

# THE **NUMBERS COUNT**

*Fraud and the Federal Sentencing Guidelines*

A White Paper Presented by

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**When you're looking at federal time, the numbers count. Criminal history points, offense levels, the number of alleged victims and the dollar amounts involved can all impact the amount of time that you serve. Here's what you need to know about federal white collar crimes and the sentences that are handed down.**

Each federal offense found in the United States Code carries a maximum sentence and fine imposed for breaking the law, but things are more complicated than that. Like many people, you might be unaware that you face a mandatory minimum prison sentence or that your sentence may be largely based on a recommended sentence determined by the United States Sentencing Guidelines.

The guidelines can make it challenging to predict exactly how much prison time is at stake, but they will likely have a big impact on the defense strategies that you and your attorney leverage in your case. They technically come into play during sentencing, after a person has pleaded guilty or been found guilty following a trial. However, they are important at all stages of your defense. You should know your guidelines range before you make major decisions, like whether to enter a guilty plea.

The guidelines have had a complicated history since they were created in 1984. Over the years, they have been revised many times. The most notable change came in 2005, when the Supreme Court held in a case called *United States v. Booker*<sup>1</sup> that guideline sentences are “advisory only.” The case changed the law, making the guideline sentences only recommendations instead of mandatory sentences that must be imposed.

*Even though the federal sentencing guidelines haven't been mandatory for years, more than 50% of defendants receive sentences that fall within the guideline range.*

Still, as the law stands now, the recommended guideline sentences carry a lot of weight with courts. Many courts impose the guideline's recommended sentence in full, even though they are not required to do so. In fact, studies have shown that defendants received sentences within the guideline range in over 50 percent of all cases being heard in the federal courts.<sup>2</sup>

# UNDERSTANDING THE BASICS OF THE FEDERAL SENTENCING GUIDELINES

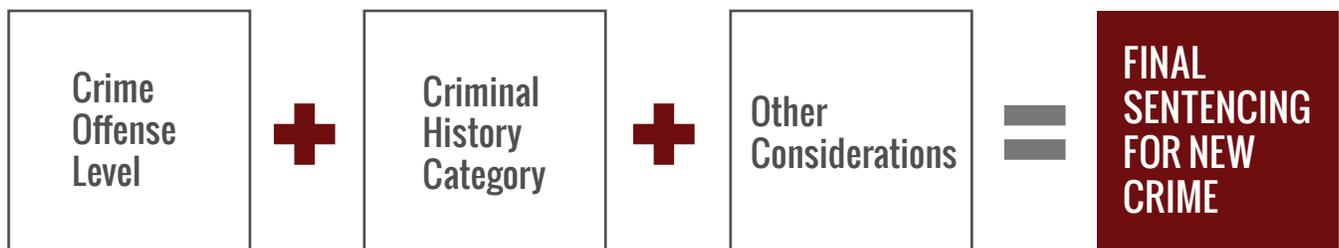
When a person is convicted, there are several factors that go into determining his or her sentence. The sentence will depend on the person's prior criminal history, the crimes charged and other factors that may increase or decrease the amount of time that the person serves.

At the most basic level, that number is determined by seeing where an offender falls on the "sentencing table." The court looks at the table and sees where the offense level intersects with the criminal history category. That intersection tells the court the guideline range, which is written in months.

## CALCULATING THE OFFENSE LEVEL

To determine a person's offense level, the court looks at the crime of which he or she was convicted. Each federal offense has a base offense level that ranges from 1 to 43.<sup>3</sup> The more serious the crime, the higher the base level assigned to it.

After determining the base offense level, the court considers factors that could lead to enhancements or departures from the guidelines to determine a new adjusted offense level. There are many of these factors, and we'll discuss them later in the white paper.



<sup>2</sup> 2013 U.S. Sentencing Commission Annual Report, Chapter 5, Page A-39.

<sup>3</sup> U.S.S.G. Chapter 5 – Determining the Sentence, Part A – Sentencing Table

# FEDERAL SENTENCING TABLE (in months of imprisonment)

ZONES	OFFENSE LEVEL	CRIMINAL HISTORY CATEGORY & POINTS					
		I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 +)
A	1	0-6	0-6	0-6	0-6	0-6	0-6
	2	0-6	0-6	0-6	0-6	0-6	1-7
	3	0-6	0-6	0-6	0-6	2-8	3-9
	4	0-6	0-6	0-6	2-8	4-10	6-12
	5	0-6	0-6	1-7	4-10	6-12	9-15
	6	0-6	1-7	2-8	6-12	9-15	12-18
	7	0-6	2-8	4-10	8-14	12-18	15-21
	8	0-6	4-10	6-12	10-16	15-21	18-24
B	9	4-10	6-12	8-14	12-18	18-24	21-27
	10	6-12	8-14	10-16	15-21	21-27	24-30
	11	8-14	10-16	12-18	18-24	24-30	27-33
C	12	10-16	12-18	15-21	21-27	27-33	30-37
	13	12-18	15-21	18-24	24-30	30-37	33-41
D	14	15-21	18-24	21-27	27-33	33-41	37-46
	15	18-24	21-27	24-30	30-37	37-46	41-51
	16	21-27	24-30	27-33	33-41	41-51	46-57
	17	24-30	30-37	37-46	46-57	51-62	61-72

*This is a section of the Federal Sentencing Table:  
As you can see, the Federal Sentencing Guidelines can be difficult to understand.*

## CONSIDERING THE CRIMINAL HISTORY CATEGORY

After evaluating the crime itself, sentencing judges then consider the prior criminal history of the defendant. The number of “criminal history points” in the person’s past determines his or her criminal history category. This can range from Level I, which is 0-1 points, all the way to Level VI, which is 13 points or higher. First-time offenders generally fall within the Level I category.

With some exceptions, the guidelines declare that extra criminal history points will be added to the offender’s total in certain situations<sup>4</sup>:

CRIMINAL HISTORY	EXTRA CRIMINAL HISTORY POINTS	MAXIMUM ADDITIONAL POINTS
People who have served a prior prison sentence of one year and one month or longer	+ 3	None
People who have served sentences running a total of 60 days to less than one year and one month	+ 2	None
People who served fewer than 60 days in jail, or no jail time, but did receive probation, fines or other penalties	+ 1	4
People who were on probation or parole at the time the offense was allegedly committed	+ 2	2
People who were previously convicted of a violent crime	+ 1	3

Once a person's criminal history category and offense level are determined, judges can use the Sentencing Table to see the number of months that an individual could serve under the guidelines.

**THE NUMBERS COUNT.** The addition of even one criminal history point, or the application of just one offense level increase,

can mean several more months in prison. That is why it is critical that your attorney pay attention to each and every detail, making sure that nothing is wrongly counted against you. As a former prosecutor as well as an experienced defense attorney, I have seen many cases in which the guidelines were applied to extend a person's prison sentence.

# APPLYING THE GUIDELINES TO FRAUD CASES: WHY THE AMOUNT OF MONEY AT ISSUE IS THE ISSUE

The sentences imposed in many fraud cases are covered by the United States Sentencing Guideline 2B1.1. This guideline also applies to larceny, embezzlement, forgery and theft, as well as many other types of white collar crimes.



# LARCENY, EMBEZZLEMENT, AND OTHER FORMS OF THEFT

## Specific Offense Characteristics

If the loss exceeded \$5,000, increase the offense level as follows:

### LOSS (APPLY THE GREATEST)

### INCREASE IN LEVEL

(A) \$5,000 or less	no increase
(B) More than \$5,000	add 2
(C) More than \$10,000	add 4
(D) More than \$30,000	add 6
(E) More than \$70,000	add 8
(F) More than \$120,000	add 10
(G) More than \$200,000	add 12
(H) More than \$400,000	add 14
(I) More than \$1,000,000	add 16
(J) More than \$2,500,000	add 18
(K) More than \$7,000,000	add 20
(L) More than \$20,000,000	add 22
(M) More than \$50,000,000	add 24
(N) More than \$100,000,000	add 26
(O) More than \$200,000,000	add 28
(P) More than \$400,000,000	add 30

The guideline says that these white collar crimes have a base offense level of seven<sup>5</sup> if the crime committed carries a maximum sentence of 20 years and six if the crime carries a maximum sentence of less than 20 years.

*When calculating a prison sentence, a difference of as little as \$1 could dramatically increase the amount of time to be served.*

However, the base offense level can increase dramatically if the “amount of (monetary) loss” involved in the crime is great. When this happens, a person’s sentence may be enhanced. According to the guidelines, the base offense level increases two spots if the amount of money is over \$5,000. If the amount is more than \$10,000, the offense level increases four spots, and so on, up to \$400 million. Anything over \$400 million leads to an extra 30 levels being added to the base number.<sup>6</sup>

So, what does this mean for defendants? It means that the difference of just \$1 could dramatically increase the amount of time served. It also means that the amount of money at issue is often a major point of conflict in white collar fraud cases, and attorneys must fight hard to make sure that the number involved is not calculated wrongly.

Things become even more complicated because the guideline doesn’t just talk about the actual loss that fraud victims experienced. It talks about something called “intended loss” – the amount of money that victims *could* have lost, even if they did not really lose that much in the end. In many cases, the intended loss is large. It may even be a number that was impossible or unlikely to occur.

The court looks at the actual loss, and it looks at the intended loss. It takes whatever number is larger and uses that number to calculate the amount of monetary loss involved in the

crime. A person who intended a large fraud that was unsuccessful is in trouble. So is someone who intended something small, but reaped large benefits.

The good news is that an experienced criminal defense attorney can often influence the way the loss is determined.

The courts are only required to establish a reasonable estimate of the loss. Especially in terms of intended loss, absolute accuracy is not required by the law. The estimate should be based on available information, and the court may consider a variety of different factors. The court may also choose from one of several different ways to calculate the loss. This can cause uncertainty for defendants who may find themselves facing significantly longer sentences just because a court considered one factor and not another, or just because it chose one way to add up the money involved.

There are other factors that also may lead to longer sentences for people convicted of fraud. Courts consider the number of victims when determining the offense level. If there are 10 or more victims, there is an increase of two levels. If there are 50 or more victims, there is an increase of four levels. If there are 250 or more victims, there is an increase of six levels.<sup>7</sup>



<sup>6</sup> U.S.S.G. § 2B1.1(b)(1)(P)

<sup>7</sup> U.S.S.G. § 2B1.1(b)(2)(C)

The court also considers the methods used to conduct the fraudulent scheme. One provision in the guidelines calls for an enhancement if the individuals used “sophisticated means” to carry out the offense.<sup>8</sup> What are sophisticated means? They could be many different things, from fake documents that allegedly cover up criminal activity to programs used by computer hackers. The more elaborate the scheme, the more likely it is that this enhancement will apply.

If the enhancement does apply, there are severe consequences for the defendant. The guideline says that two points will be added to the base offense level, with a minimum level of 12 if it is used in any particular case. That means that, even if the offender was at nine after the two points are added, he or she would automatically be raised to level 12 due to the sophisticated means enhancement.

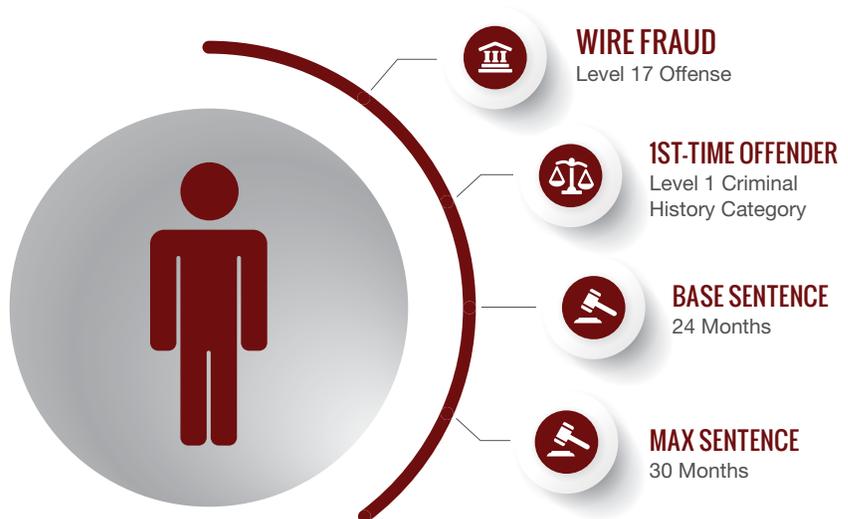
## IMAGINE AN EXAMPLE: SENTENCING GUIDELINES AND A PONZI SCHEME

To better understand how the sentencing guidelines work, imagine a man with no criminal history. He has never been in trouble with the law before, but he is being charged with wire fraud in connection with a Ponzi scheme. In a Ponzi scheme, the organizer typically makes promises of huge returns to investors in exchange for their investments. When a person invests in the fund, this money is then used to pay off earlier investors and reward the organizer. The scheme requires that new people be constantly recruited in order to maintain the funds necessary to repay those already involved. In many cases, the funds quickly dry up, leaving investors broke.

The man may have sent emails to 100 potential investors, calling for a \$5,000 investment, with a promise of

a \$7,500 return. If 20 people participated in the proposal, he will have made \$100,000.

Under the code, a conviction for wire fraud carries a possible maximum sentence of 30 years.<sup>9</sup> (Note that wire fraud is just one of the possible code sections that might apply in this case.) Because the man is a first-time offender, he falls in the Level I criminal history category.



The base offense level for this crime would be seven, since the maximum possible sentence exceeds 20 years.

With those numbers as the starting point, we can clearly see how enhancements might impact his case. With 20 possible victims, the offense level will increase two levels, placing him at level nine. Since the amount of money involved is over \$5,000, this, too, means a more severe recommended guideline. If he receives a total of \$100,000 from the investors, this could be an additional eight-level increase under the amount of loss enhancement, leaving him at an offense level 17. Other enhancements, such as the use of sophisticated means, are still possible.

So, how much prison time might be sentenced in his case? Someone with a zero criminal history level and a base offense level of 17 is looking at a potential minimum sentence of 24 to 30 months in prison under the federal sentencing guidelines, in addition to the fines connected to the case.

*Prosecutors rely on fear to encourage people to plead guilty. That's one of the reasons why 97% of people who were charged with a federal crime in 2013 pleaded guilty to the offense.*

# DON'T LET FEAR OF THE SENTENCING GUIDELINES KEEP YOU FROM PROTECTING YOUR RIGHTS

These numbers can be terrifying to someone facing fraud charges. Fear may be one of the main reasons that nearly 97 percent of people who were charged with a federal crime in 2013 pleaded guilty to the offense.<sup>10</sup>

Prosecutors leverage that fear to get people to plead guilty to fraud and other white collar criminal charges. They tell them about the years in prison they face, and then they offer lesser time in exchange for a plea.

Many of the people who accepted plea deals last year may not have had any idea about any of the steps that an experienced attorney could have taken to present a defense to white collar criminal allegations.

If they failed to consult an attorney before meeting with prosecutors, they may have been led to believe there was no option but to plead guilty to the charges they were facing.

## HERE'S THE TRUTH

With an experienced lawyer's help, there may be opportunities for a downward departure from the sentencing recommendations. There may also be opportunities to have charges dropped or reduced, or to go to trial and be acquitted. The best way to protect your interests and avoid potentially strict consequences is to involve a lawyer as soon as possible – even before formal charges have been filed.

Many people discover that they are being charged with a federal white collar crime when they receive a "target letter" from the government. The letter states that there is a pending investigation and that there is enough information to convene a grand jury to determine if charges will be brought forward in the case. Those who receive notification of a pending investigation need to take immediate action by consulting an experienced criminal defense attorney as soon as possible. An attorney can begin analyzing the situation to determine if any sentencing departures may be available.



*In my years as a criminal defense attorney handling federal fraud cases, I have come to understand that the math involved in prison sentences is serious. When it comes to the federal sentencing guidelines, the numbers count, and you must be able to count on your attorney.*

*Patrick Roberts*

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