Proposed 2017 Amendments to Sentencing Guidelines May Be Good News for Tax Offenders

By Evan J. Davis and Steven Toscher

Evan J. Davis and Steven Toscher examine proposed Federal Sentencing Guideline amendments and a related study that highlights low recidivism rates for offenders who share characteristics with most tax offenders: first offenders, fraud conviction, 40+ years old and well-educated.

Federal judges are required to calculate accurately an offender's criminal history category and offense level under the Federal Sentencing Guidelines ("Guidelines") before pronouncing a sentence. The criminal history category and offense level are two axes on a grid, which together generate a recommended Guideline sentencing range for every offender. Since 2005, as a result of the Supreme Court's *Booker* decision, the Guidelines are no longer mandatory, but instead merely advisory; the truth, however, is that many judges still hew to the Guidelines when sentencing most offenders.[1]

Around December 1 of each year, the Federal Sentencing Commission ("Commission") proposes changes to the Guidelines, which have both generally applicable and crime-specific sections. The proposed 2017 amendments do not include recommended changes to the tax-specific Guidelines. However, two recent events may lead to lower sentences for tax offenders: the March 2016 publication of a comprehensive study of recidivism rates, and the related proposed 2017 amendments that would lower the Guideline offense level for first-time offenders and collapse Zones B and C of the Guideline recommended-sentence grid. These two

STEVEN TOSCHER and **EVAN J. DAVIS** are Principals with Hochman, Salkin, Rettig, Toscher & Perez, P.C., in Beverly Hills, California.

© 2017 E.J. DAVIS AND S. TOSCHER

developments further bolster why long sentences for tax offenders are not only unwarranted in many situations but could be counterproductive.

Background of the Sentencing Guidelines

Title 28 USC §3553(a) mandates that a sentencing court must impose "a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in" Section 3553(a)(2). Those purposes are: deterrence; reflecting the seriousness of the offense; promoting respect for the law; providing just punishment; protecting the public from the defendant's further crimes; and providing needed treatment or training in a correctional setting. The court is also required to consider the nature and circumstances of the offense and the history and characteristics of the defendant; the advisory Guidelines; available sentences (*e.g.,* whether probation is a prohibited sentence); avoiding unwarranted sentencing disparities compared to similarly situated defendants; and restitution.

Although the Guidelines are only one of the many factors—the "starting point"—that courts are required to consider at sentencing, for some judges, the Guidelines remain very influential.

Although the Guidelines are only one of the many factors—the "starting point"—that courts are required to consider at sentencing, for some judges, the Guidelines remain very influential. Absent fact-specific circumstances surrounding the nature of the crime or the history and characteristics of the defendant, many judges consider a Guideline sentence the default result. Why? For a handful of reasons.

First, much work and thought has been put into the Guidelines, which were designed to reflect and balance all of the Sec. 3553(a) factors noted above. They are updated annually, after consultation with federal judges, among others, so it should come as no surprise that other federal judges respect the outcome of this process.

Second, the Guidelines are a comfort zone. Many, if not most, federal judges have no experience with sentencing in the absence of Guidelines. The Guidelines were enacted in 1987, and between 1987 and 2005's *Booker* decision, they were treated as mandatory, meaning that judges in most cases were required to impose a sentence within the calculated Guideline range. Even if they chafed at sentences in particular cases, judges became familiar with using the Guidelines as the sole basis for determining a sentence absent what was referred to as a "departure" from the Guidelines. In the wake of *Booker*, the Guidelines did not become irrelevant; courts are still required to accurately calculate the Guidelines. More importantly, imposing a within-Guidelines sentence reduces the risk that the sentence will be overturned on appeal as being unreasonable, as judges can justify their sentences by referencing the Sentencing Commission's reasoning.[2] Judges do not like having their sentencing judgments reversed and remanded for a new sentencing.

Third, consistency. The Guidelines were enacted largely to ensure sentencing consistency across the country, and avoid situations where nearly identical defendants in two different districts (or even in front of different judges in the same district) receive drastically different sentences.[3] This is one of the main reasons that the Department of Justice (DOJ) still treats the Guidelines as effectively mandatory for internal purposes, such as continuing to require that prosecutors obtain approval to seek a below-Guidelines sentence. In addition, for many reasons, the DOJ cares about consistency in tax matters more than almost any other category of cases.

Judges Are Bucking the Tax Guidelines

In the most-recent analysis of sentences in tax cases, the trends suggest that judges are becoming more lenient now that *Booker* has returned discretion to the district courts.[4] Between 2011 and 2015, the average minimum Guideline recommended sentence in tax cases increased from 24 to 26 months (roughly correlated to Offense Levels 17 and 18), but at the same time the average sentence judges actually imposed decreased, from 18 to 17 months (roughly correlated to Offense Levels 15 and 14). In fact, the percentage of within-Guideline sentences imposed has plunged in those five years, from 37.1 percent to just 25 percent. It seems that judges are becoming less tethered to the Tax Guidelines because most or all of this reduction is attributable to judges exercising their discretion to impose lower sentences over the government's objection: each year judges were more likely to impose a sentence below the minimum Guidelines recommendation *even if* the government was not recommending a below-Guidelines sentence.

This regression toward pre-Guideline average sentences of 12 months for tax offenders who did not receive probation—which pre-Guideline average is stated (and implicitly criticized) in the Background notes to Guideline Section 2T1.1—is not surprising when one also looks at the statistics for who commits tax crimes. The average tax offender qualifies for membership in the AARP, at 50 years old. Over 81 percent of tax offenders have little or no criminal history, as they are in the lowest Criminal History category. Although not specifically identified in the 2015 Tax Fraud synopsis, in our experience tax offenders also tend to be better educated that average federal defendants as well.

Recent Study of Recidivism Supports Lower Tax Sentences

In March 2016, the Sentencing Commission published a study of recidivism (including re-arrest, re-conviction, and re-incarceration) rates, broken down by various measures. This study shows the wide discrepancy between offenders in the various Criminal History categories, as well as between young and old offenders, and violent versus nonviolent offenses. Although the data were not made available so that one could plug in a defendant's characteristics and see their statistical likelihood of reoffending—as helpful as that might be to a judge—all signs in the study point to an exceedingly low recidivism rate for tax offenders when risk characteristics are layered upon each other.

As noted above, the vast majority of tax offenders have little or no criminal history, and the re-arrest rates for persons with zero criminal history points were just 30.2 percent, compared to 81.5 percent for those who had more than 10 points. Interestingly, there was a large re-arrest rate jump between those with zero criminal history points—which includes never-arrested persons as well as those convicted of minor offenses or an offense more than 10 years old—and those with just one point, from 30.2 percent to 46.9 percent. This highlights the differences between first-time offenders and merely low-level or infrequent offenders.

In addition to the low re-arrest rate for persons with zero criminal history points, which is most tax offenders, the re-arrest rate for fraud offenses was the lowest among all identified categories, at 34.2 percent. Compare that to firearms offenses, at nearly 70 percent.

Moving to age of offender, this statistic also cuts in favor of tax offenders having a low re-arrest rate. Offenders who are under 21 when sentenced reoffend at nearly a 71-percent rate, while those who are over 60 reoffend at just a 14-percent rate. Offenders in their 40s and 50s are also at a much lower likelihood of reoffending, at 36 and 22 percent, respectively.

Education level also makes a huge difference in re-arrest rate, with offenders having college degrees reoffending at just a 19-percent rate versus those without a high school diploma reoffending at a 60-percent rate.

Interestingly, re-arrest rates across Offense Level calculations—designed to measure the seriousness of the offense—were relatively flat, meaning that recidivism appears weakly correlated to the seriousness of the offense. Someone who stole a little money is just as likely to reoffend as someone who stole a lot.

Because the DOJ Tax Division and the IRS care about the length of sentence—they believe that the length of sentence plays an important role in deterring would-be tax criminals.

Although the numbers could be skewed by the less-serious nature of the crimes involved, sentences of straight probation and between zero and six months of incarceration shared a low likelihood of re-arrest, at roughly 35 percent. This compares to a relatively flat rate of re-arrest of roughly 50 percent for all durations above six months. One could argue that this statistic gives credence to those who suggest that prisons make offenders more likely to reoffend and demonstrates why a noncustodial sentence such as home detention may be more effective at protecting the public than a relatively short sentence of incarceration.

Finally, looking at re-arrest, re-conviction, and re-incarceration rates compared to the Guideline range, the lowest category for all three types of recidivism was "Non-Government Sponsored Below Range." This category reflects when judges reject prosecutors' higher recommendations and go below the Guidelines range. The fact that this is the lowest category—even lower than those when prosecutors recommend a below-range sentence—supports the view that judges are in the best position to assess an offender's recidivism risk.

The upshot of this study, at least for tax offenders, is that the average tax offender—older, better educated, with a fraud-type offense, and with little or no criminal history—is unlikely to reoffend. This means that specific deterrence of the offender and protecting the public from future crimes of the offender, which are two of the 3553(a) factors, militate in favor of little or no incarceration for most tax criminals.

Proposed Guidelines Amendments

As of 2016, one of the stated goals of the Sentencing Commission is to "encourage the use of alternatives to incarceration," which is in tension with the 2T1.1 Tax Guideline's stated goal of increasing the average prison sentence for tax offenders.[5] In light of the Sentencing Commission's 2016 goal, and in part driven by the results of the March 2016 study and its mandate to reduce federal prison overcrowding, the Commission has recommended two 2017 Guideline amendments that could result in less incarceration for tax offenders: combining Zones B and C of the sentencing table and reducing Offense Levels for "First Offenders."[6]

The effect of combining Zones B and C of the sentencing table will be to encourage judges to impose non-prison sentences on more offenders, which dovetails with the Commission's 2016 goal. As the table current exists, a Guideline range in Zone B permits judges to substitute alternative confinement, such as home detention or a halfway house, for imprisonment. Zone C, on the other hand, requires that the court impose a term of imprisonment of at least 50 percent of the Guideline sentencing range. For example, if the Guideline range is 12–18 months (based on Offense Level 13 and Criminal History Category 1), a court would have to impose at least six months of imprisonment under the current Guidelines grid. Under this proposed revision, judges will have greater flexibility to construct exclusively home-confinement or halfway house sentences for slightly higher Guideline ranges currently in Zone C.

However, the more-dramatic change for tax offenders is the proposal to give a two-point Offense Level reduction for First Offenders. This proposed amendment—explicitly driven by the March 2016 recidivism study—will reduce first-time tax offenders' Offense Level by one or two points. These reductions could have a dramatic effect on sentences imposed. If the sentence reductions move in lock-step with the proposed Guideline reduction, 2015's average sentence of 17 months would drop to as low as 12 months. Thirty years after the Tax Guidelines were adopted in part to increase average sentences from 12 months, *Booker* and Guideline amendments may bring us back to where we started—and maybe that is where we should be. The pre-Guideline sentences were the product of years of experience of federal judges charged with the responsibility of sentencing persons guilty of tax crimes. Perhaps, these judges had it right.

Conclusion

Although the March 2016 recidivism study casts doubt on the specific-deterrence value of longer sentences, prosecutors will continue to fight for within-Guideline sentences because they believe longer sentences deter other would-be offenders (general deterrence). This could be an uphill battle in light of the proposed Guideline Amendments and the post-*Booker* trend of the past five years, toward reduced sentences despite higher average Offense Levels and that prosecutors were not asking for the sentencing reduction. Judges will go their own way, and the proposed Guideline amendments could accelerate the recent trend toward sentences that mirror lower, pre-Guideline sentences. If this prediction comes to pass, then the Tax Division and IRS may have to rely on more tax prosecutions, instead of longer sentences, to deter tax crimes.

ENDNOTES

[1] *Booker*, 543 US 220 (2005).

[2] *Rita*, 551 US 338 (2007) (appropriate for appellate courts to presume that a within-Guideline sentence was reasonable).

[3] *Rita*, 551 US at 349.

[4] *See www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Tax_Fraud_FY15.pdf.*

[5] *See www.ussc.gov/policymaking/federal-register-notices/federal-register-notice-final-2017-priorities.*

[6] *See www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20161219_rf_proposed.pdf*; *www.ussc.gov/about/news/press-releases/december-9-2016* (describing the purposes of the proposed amendments).

This article is reprinted with the publisher's permission from the JOURNAL OF TAX PRACTICE & PROCEDURE, a bi-monthly journal published by Wolters Kluwer. Copying or distribution without the publisher's permission is prohibited. To subscribe to the JOURNAL OF TAX PRACTICE & PROCEDURE or other Wolters Kluwer Journals please call 800-449-8114 or visit CCHGroup.com. All views expressed in the articles and columns are those of the author and not necessarily those of Wolters Kluwer or any other person.