Recent Amendment to the U.S. Sentencing Guidelines Allows for More Lenient Sentencing of Nonviolent First-Time Offenders

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Earlier this year, the U.S. Sentencing Commission voted to approve several amendments to the U.S. Sentencing Guidelines, including promulgating a new guideline at §4C1.1, entitled *Adjustments for Certain Zero-Point Offenders*, thus paving the way for more lenient sentences for certain nonviolent, first-time offenders. Late last month, the Commission voted to make these amendments retroactive. Because most white-collar defendants have no criminal history, §4C1.1 is likely to have a significant impact on sentencing in white-collar cases, both going forward and (now that it's retroactive) for those currently in custody.

Absent Congressional action, §4C1.1 will take effect on November 1, 2023, becoming retroactive on February 1, 2024. As we approach these dates, here is what practitioners and those potentially eligible for the adjustment need to know:

What is the Zero-Point Offender Adjustment?

Section 4C1.1 allows for a two-level reduction to a defendant's offense level for certain first-time offenders. As a reminder, a defendant's offense level is one of two variables (along with the defendant's criminal history category) that determines their advisory guidelines range. The lower the offense level (or criminal history category), the lower the advisory guidelines range.

Who qualifies for the adjustment?

To qualify for the adjustment, a defendant must—

- have no criminal history points;
- not have received a terrorism adjustment under USSG §3A1.4;
- not have used violence or credible threats of violence in connection with the instant offense;
- not be convicted of an offense resulting in death or serious bodily injury;
- not be convicted in the instant case of a sex offense;
- not have personally caused substantial financial hardship (*more on this below*);

- not have possessed, received, purchased, transported, transferred, sold, or otherwise disposed of a firearm or other dangerous weapon (or induced someone else to do so) in connection with the offense;
- not have committed a civil rights offense covered under USSG §2H1.1;
- not have received an adjustment under USSG §3A1.1 for committing a hate crime or USSG §3A1.5 for committing a serious human rights offense; and
- not have received an aggravating role adjustment under USSG §3B1.1 and was not engaged in a continuing criminal enterprise, as defined in 21 U.S.C. § 848.

If any of the foregoing apply, the defendant is ineligible for the zero-point offender adjustment.

Of all the criteria for a §4C1.1 adjustment, the biggest stumbling block for most white-collar defendants is likely to be §4C1.1(a)(6), barring the adjustment for defendants who "personally cause substantial financial hardship." In determining whether that's the case, the guideline directs the court to consider, among other factors, whether the offense resulted in the victim: (i) becoming insolvent; (ii) filing of bankruptcy under Chapter 11; (iii) suffering a substantial loss of retirement, education, or other savings or investment fund; (iv) making a substantial change in employment, such as postponing retirement plans; (v) making substantial change in living arrangements, such as relocating to a less expensive home; and (vi) suffering substantial harm to his or her ability to obtain credit.

What is the impact of the adjustment?

For those facing a severe sentence, §4C1.1's two-level downward adjustment could shave months—in some cases, years—off the ultimate sentence imposed. The impact of the reduction depends in large measure on the defendant's base offense level. The higher the defendant's base offense level, the bigger the reduction. For example, for a defendant with a base offense level of 15, the two-level adjustment would reduce the bottom end of the defendant's guidelines range by six months, while for a defendant with a base offense level of 30, the adjustment would cut the range by 19 months.

Low-level offenders will benefit even further from the Commission's changes. New commentary added to USSG §5C1.1 specifies that a non-custodial sentence is "generally appropriate" for defendants who both receive §4C1.1's zero-point adjustment and have an adjusted offense level of 11 or less.

Why did the Commission make this change?

The Commission voted to pass §4C1.1 following years of research showing that defendants with zero criminal history points have considerably lower recidivism rates than other offenders, including lower recidivism rates than the offenders in Criminal History Category I with one criminal history point. As just one example, the Commission found that the re-arrest rate for "zero-point" offenders was over one-third less than the same rate for "one-point" offenders (26.8% compared to 42.3%)—the largest variation of any comparison of offenders within the same Criminal History Category.

Although the changes aren't yet in effect, defendants that will stand to benefit from the amendments should nonetheless argue for the application of adjustment now. The Commission's intent is clear: zero-point offenders should not face the same consequences as those who have criminal history.

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