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November 06, 2023

### 2023 Amendments to Federal Sentencing Guidelines Now in Effect



On November 1, 2023, [significant amendments to the Federal Sentencing Guidelines](#) went into effect after Congress took no action to veto the proposed amendments, which were adopted by the U.S. Sentencing Commission earlier this spring.

This marks the first time in five years that the Guidelines have been amended, in part due to the Commission having a [lack of quorum](#) from 2019 through 2022.

The newly effective amendments enact, among other things, a new Chapter Four guideline, which provides for a decrease of two offense levels for "zero-point offenders" (that is, defendants with no prior criminal history) and whose instant offense did not involve certain enumerated criteria. In practical terms, this could mean months less of prison time, and tens of thousands of dollars less in fines, for zero-point offenders. The amendment also could have a particularly meaningful impact on white collar criminal defendants who, in many cases, have no prior criminal history.

#### **Two-Level Reduction for "Zero-Point Offenders"**

The new Chapter Four guideline, [U.S.S.G. § 4C1.1](#), provides that if the defendant is a zero-point offender and meets certain other criteria, the offense level will be decreased by two levels. Under the Guidelines, zero-point offenders are those with zero criminal history points and include (1) offenders with no prior convictions; (2) offenders with prior convictions that fall outside of the Guidelines' applicable time period, defined in [§ 4A1.2\(d\)](#) and (e); and (3) offenders with prior foreign or tribal court convictions, which are not counted.

The other criteria that must be met to qualify for the two-level decrease include the following:

- The defendant did not receive an adjustment under [§ 3A1.4](#) (Terrorism);
- The defendant did not use violence or credible threats of violence in connection with the instant offense;

- The instant offense did not result in death or serious bodily injury;
- The instant offense of conviction is not a sex offense;
- The defendant did not personally cause substantial financial hardship to the victim (such as causing the victim to become insolvent, filing for bankruptcy, suffering substantial loss of an investment fund, or making substantial changes to victim's employment, living arrangements, or the ability to obtain credit);
- The defendant did not possess, receive, purchase, transport, transfer, sell, or otherwise dispose of a firearm or other dangerous weapon (or induce another participant to do so) in connection with the instant offense;
- The instant offense is not covered by [§ 2H1.1](#) (Offenses Involving Individual Rights);
- The defendant did not receive an adjustment under [§ 3A1.1](#) (Hate Crime Motivation or Vulnerable Victim) or [§ 3A1.5](#) (Serious Human Rights Offense); and
- 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](#).

If the defendant is a zero-point offender and all of the above criteria are met, the defendant's offense level will be reduced by two levels under the Guidelines. Although pursuant to *United States v. Booker*, the Guidelines are advisory only and just one of the many factors courts must consider when "impos[ing] a sentence sufficient, but not greater than necessary, to comply with" the sentencing goals in [18 U.S.C. § 3553\(a\)](#), a two-level reduction in the offense level could mean materially shorter prison time and lower fines for qualifying defendants.

### **Retroactivity**

In addition to the new Chapter Four guideline, the U.S. Sentencing Commission also adopted an [amendment](#), now in effect, which provides that the two-level reduction for zero-point offenders will be given retroactive effect. This means, for any zero-point offenders currently incarcerated, they or their counsel could move the sentencing court for a determination as to whether (1) the defendant would fall within a lower Guidelines range; and (2) a reduction in the term of imprisonment is warranted. In adopting the retroactivity amendment, the Commission reasoned that "individuals with zero criminal history points have considerably lower recidivism rates than other sentenced individuals" and "courts generally depart and vary more often [from the Guidelines] in cases involving individuals with zero criminal history points as compared to other individuals."

The amendment provides, however, that a sentencing court may not order a reduced term of imprisonment based on retroactive application of U.S.S.G. § 4C1.1 unless the effective date of the court's order is February 1, 2024, or later. The Commission believed that this three-month delay would give the agencies of the federal criminal justice system responsible for assisting prisoner reentry into society time to prepare, as well as help the released individuals prepare, for that reentry. Although a reduced term of imprisonment based on the newly effective amendment cannot be ordered until February 1, 2024, the Commission explained that this did not preclude courts from conducting sentence reduction proceedings before that date, so long as the order has an effective date of February 1, 2024, or later.

Notably, in adopting the retroactivity amendment, the Commission [analyzed](#) the potential impact of retroactivity on currently incarcerated individuals and determined that applying the two-level reduction for zero-point offenders retroactively would have a meaningful impact. Specifically, the Commission estimated that 7,272 currently incarcerated individuals would have a lower Guidelines range as a result of U.S.S.G. § 4C1.1, with an average sentence reduction of 15 months (or 17.6%).

### **Conclusion**

The newly effective amendments to the Federal Sentencing Guidelines could reduce sentences for a large number of criminal defendants, including white collar criminal defendants, who are first time offenders. This includes both defendants who are awaiting sentencing and those who already have been sentenced. In light of these amendments, it is particularly important for white collar criminal defendants (or those under federal

investigation) to retain counsel who are well versed in, and stay abreast of changes to, the Federal Sentencing Guidelines. Such changes, as discussed herein, could have a material impact on any ultimate sentence imposed.

## **Authors**

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