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THE SENTENCING GUIDELINES' NEW ZERO-POINT OFFENDER PROVISION

A GAME CHANGER, OR BUSINESS AS USUAL?

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SUMMARY

This article discusses Amendment 821 to the Sentencing Guidelines, which went into effect on November 1, 2023, adding a new "zero-point offender" adjustment. The white-collar bar lauded this amendment, which—at first blush—creates a new path to noncustodial sentences for prosecutions involving first-time offenders. Yet, as noted below, the "zero-point offender" adjustment may not have an all-too-significant impact in white-collar matters, particularly given the types of cases the U.S. Department of Justice (DOJ) routinely chooses to pursue. While there are, surely, instances where the new Guidelines amendment will have a material and favorable impact for defendants at sentencing, it is hardly a "get out of jail free" card, and defense counsel should be wary of viewing it as such.

THE 2023 AMENDMENTS TO THE SENTENCING GUIDELINES FOR ZERO-POINT OFFENDERS

Under Amendment 821 to the Sentencing Guidelines, which took effect on November 1, 2023, the United States Sentencing Commission added two new Guidelines provisions that are relevant here.

First, the Commission created an "Adjustment for Certain Zero-Point Offenders," now operative at Guideline § 4C1.1. Under this section, if a defendant satisfies ten specifically enumerated criteria (detailed further below), she is entitled to a two-level reduction in her total-offense level.

Second, as a practical guide for how the zero-point-offender adjustment should be implemented, the Commission added the following new application note 10(A) to Guideline § 5C1.1: "If the defendant received an adjustment under §4C1.1 (Adjustment for Certain Zero-Point Offenders) and the defendant's applicable guideline range is in Zone A or B of the Sentencing Table, a sentence *other than a sentence of imprisonment* . . . is generally appropriate." (Emphasis added.)[1]

What does this mean, in practice? Federal criminal lawyers are intimately familiar with the following image—the one-page sentencing table from Chapter 5 of the Guidelines, which is the starting point for calculating any defendant's sentencing range, based on the corresponding entry for total-offense level (the left-most column) and criminal-history category (the top-most row).

Traditionally, zero-point offenders (in criminal history I), whose total-offense level was between 1 and 8 fell within "Zone A" of the Guidelines; those whose total-offense level was between 9 and 11 fell within "Zone B." For both categories of individuals, the Guidelines allowed for alternatives to imprisonment (including probation or home detention) as an acceptable sentence. *See* Guideline § 5C1.1(b) and (c).

Now, take the example of a defendant whose offense level is 13, falling within "Zone C." If this individual satisfies the criteria for the new zero-point offender adjustment under Guideline § 4C1.1, her new total-offense level is **11**, now within "Zone B." Further, under the new application note 10(A) to Guideline 5C1.1, the Sentencing Commission directs that "a sentence other than a sentence of imprisonment," meaning—a non-custodial sentence—"is generally appropriate" for this individual.

This is a welcome change for first-time federal offenders charged with low-level offenses, who now have an avenue to argue for a non-custodial sentence as a within-Guidelines disposition, rather than seeking a downward variance (which can be a heavier lift, particularly in jurisdictions that routinely impose Guidelines sentences). But what about the "traditional" defendant in a white-collar prosecution brought by the DOJ? Is § 4C1.1 a similar game-changer?

THE LIKELY IMPACT OF THE ZERO-POINT OFFENDER ADJUSTMENT IN ROUTINE WHITE-COLLAR CASES

To outsiders, the federal government—particularly, the prosecutorial function of the executive branch—may appear a monolith with boundless means. The reality is much blander. The DOJ, and its component United States Attorney's Offices in federal districts across the country, are often constrained by limited resources. Against this backdrop, the frequent success of federal prosecutions is attributable not only to the talented lawyers who helm them, but the critical choice of whom (or whether) to charge. Indeed, federal charging decisions are largely discretionary. And in white-collar cases, charging decisions turn on certain threshold factors, including: (i) the amount of loss resulting from the offense; (ii) the presence of any vulnerable victims; and (iii) aggravating circumstances, if any, with respect to a defendant's role in the offense.

Of these, loss amount is often the driving factor in sentencing white-collar cases under the Guidelines. Crimes like wire, mail, or bank fraud are governed by Guideline § 2B1.1, which includes the following table of escalating offense levels tethered to increasing loss amounts:

Loss (apply the greatest)	**Increase in Level**

Loss (apply the greatest)	Increase in Level
(A) $6,500 or less	no increase
(B) More than $6,500	add 2
(C) More than $15,000	add 4
(D) More than $40,000	add 6
(E) More than $95,000	add 8
(F) More than $150,000	add 10
(G) More than $250,000	add 12
(H) More than $550,000	add 14
(I) More than $1,500,000	add 16
(J) More than $3,500,000	add 18
(K) More than $9,500,000	add 20
(L) More than $25,000,000	add 22
(M) More than $65,000,000	add 24
(N) More than $150,000,000	add 26
(O) More than $250,000,000	add 28
(P) More than $550,000,000	add 30.

Other Guidelines provisions governing traditional white-collar prosecutions, such as bribery or honest-services fraud (§ 2C1.1), and money laundering (§ 2S1.1), also cross-reference the above loss table in § 2B1.1. Typical United States Attorney's Offices or DOJ fraud units have "prosecution guidelines," which set loss thresholds (often, $250,000 or higher) before a case will be accepted for intake, meaning that the adjusted-offense level for a run-of-the-mill federal fraud prosecution—with no further enhancements—is at least 19.[2] Accounting for acceptance-of-responsibility credit under Guideline § 3E1.1 (which requires the entry of a timely guilty plea), that offense level is reduced by three levels to 16, falling within "Zone D" of the Sentencing Table. The upshot? A custodial sentence is warranted—required, even—according to the Guidelines.[3] Assuming that the defendant is eligible for the new zero-point offender adjustment under Guideline § 4C1.1, the total-offense level is 14, still within "Zone D." In short, despite the recent changes to the Guidelines, the possibility of prison is still very much on the table for a first-time offender in a routine federal white-collar case.

Notably, the Sentencing Commission added another application note—note 10(B)—to Guideline § 5C1.1, which states: "A departure, *including a departure to a sentence other than a sentence of*

imprisonment, may be appropriate if the defendant received an adjustment under §4C1.1 … and the defendant's applicable guideline range overstates the gravity of the offense *because* the offense of conviction is not a crime of violence or an otherwise serious offense." (Emphasis added.) This provision gives the zero-point offender adjustment additional bite.

Put differently, even where a defendant's total-offense level falls within Zone D, if she is eligible for the zero-point offender adjustment, she may yet be entitled to a noncustodial sentence, so long as her offense was not "a crime of violence" or "an otherwise serious offense." As to the former, the term "crime of violence" is defined elsewhere in the Guidelines (§ 4B1.2(a)), and few—if any—routine white-collar cases will fall within that category. The operative question is whether white-collar crimes are "otherwise serious offense[s]," a term *not* defined in the Guidelines. In the opening pages of the Guidelines Manual, the Commission remarks: "Under pre-guidelines sentencing practice, courts sentenced to probation an inappropriately high percentage of offenders guilty of certain economic crimes, such as theft, tax evasion, antitrust offenses, insider trading, fraud, and embezzlement, *that in the Commission's view are 'serious.*" USSG Ch. 1, Pt. A. § 4(d), intro. comment. (emphasis added). Given the apparent tension between Amendment 821 and the above preambular statements to the Guidelines, it remains to be seen whether—and to what extent—white-collar defendants eligible for the zero-point offender adjustment, whose total-offense level still falls within Zone D, receive the downward departures contemplated above.

DOJ'S LIKELY STRATEGIES TO OPPOSE THE APPLICATION OF GUIDELINE § 4C1.1 IN WHITE-COLLAR PROSECUTIONS

Some of the above discussion puts the cart before the horse, simply presuming that first-time white-collar defendants will invariably qualify for the new zero-point offender adjustment. Yet based on the types of white-collar cases it routinely pursues given its discretion, the DOJ will likely attack defendants' eligibility for relief under § 4C1.1 on numerous grounds. What follows, below, is: (1) a review of the various criteria required under the Guidelines to be eligible for the zero-point offender adjustment; and (2) an analysis of the principal criteria that the DOJ will likely emphasize, in white-collar cases, to argue why the adjustment should not apply.

Section 4C1.1 enumerates ten criteria that a defendant must meet to be eligible for a two-level downward adjustment to her offense level, namely:

(1) the defendant did not receive any criminal history points from Chapter Four, Part A;

(2) the defendant did not receive an adjustment under §3A1.4 (Terrorism);

(3) the defendant did not use violence or credible threats of violence in connection with the offense;

(4) the offense did not result in death or serious bodily injury;

(5) the instant offense of conviction is not a sex offense;

(6) the defendant did not personally cause substantial financial hardship;

(7) the defendant did not possess, receive, transport, transfer, sell, or otherwise dispose of a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;

(8) the instant offense is not covered by §2H1.1 (Offenses Involving Individual Rights);

(9) the defendant did not receive an adjustment under §3A1.1 (Hate Crime Motivation or **Vulnerable Victim**) or §3A1.5 (Serious Human Rights Offense); and

(10) the defendant did not receive an adjustment under §3B1.1 (Aggravating Role) and was not engaged in a continuing criminal enterprise, as defined in 21 U.S.C. § 848[.][4]

Of these, highlighted above are the three provisions—Criteria 6, 9, and 10—that the DOJ is likely to focus upon in contesting the applicability of § 4C1.1 in white-collar cases.

Turning first to Criterion 6: the term "substantial financial hardship" is defined elsewhere in the Guidelines, at application note 4(F) to § 2B1.1. Yet, the focus of that application note is whether "the offense" resulted in substantial financial hardship to the victim, directing a sentencing court to weigh a non-exhaustive list of factors, including whether "the offense" resulted in the victim becoming insolvent, filing for bankruptcy, or suffering substantial retirement losses, among other adverse outcomes. In § 4C1.1, however, the inquiry is whether the *defendant* "personally cause[d] substantial financial hardship," a case-dependent question. For instance, in investment frauds or Ponzi schemes, the DOJ would have fair argument that the defendant, not just the offense in the abstract, "personally cause[d] substantial financial hardship," if any, to the victim(s). But in complex multi-defendant cases, where an individual on the periphery furthered the scheme but did not directly interact with victims (*e.g.*, a money courier in an Internet romance scam case with co-schemers stationed in different countries), that becomes a closer question, one likely inuring to a zero-point offender's benefit under § 4C1.1.

Criterion 9 is also victim-focused; a defendant who receives a "vulnerable victim" enhancement under the Guidelines is automatically disqualified from receiving the two-level downward adjustment under § 4C1.1. Recall that DOJ's charging decisions in white-collar cases are largely discretionary, guided—in part—by the presence of vulnerable victims. Under its Elder Justice Initiative, the DOJ frequently prosecutes frauds or criminal schemes targeting elderly victims.[5] The DOJ's COVID-19 Fraud Task Force, meanwhile, has pursued cases against individuals who sold misbranded or fake cures for COVID-19 and other serious diseases.[6] These types of cases are primed for application of the "vulnerable victim" enhancement under § 3A1.1, exposing zero-point offenders to the same sentencing ranges after Amendment 821 to the Guidelines as they would have faced before.

Finally, Criterion 10 is particularly fraught. Other commentators have rightly noted that this "last criterion likely will be the subject of significant litigation." *See* Alan Ellis, Mark Allenbaugh, and Doug

Passon, "How Zero-Point Offender Change Will Work Prospectively," Law360 (Oct. 5, 2023). While acknowledging that "[o]n is face, it would appear to preclude any otherwise eligible defendant from receiving the zero-point offender adjustment simply if the defendant had received a role adjustment for being an organizer, leader, manager or supervisor in a criminal conspiracy," Ellis *et al.* surmise that "this is too narrow of a reading, as it ignores the continuing criminal enterprise prong"; they conclude "this last criterion for the zero-point offender adjustment should only preclude supervisors and up within criminal drug conspiracies from receiving the zero-point offender adjustment, and not, for example, a supervisor of a wire fraud conspiracy." *Id.*

That may be too optimistic a view. True, as Ellis *et al.* observe, the Commission "took the language in Criterion 10 of the amendment nearly verbatim from a criterion for receiving the so-called safety valve at Title 18 of the U.S. Code, Section 3553(f)(4), which states that 'the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise.'" *Id.* And in the § 3553(f)(4) context, courts have routinely held that a defendant is disqualified from safety-valve relief if she fails to establish *both* that she: (1) was not an organizer, leader, manager, or supervisor of the criminal activity; *and* (2) was not engaged in a continuing criminal enterprise. *See United States v. Bazel*, 80 F.3d 1140, 1142–45 (6th Cir. 1996); *United States v. Draheim*, 958 F.3d 651, 657–58 (7th Cir. 2020)). Extending that logic to Criterion 10, if a defendant qualifies for an aggravating-role enhancement under Guideline § 3B1.1, she will likely be ineligible for a zero-point offender adjustment under § 4C1.1, regardless whether she is *also* involved in a continuing criminal enterprise.

In short, even if a white-collar defendant has no prior criminal history, she is not presumptively entitled to relief under § 4C1.1. And the DOJ has several avenues—under this new provision—to contest the applicability of the two-level downward adjustment, especially given the types of white-collar cases the DOJ routinely pursues in its discretion.

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[1] Application note 10(B) to § 5C1.1, also newly added to the Guidelines, is addressed further below.

[2] Start with a base-offense level of 7 for crimes, like wire fraud, that carry a 20-year maximum term of imprisonment (USSG § 2B1.1(a)(1)), and add a 12-level loss enhancement (USSG § 2B1.1(b)(1)(G)).

[3] *See* Guideline §5C1.1(f) ("If the applicable guideline range is in Zone D of the Sentencing Table, the minimum term *shall be* satisfied by a sentence of imprisonment.") (emphasis added).

[4] Also known as the "Kingpin Statute," 21 U.S.C. § 848 targets large-scale drug-trafficking operations.

[5] *See* https://www.justice.gov/elderjustice.

[6] *See* https://www.justice.gov/usao-sdfl/pr/leaders-genesis-ii-church-health-and-healing-who-sold-toxic-bleach-fake-miracle-cure.

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Saurish Appleby-Bhattacharjee

Chicago / Los Angeles

saurish@bclplaw.com
+1 312 602 5004
