying to ensure that its punishment regime is fair and flexible. One cannot help but wonder, however, whether all of the changes are truly necessary. In the health care fraud area, an obvious alternative is to simply ratchet up enforcement of current laws. The Justice Department has proven through its Health Care Fraud Prevention & Enforcement Action Team (HEAT), whose "aggressive pursuit of healthcare fraud" resulted in more than \$4 billion in recoveries in 2010,²¹ that an increase in resources and enforcement can result in huge payoffs that compensate victims and deter future wrongdoers. And procedurally, the plethora of amendments, particularly to the specific offense characteristics for drug offenses, continues the odd trend of channeling (or at least endeavoring to channel) guideline decision-making in an era of increased judicial discretion in sentencing.

What makes the latest series of changes even more noteworthy, if not a cause for concern, is that instead of the commission leading the way, almost all of the changes were made by Congress through what is essentially legislative amendment of the guidelines, rather than through the consultative approach envisioned by Congress itself when it created the commission.²² This is rare, with the most recent example being the 2003 PROTECT Act's curtailment of downward departures and enhancements for various crimes.²³ It is unclear what spurred Congress to resort again to this method of guideline revision, or whether it portends the beginning of a trend of increased legislative activism in formulating guideline policy.

In the end, the practical effect of these changes may be modest at best. In a post-*Booker*²⁴ world, in which the guidelines are merely the "starting point and the initial benchmark" in the sentencing process and no longer binding,²⁵ it remains to be seen whether district judges will apply this ever-increasing multitude of factors in determining a sentence, or whether we will see more outside-the-guideline sentences as judges resist what they may perceive as an infringement on their ability to individually assess defendants and fashion appropriate sentences for them.



1. See U.S. Sentencing Commission, Amendments to the Sentencing Guidelines (April 28, 2011), available at http://www.ussc.gov/Legal/Amendments/Reader-Friendly/20110428_RF_Amendments_Final.pdf [hereinafter Amendments].

2. Others (not addressed in this article) relate to child support, firearms and illegal re-entry offenses, and supervised release terms.

3. Patient Protection and Affordable Care Act of 2010, Pub. L. 111-148, §10606(a)(2) (2010) [hereinafter Patient Protection Act].

4. Fair Sentencing Act of 2010, Pub. L. No. 111-220 (2010).

5. Statement of Eric H. Holder, Jr., Attorney General of the United States, Before the U.S. Sentencing Commission, Hearing on Retroactive Application of the Proposed Amendment to the Federal Sentencing Guidelines Implementing the Fair Sentencing Act of 2010, at 2 (June 1, 2011), available at http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20110601/Testimony_AG_Eric_Holder.pdf [hereinafter Holder Statement].

6. See Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, §§805, 905, 1104 (directing the commission to increase the sentencing ranges for high-loss fraud offenses); U.S. Sentencing Guidelines Manual §2B1.1 (2001) (changes to fraud guidelines based on loss amount).

7. See, e.g., *United States v. Parris*, 573 F.Supp.2d 744, 754 (E.D.N.Y. 2008); *United States v. Adelson*, 441 F.Supp.2d 506, 512 (S.D.N.Y. 2006), aff'd, 237 Fed. Appx. 713 (2d Cir. 2007); Frank O. Bowman, III, "Pour encourager les autres? The Curious History and Distressing Implications of the Criminal Provisions of the Sarbanes-Oxley Act and the Sentencing Guidelines Amendments That Followed," 1 Ohio St. J. Crim. L. 373, 434 (2004).

8. Pub. L. No. 111-220, §8 (2010).

9. Pub. L. No. 104-38, §1-2 (1995).

10. U.S. Sentencing Guidelines Manual, App. C, Amendments 706 and 711.

11. Amendments at 42-44.

12. Amendments at 44-45.

13. The commission can authorize courts to apply amendments to the guidelines retroactively pursuant to 18 U.S.C. §3582(c)(2) and 28 U.S.C. §994(u). It does so under §1B1.10 of the guidelines.

14. Holder Statement at 3.

15. Memorandum from Kim Steven Hunt and Andrew Peterson to Patti Saris and Judith Sheon, "Recidivism Among Offenders With Sentence Modifications Made Pursuant to Retroactive Application of 2007 Crack Cocaine Amendment" (May 31, 2011), available at http://www.ussc.gov/Research/Research_Projects/Miscellaneous/20110527_Recidivism_2007_Crack_Cocaine_Amendment.pdf.

16. U.S. Sentencing Commission, 2010 Annual Report, ch. 5, at 32, available at http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2010/2010_Annual_Report_Chap5.pdf ("In 2010, the most frequently applied primary guidelines from the Guidelines Manual w[as] Drug Trafficking (31.3 percent)...").

17. Amendments at 81.

18. Id.

19. Id. at 80.

20. Id. at 19.

21. DOJ Press Release, Health Care Fraud Prevention and Enforcement Efforts Recover Record \$4 Billion; New Affordable Care Act Tools Will Help Fight Fraud (Jan. 24, 2011), available at <http://www.justice.gov/opa/pr/2011/January/11-asg-094.html>.

22. See Sentencing Reform Act of 1984, Pub. L. No. 98-473, §217 (codified as amended at 28 U.S.C. §994(o) (requiring the commission to "periodically...review and revise" the guidelines after consulting with various authorities on and representatives of the federal criminal justice system)).

23. Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act of 2003 (PROTECT Act), Pub. L. No. 108-21, §401 (2003).

24. *United States v. Booker*, 543 U.S. 220 (2005).

25. *Gall v. United States*, 552 U.S. 38, 49 (2007).