

## WHITE-COLLAR CRIME

## Expert Analysis

# Life After 'Booker': Insights From Federal Sentencing Data

Following the Supreme Court's landmark 2005 decision in *United States v. Booker*, 543 U.S. 220 (2005), which transformed the U.S. Sentencing Guidelines from mandatory to advisory, the question of how sentencing judges would exercise their restored discretion has been a matter of great interest. In 2012 the Sentencing Commission issued to Congress a comprehensive "Report on the Continuing Impact of *United States v. Booker* on Federal Sentencing," which undertook analyses of approximately six years of sentencing data following the *Booker* ruling and presented various findings related to the ruling's impact. Now that another six years of post-*Booker* sentencing statistics have become available with the commission's recent issuance of its Sentencing Databook for fiscal year 2017, the time is ripe to reexamine the data, both nationally and specific to the U.S. Court of Appeals for the Second Circuit, focusing on insights of particular interest to white-collar practitioners.

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*Booker* period, from 12.1 percent in 2006 to 17.4 percent in 2011 to 20.1 percent in 2017, with some leveling off in more recent years. Notably, of all categories of crime nationwide in the post-*Booker* period, fraud cases—where the guidelines calculation is driven by the much-criticized loss tables—consistently have been at or near the top for the proportion of nongovernment sponsored

below range sentences. (Because much of the sentencing data that segregates crimes into categories uses the category "fraud," which embraces a fairly broad group of economic crimes sentenced under guidelines Section 2B1.1, the fraud category provides a useful proxy for white-collar crimes generally).

In short, the sentencing data over the past six years show a continuation of key trends observed during the first six years following the *Booker* decision that have been welcome to practitioners and many district judges, if not to the Sentencing Commission: district courts firmly embracing their discretion to tailor individualized sentences, with courts expressing regional differences, and those in the Second Circuit taking the lead in ameliorating the excesses of the guidelines in the main category of white-collar cases.

### Key Findings of 2012 Post-'Booker' Report

The most relevant high-level findings of the 2012 post-*Booker* report, based on the commission staff's analysis of the nationwide sentencing data over the first six years following *Booker*, included that the guidelines remained the starting point for all federal sentences and continued to influence sentences significantly; that the influence of the guidelines, as measured by the

relationship between the average guideline minimum and the average sentence, generally remained stable in the major categories of offenses, but diminished in fraud offenses (and some others); and that for most offense types, the rate of within range sentences decreased while the rate of below range sentences—both government sponsored and non-government sponsored—increased over time.

Notably, the post-*Booker* report also found that the influence of the guidelines varied significantly by circuit, as well as by offense. In fraud offenses in particular, over the first six post-*Booker* years, within range rates decreased in every circuit. The proportion of below range sentences nationwide—generally above 50 percent—was greatest for fraud cases among all crime categories. But the proportion was significantly greater in some circuits than in others; for example, for fraud offenses in the Second Circuit, the rate of nongovernment sponsored below range sentences in fraud cases increased over the six-year period analyzed such that by the end of that period, the rates of nongovernment sponsored below range sentences was higher than the rates of within range sentences. This pattern did not occur in any other circuit. Further, the data also showed that in the Second Circuit, changes in average sentences for fraud cases over time did not parallel changes in average guideline minimums, which increased substantially over the six post-*Booker* years analyzed. For the period, the difference between the guidelines minimum and sentence imposed in fraud cases in the Second Circuit averaged 38.1 percent.

The post-*Booker* report also found that variation in the rates of nongovernment sponsored below range sentences among judges within the same district increased in most districts. The report includes an appendix with charts analyzing, for each circuit and district, both

the frequency and extent of below-guideline sentences, on a judge-by-judge basis without listing names. The broad takeaway, which will not be surprising to practitioners, is that generally speaking judges with similarly sized caseloads imposed nongovernment sponsored below range sentences at very different rates.

### U.S. Sentencing Commission Data From 2017

Flashing forward to the recently released sentencing data for fiscal year 2017 (available at <https://www.ussc.gov/topic/data-reports>), the new data reveal that almost half, 47.9 percent, of the more than 66,000 federal cases nationwide resulted in the imposition of a sentence below the guideline range. Focusing on nongovernment sponsored below range sentences, where the court imposes a below guidelines sentence based on a defense request or on its own accord, 20.1 percent of federal defendants received such below range sentences in 2017.

The second category of below range sentences contemplated by the guidelines is government sponsored below range sentences, which is further separated into: Section 5K1.1 departures attributable to a defendant's "substantial assistance" to the government; Section 5K3.1 departures available where a defendant enters an early disposition program; and "other" where the government agrees to a below guideline sentence for reasons other than a defendant's cooperation or participation in an early disposition program. In 2017, 27.8 percent received government sponsored below range sentences; 39 percent of these (or 10.8 percent of the total number of cases) were the result of the defendant's cooperation efforts.

The statistics show that these numbers are higher in fraud cases when

compared to the national average. Fraud cases accounted for approximately 9 percent of the total number of criminal cases brought by the federal government in 2017. More than half, 55.2 percent, of all fraud cases resulted in a below guideline sentence, with the split 28.1 percent nongovernment sponsored and 27.1 percent government sponsored. Sixty-two percent of the government sponsored below range sentences in fraud cases (or 16.8 percent of the total number of fraud cases) were the result of the defendant's cooperation.

A review of sentencing statistics for the past six years, from 2012 through 2017, reveals that the number of within guideline sentences for all offense categories has continued to decrease, to as low as 46 percent in 2014 and remaining below the 50 percent mark since. The total number of non-government sponsored below range sentences fluctuated between 18 and 21 percent between 2013 through 2017. Meanwhile, the number of below range sentences based on government motions pursuant to Section 5K1.1 has shown a slight decrease since 2014, falling from 12.8 percent in that year to 10.8 percent in 2017.

### Drilling Down Further on White-Collar Cases

Given the volume and complexity of white-collar cases brought in courts geographically located in and around Manhattan, the financial center of the country, it is interesting to review how the national numbers compare to figures from the Southern District of New York, Eastern District of New York, District of Connecticut and District of New Jersey.

The proportion of nongovernment sponsored below range sentences in fraud cases was the highest in the

District of Connecticut in 2017, where such reductions accounted for 46.6 percent of all fraud cases, all of which were *Booker*-related, that is, pursuant to the court's general authority under the main sentencing statute, 18 U.S.C. Section 3553(a). The Southern and Eastern Districts of New York were not far behind with 45.1 and 40.6 percent of nongovernment sponsored below range sentences in fraud cases, respectively. The District of New Jersey had the lowest number of nongovernment sponsored below range sentences in fraud cases in 2017—20.9 percent total.

In almost all of these districts, the number of below guideline sentences resulting from a defendant's cooperation and the sentencing court's reliance on Section 5K1.1 were higher than the national figures. The highest percentage was in the District of New Jersey where 41.1 percent of all fraud cases involved a cooperating defendant. Following was the Eastern District of New York with 34.6 percent, the Southern District of New York with 21.3 percent and finally the District of Connecticut with 8.9 percent (or four out of 45 total reported fraud cases in the District of Connecticut in fiscal year 2017).

The figures from 2017 reflect a post-*Booker* consistency from the district courts in and around Manhattan. With a few exceptions, between 2012 and 2017, the number of nongovernment sponsored below guideline sentences in fraud cases in these courts exceeded the national average. The Southern District of New York led the way with *Booker*-related reductions between 2012 and 2014, handing the crown off to the Eastern District of New York in 2015 and then to the District of Connecticut in 2016 and 2017. The District of New Jersey consistently had the lowest number of non-government sponsored below range sentences during

that same period. In contrast, the District of New Jersey led the pack in the number of Section 5K1.1 below-guideline departures in fraud cases between 2012 and 2017. With one exception (the District of Connecticut in 2017), all of the courts reported Section 5K1.1 departures to be higher than the national average in fraud cases.

### The Degree of Below-Guidelines Reductions

The Sentencing Commission data for 2017 reveals that, nationwide, the difference between the bottom of the sentencing range and the actual sentence imposed is significant, particularly in white-collar cases. Unfortunately, the commission does not make readily available offense-specific data on the

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extent of below range reductions broken down by circuit or district. With respect to nongovernment sponsored below range sentences nationwide the median decrease from the guideline minimum across all offense categories is 35.1 percent. In fraud cases nationwide, the median decrease from the guideline minimum is significantly greater at 47.8 percent.

Not surprisingly, in government sponsored below range cases, the numbers are higher. Focusing only on those government sponsored below range cases where the departure is due to Section 5K1.1, in all federal cases nationwide,

there is a 49.2 percent median decrease from the guideline minimum. In fraud cases this number jumps to a 77.1 percent decrease from the guideline minimum. Thus, the benefit derived by defendants from cooperating is substantial in all cases and particularly in white-collar cases. This high rate may be somewhat exaggerated, however. As practitioners are aware, in cooperation cases, guidelines ranges tend to be inflated, both because the cooperating defendant will likely provide information that increases the loss amount and other factors that increase the guidelines range, and because cooperating defendants have less incentive and opportunity to contest the loss amounts attributable to them than defendants who do not cooperate.

For the period 2012 to 2016, the figures were similar to those found in the 2017 data. In each year, the median reduction in fraud cases nationwide was always higher than the average across all offense types, for both *Booker*-related below range sentences and Section 5K1.1 departures.

### Conclusion

In sum, the data over the past six years supports the continuation of welcome trends observed over the first six years after *Booker*: district courts exercising their restored discretion to tailor sentences individually, with courts in the Second Circuit taking a leading role in mitigating the well-recognized excessive harshness of the fraud guidelines.