

What Goes Up Can Come Down

Discretion to Impose Lower Fraud Sentences

By **Jodi Misher Peikin**
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The pattern playing out in the current economic crisis is familiar: With financial collapse and scandal, the public is insisting that corporate executives be held accountable and Congress is pressing the Sentencing Commission to ensure sentences for economic offenses are sufficiently severe.

The Dodd-Frank Wall Street Reform and Consumer Protection Act (Pub.L. 111-203, H.R. 4173), which was signed into law in July 2010, directs the Commission to review and amend the Sentencing Guidelines for certain fraud offenses, just as Sarbanes-Oxley did ten years ago. The Commission's Sarbanes-Oxley amendments led to fraud sentences exponentially greater than the sentences under the original Guidelines Manual, and a similar result will likely follow from Dodd-Frank.

Does this mean that defendants and their counsel should abandon all hope? Not necessarily. Whatever sentencing "enhancements" Dodd-Frank inspires, defense counsel can take refuge in recent decisions permitting district courts not to follow the guidelines if they disagree with them.

NOT ALL GUIDELINES ARE CREATED EQUAL

After *United States v. Booker*, 534 U.S. 220 (2005), rendered the guidelines advisory, courts disagreed on when sentenc-

es could vary from the guidelines range. Some courts doubted they could decline to impose a guidelines sentence simply because they disagreed, not with how the guidelines fit a particular defendant, but with the policy reflected in the guidelines generally. The Supreme Court resolved this doubt in *Kimbrough v. United States*, 552 U.S. 85 (2007), holding that, even in ordinary cases, district courts can impose a non-guidelines sentence if they conclude that the guidelines sentence would be greater than necessary to achieve the statutory purposes of sentencing. (Those purposes, set forth in 18 U.S.C. § 3553(a), include the need to provide just punishment and adequate deterrence.) The Court later emphasized district courts' discretion, explaining that courts can vary from guidelines they "categorically" disagree with on policy grounds, regardless of whether "particular circumstances" justify a variance. *Spears v. United States*, 129 S.Ct. 840, 844 (2009).

Courts still must consider the guidelines in determining a sentence and adequately explain variances from them, but the Supreme Court has confirmed that not all of them are entitled to the same deference. Most guidelines were developed by the Commission based on data regarding past sentencing practice, guided by "professional staff with appropriate expertise." According to the Court, only guidelines reflecting those "institutional strengths" are likely to recommend sentences satisfying 18 U.S.C. § 3553(a). The crack cocaine guidelines at issue in *Kimbrough*, however, were based on the mandatory minimum sentences for drug offenses established by Congress. Because those guidelines do not "exemplify" the Commission's "characteristic institutional role," district courts have greater discretion to disagree with them for gen-

eral policy reasons. *Kimbrough*, 552 U.S. at 109-110.

After *Kimbrough*, defense attorneys began searching for other guidelines that lack grounding in empirical data or resulted from Congressional goading. The search paid off in cases involving the guidelines for child-pornography offenses: Courts have agreed that those Guidelines do not deserve the "usual" deference. For example, in *U.S. v. Dorvee*, 616 F.3d 174 (2d Cir. 2010), the Second Circuit found that a guidelines sentence of 240 months' imprisonment for distribution of child pornography was unreasonably long. This decision was premised partly on the fact that the child-pornography guidelines were not based on "data about past sentencing practice." Instead, the Commission amended those guidelines at Congress's direction, "each time recommending harsher penalties." *Id.* at 184. The Second Circuit also found that, because the enhancements "cobbled together" in the child-pornography guidelines apply in virtually all cases, they do not distinguish between dangerous and non-dangerous offenders. This means the advisory ranges can be close to the statutory maximum even for first-time offenders, and can "easily generate unreasonable results." *Id.* at 186-188.

The Third Circuit reached a similar conclusion in *U.S. v. Grober*, 2010 WL 4188237 (3rd Cir. Oct. 26, 2010). In that case, although the child-pornography guidelines called for a sentence of 235-293 months, the district court concluded that their lack of empirical support made them unreliable and imposed a 60-month sentence. The Third Circuit affirmed, finding that because the child-pornography guidelines were largely the result of "congressional directives" rather than the Commission's expertise, district courts

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are free to conclude that they are likely to yield excessive sentences. *Id.* at *12-13. The Third Circuit appeared to recognize that congressional directives to the Commission are often prompted more by political pressure than by sound sentencing policy, noting that, if Congress wants to restrict judicial discretion, it can amend the pertinent statute.

DECONSTRUCTING THE FRAUD GUIDELINES

The history of the fraud guidelines, which are in § 2B1.1 of the Guidelines Manual, suggests they are vulnerable to a similar attack. In developing the guidelines for economic offenses, the Sentencing Commission departed from past practice, in which many white-collar defendants received probation, and chose to recommend “a short but definite period of confinement.” The resulting sentences were “significantly more severe.” United States Sentencing Commission, *Fifteen Years of Guidelines Sentencing* at 47, 55-56 (2004).

Since then, Congress has pressured the Commission to make the penalties even higher. After the guidelines amendments directed by Sarbanes-Oxley, a defendant in a high-loss fraud case whose sentence under the original guidelines would have been less than five years can easily face a guidelines sentence of life imprisonment. See 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, 428 (2004). See also “Deconstructing the Guidelines,” http://www.fd.org/odstb_SentencingResource3.htm#DECONS, a Web site maintained by the Office of Defender Services that collects papers analyzing the fraud and other guidelines.

Given this history, district courts should be able to vary from the fraud guidelines if they disagree with them on policy grounds just as readily as they can vary from the crack cocaine or child-pornography guidelines. Although courts haven't yet specifically relied on the history of Congress-directed amendments as a reason not to follow the fraud guidelines, numerous courts already disagree with the sentences generated by those amendments. In *U.S. v. Parris*, 573 F. Supp.2d 744 (E.D.N.Y. 2008), the court concluded

that the fraud guidelines fail to provide sensible guidance because their focus on loss amount and their numerous, easily triggered “offense characteristic” enhancements mean that “any officer or director of virtually any public corporation who has committed securities fraud will be confronted with a guidelines calculation either calling for or approaching lifetime imprisonment.” And in *U.S. v. Adelson*, the court found that, contrary to the fraud guidelines' recommendation of lengthy sentences, the need for both general deterrence and punishment could be satisfied by “relatively short sentences.” 441 F. Supp. 2d 506, 514, *aff'd*, 301 Fed. Appx. 93 (2d Cir. 2008). Cf. *Gall v. United States*, 552 U.S. 38, 48 (2007) (sentences of probation “substantially restrict [defendants'] liberty”).

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Another ground for disagreement is the guidelines' failure to account for the punishment caused when a conviction ends a defendant's career or causes other collateral consequences. See *U.S. v. Stewart*, 590 F.3d 93, 141 (2d Cir. 2009) (“It is difficult to see how a court can properly calibrate a ‘just punishment’ if it does not consider the collateral effects of a particular sentence.”).

Former federal prosecutors agree that the fraud guidelines are deeply flawed. In a letter to a district court, six former Attorneys General and 14 former U.S. Attorneys declared that the fraud guidelines often recommend sentencing ranges “that are indisputably far ‘greater than necessary’ and lack any common sentencing wisdom.” Letter dated April 26, 2010 to Judge Linda R. Reade regarding the sentencing of Sholom Rubashkin, from Janet Reno, et al.

DOJ DÉJÀ VU

Despite the backlash against the often over-inflated sentences the guidelines recommend, the DOJ appears to be seeking further amendments to the fraud

guidelines that will yield even higher sentences. In a letter to the Sentencing Commission from the DOJ's Director of Policy and Legislation, the DOJ decried the fact that judges have imposed below-guidelines sentences on white-collar defendants. Just as it did after Sarbanes-Oxley, the DOJ claimed that the “recent economic crisis” demonstrates the need for “certain and significant” prison terms. And the DOJ urged the Commission to consider proposing amendments to the fraud guidelines or recommending “new statutory penalties.” Letter dated June 28, 2010 to the Hon. William K. Sessions from Jonathan J. Wroblewski at 2, 4-5.

Judge John Gleeson, in the Eastern District of New York, has publicly disagreed with the DOJ's position. See *U.S. v. Ovid*, 2010 WL 3940724 (E.D.N.Y. Oct. 1, 2010). Far from seeing below-guidelines sentences as a cause for concern, Judge Gleeson believes that because “fraud cases present a wide spectrum of culpability,” carefully applying the § 3553(a) factors to fraud defendants “may properly result” in sentences “well below the advisory range.” Judge Gleeson also disputes the need for amendments to fraud guidelines that are “way too complicated” already. The fraud Guidelines “do[] not account for many of the myriad factors that are properly considered in fashioning just sentences, and indeed no workable guideline could ever do so.” *Id.* at *1, 9.

History predicts that the Commission will not share Judge Gleeson's view and will respond to Dodd-Frank and the DOJ with guidelines amendments that produce higher recommended sentences. Fortunately, cases like *Kimbrough* and *Dorvee* make clear that judges need not impose them.