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# How the Federal Sentencing Guidelines Work: An Abridged Overview

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## Summary

Sentencing for all serious federal noncapital crimes begins with the federal Sentencing Guidelines. Congress establishes the maximum penalty and sometimes the minimum penalty for every federal crime by statute. In between, the Guidelines establish a series of escalating sentencing ranges based on the circumstances of the offense and the criminal record of the offender. The Guidelines do so using a score-keeping procedure. The Guidelines process involves:

- I. Identification of the most appropriate Guidelines section for the crime(s) of conviction, based on the nature of the offense (the most commonly applicable are noted in the Guidelines Index)
- II. Identification of the applicable base offense level indicated by the section
- III. Addition/subtraction of offense levels per section instructions for the circumstances in the case at hand
- IV. Addition/subtraction of offense levels per instructions in those chapters of the Guidelines relating to
  - A. Victim related matters
  - B. Role in the offense
  - C. Obstruction
  - D. Multiple counts
  - E. Acceptance of responsibility
- V. Calculation of the criminal history score
- VI. Consideration of departures (more/less severe treatment) which the Guidelines permit
- VII. Application Guidelines instructions relating to
  - A. Imprisonment (Sentencing Table)
  - B. Probation
  - C. Supervised release
  - D. Special assessments
  - E. Fines
  - F. Restitution
  - G. Forfeiture

VIII. Sentencing of Organizations

IX. Deviation based on the sentencing principles in 18 U.S.C. 3553(a).

This is an abridged version of a longer report entitled to CRS Report R41696, *How the Federal Sentencing Guidelines Work: A Brief Overview*, without the footnotes, attribution, citations, or full content found in the longer report.

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## **Introduction**

The federal Sentencing Guidelines greatly influence the sentences imposed for federal crimes. Once binding on federal courts, the Guidelines are now the starting point for federal sentencing in most cases. They provide the principal standard against which the reasonableness of any sentence imposed is judged. In the last quarter of FY2014, over 75% of the sentences imposed by federal courts fell within the sentence ranges recommended by the Guidelines or within those ranges but reduced by prosecution endorsed departures recommended in the Guidelines.

The Guidelines are the work of the U.S. Sentencing Commission. Congress created the commission and authorized the Guidelines in the Sentencing Reform Act of 1984. The first Guidelines were promulgated with an effective date of November 1, 1987. The commission may promulgate amendments which become effective 180 days after they are presented to Congress, absent congressional action.

Sentencing under the Guidelines is essentially a score-keeping exercise, not unlike the procedure for filling out a federal income tax return. The process involves assigning “offense levels” for a particular offense based on the nature of the offense and the circumstances under which it was committed. Under the Guidelines, most sentencing determinations follow from the final offense level identified at the end of the process. The sentencing ranges for any term of imprisonment depend both on the final offense level and upon the offender’s criminal history score calculated on the basis of his past criminal record and divided into categories. Each of the possible forty-three offense levels has six sentencing ranges corresponding to the six criminal history categories

## **Preliminaries**

In noncapital cases, federal sentencing begins after a conviction at trial or more often pursuant to a plea agreement. Unless excused by the court, a probation officer will conduct a presentence investigation in anticipation of providing the court with a presentence report. The investigation includes an interview with the defendant. The report will include a detailed recitation of factual information and of the Guideline and statutory provisions which the officer believes relevant and applicable. The parties are supplied with copies of the report, afforded an opportunity to comment, and may be allowed to present evidence to the court relating to objections to the report. A party who objects to a recommendation in the report bears the burden of proof by a preponderance of the evidence.

The court must begin its sentencing determinations with a calculation of the sentencing range called for under the Guidelines. Before imposing sentence the court must give the parties and victims of the crime a chance to be heard. Having identified the applicable Guideline range, the court, in the exercise of its sentencing discretion, considers it along with the other sentencing factors found in 18 U.S.C. 3553(a) and with any other applicable statutory demands, such as the requirement to impose a minimum sentence of imprisonment in some instances.

## Sentencing Calculations

In imposing sentence, the court will include a detailed explanation of its determinations and may impose probation, a fine, a special assessment, a term of incarceration, a term of supervised release, an obligation to pay restitution, and/or order forfeiture. The court may adjust an earlier sentence to correct clear error or to reflect substantial assistance to the government. The parties may challenge on appeal the sentence or determinations upon which it is based. The court's sentence will be upheld on appeal, if it is found procedurally and substantively reasonable.

*Base Offense Levels:* A Guideline calculation is required for every serious offense for which the defendant is convicted. In most instances, the Guideline Index notes the Guideline offense section that corresponds to the offense of conviction. In other instances, the most closely analogous section applies.

A few offense sections list a single offense level. Most, however, list two or more alternative base offense levels; indicate circumstances under which offense levels are to be added or subtracted; cross reference to the application of another offense section under some circumstances; or do some combination of the three. The offense section for drug trafficking, for instance, lists 5 alternative base offense levels, grounded primarily on the type and amount of the controlled substance involved. Four of those set minimum offense levels when the offense also involves a serious injury; the fifth refers to the Drug Quantity Table which contains an array of 17 escalating offense levels based on the amount and type of drug involved. In order to account for the cases which involve more than one type of controlled substance, the Guideline contains a drug equivalence table under which marijuana is used as the standard and other drugs are assigned an equivalent weight. For instance, 1 gram of heroin is treated as the equivalent of 1 kilogram of marijuana. It also lists 14 circumstances under which offense levels must be added to or subtracted from the base offense level (e.g., a two-level increase for possession of a firearm during the course of the offense).

*Adjustments:* The Guidelines make adjustments for victim-related factors, the extent of the offender's participation (role in the offense), obstruction, conviction for multiple offenses, and the offender's acceptance of responsibility.

The Guidelines make adjustments in five victim-related situations: (1) when the victim is vulnerable or the offense is hate crime motivated; (2) when the victim is or was a government official or member of the officer's immediate family; (3) when the victim is restrained; (4) when the offense is a federal crime of terrorism; and (5) when the offense is a serious human rights offense.

The Guidelines devote five sections to matters related to the offender's role in the crime of conviction: (1) aggravating roles, (2) mitigating roles, (3) abuse of a position of trust or use of special skill, (4) use of a minor, and (5) use of body armor in a drug trafficking offense or a crime of violence.

The Guidelines may adjust an offender's offense level based on his level of participation in the offense of conviction. There is no adjustment for the one-man crime or the defendant of average culpability in a crime with more than one offender. On the other hand, leaders or organizers of a large criminal endeavor, and their managerial subordinates warrant offense level increases. Conversely, minimal participants in an offense merit.

An enhancement awaits a defendant who “abuse[s] a position of public or private trust, or use[s] a special skill, in a manner than significantly facilitate[s] the commission or concealment of the offense.” A similar enhancement accompanies using, directing, commanding, encouraging, intimidating, counseling, training, procuring, recruiting, or soliciting a child under the age of 18 to commit a federal offense or to avoid apprehension; or attempting to do so. A defendant convicted of a crime of violence or a drug trafficking crime faces an enhancement, if body armor was involved in the offense.

Obstruction may result in a sentencing enhancement under any of four sections: (1) obstruction or impeding the administration of justice, (2) reckless endangerment during flight, (3) commission of an offense while on release and (4) false registration of a domain name.

The Guidelines use a procedure called grouping to account for a defendant’s simultaneous convictions for several crimes within a single offense level. The crimes of conviction are divided into groups of related offenses (similar crimes/same harm/same victim/common scheme) and the offense level for each group is calculated using the most serious offense in the group as if it were the only offense of conviction. The offenses levels for each group are then assigned a number of units, the total converted into offense levels, and combined.

Defendants are entitled to credit when they accept responsibility for their misconduct.

*Criminal History:* A defendant’s criminal record may be of consequence under the Guidelines for two reasons. First, each of the final offense levels is divided into six criminal history categories with its own sentencing range corresponding to the extent of the defendant’s criminal record. Second, a defendant’s criminal history will trigger repeat offender enhancements in some instances.

*Repeat Offenders:* A defendant’s final offense level and in some instances his criminal history category may also be modified to reflect his past criminal record. The Guidelines do so in the case of career offenders, professional offenders, armed career offenders, and child molesting recidivists.

## **Departures**

As a general matter, the Guidelines permit departure on any grounds that a court finds the Guidelines have not taken into account or have not taken into account to the extent appropriate. When a pattern of departures suggests that a factor has not been adequately addressed, the commission has generally taken up the matter in order to avoid unwarranted sentencing disparity and for compliance with the principles articulated in 18 U.S.C. 3553(a). The Guidelines acknowledge that a trial court in an individual case may consider the Guidelines sentence either too severe or insufficiently punitive. They speak to the concern in four ways. First, throughout the Guidelines, they note instances where either an upward or downward departure may be appropriate. Second, they discuss when criminal history-related departures may be appropriate. Third, they identify specific offender characteristics that permit or do not permit departure from the norm. Fourth, they identify offense characteristics that permit or do not permit such a departure.

Most of the departures suggested in individual Guidelines indicate when an upward departure may be warranted. Many refer, expressly or implicitly, to one or more of the departures found in

Part 5K of the Guidelines. Some are general; some are very specific. A few mention instances under which either an upward or a downward departure may be fitting.

The Guidelines sometimes permit a sentencing court to depart from the defendant's otherwise applicable criminal history category, when the circumstances indicate the assignment either underestimates or overestimates the seriousness of the defendant's criminal record. The factors that mark a case in which an upward departure may be fitting include foreign, tribal, or other sentences not counted for criminal history purposes; sentences imposed for different crimes on different occasions; civil or administrative disposition of similar misconduct; pending criminal trial or sentencing on other charges; and similar criminal conduct without a criminal conviction (arrests may not be counted). When an upward departure is appropriate but the defendant is already in Category VI, the court may seek out the offense level where the sentencing range for Category VI is most appropriate.

Downward Category departures may be granted, but no comparable traversing of offense levels is permitted merely because Category I overestimates the seriousness of the defendant's criminal history. Nor may a court depart downward from the Category assigned armed career criminals under §4B1.4 or recidivist child molesters under §4B1.5.

The Guidelines recognize a dozen offender characteristics that may be relevant to an offense level departure decision: age, education, mental and emotional conditions, physical condition, employment record, family, role in the offense, criminal history, crime as a livelihood, invidious discrimination, public service, and lack of youthful guidance. The Guidelines identify 24 circumstances, most related to the crime of conviction, under which departure may be warranted, ranging from substantial assistance for authorities to harm caused or aberrant behavior. Some departures, the Guidelines simply proscribe. Numbered among them are prohibited departures based on the defendant's race, sex, national origin, creed, religion, economic status, and the like.

## **Determination of Sentence**

The final offense level and criminal history category for the offense(s) of conviction after any departures help to determine whether a particular type of sentence should be imposed and if so to what extent.

*Probation:* The Guidelines limit probation, imposed without any condition of accompanying confinement, to cases in which the applicable offense levels and criminal history categories translate to a sentencing range that tops out at 6 months imprisonment (Zone A). If the top of the applicable range is imprisonment for 14 months (15 months in the case of Categories V and VI)(Zone B), the Guidelines authorize probation as long as it is accompanied by a requirement for some form of confinement (a halfway house, weekend imprisonment, home confinement). Probation may be for no more than five years or less than a year.

The Guidelines mention four forms of confinement that may be imposed in conjunction with probation: community confinement, home detention, shock incarceration, and intermittent confinement. Community confinement refers to being a resident in a halfway house, a rehabilitation center, or the like. Home detention, as the name implies, is supervised confinement at home that permits the defendant to work, go to school, perform community service, or attend to personal needs elsewhere. Intermittent confinement refers to imprisonment on less than a full schedule – night-time, weekend or some other form of less than full time imprisonment. A shock



incarceration program is a boot camp program, a program that apparently was discontinued at the federal level some years ago.

*Imprisonment:* Unless the sentence of conviction carries a statutory mandatory minimum, the Guidelines sentence is one that is within the sentencing range for the final offense level and criminal history category for the defendant's crime of conviction. If the sentencing range is between 15 and 21 months or higher (Zone D), the defendant is ineligible for a split sentence involving incarceration in prison as well as at home, in a halfway house, or on an intermittent schedule.

*Supervised Release:* Supervised release is imposed at sentencing and served after the defendant has served his full sentence of imprisonment (less any reduction for good behavior). As a general rule, the maximum for a term of supervised release is not more than 5 years, if the defendant was convicted of an offense with a maximum penalty of 25 years' imprisonment or higher; not more than 3 years, if the maximum is less than 25 years but more than 5 years; and not more than 1 year for other offenses. Most controlled substance offenses, however, have mandatory minimum terms of supervised release, often higher than the general maximum. The same is true of terrorism offenses and sexual offenses committed against children.

*Assessments, Fines, Forfeiture, and Restitution:* The Guidelines replicate the statute which dictates that a convicted defendant is to be assessed \$100 for a felony conviction; \$25 for a Class A misdemeanor (punishable by imprisonment for from 6 months to 1 year); \$10 for a Class B misdemeanor (punishable by imprisonment for from 30 days to 6 months); \$5 for a Class C misdemeanor or infraction (not punishable by imprisonment or punishable by imprisonment for not more than 30 days). The Justice for Victims of Trafficking Act of 2015 calls for a second assessment in the amount of \$5,000, imposed on non-indigents convicted of certain sex or human trafficking offenses.

Federal law sets an upper limit on fines in felony cases at \$250,000, although a few statutes authorize a higher fine for specific offenses. For example, the maximum fine for trafficking in 5 kilograms or more of cocaine is \$4 million. The Guidelines establish an escalating series of fine ranges based on the offense level for crimes subject to the \$250,000 cap. The range for crimes with an offense level of 3 and below is \$100 to \$5,000. At the other end of the spectrum, crimes with an offense level of 38 or higher have a fine range of \$25,000 to \$250,000. The Guidelines permit the court to consider the extent of restitution, which the defendant has paid or owes, when it determines the amount of the fine to impose.

The forfeiture Guideline declares in its entirety, "Forfeiture is to be imposed upon a convicted defendant as provided by statute." Forfeiture is the confiscation of property occasioned by the property's proximity to a particular crime. Some federal criminal statutes, including the Controlled Substance Act, provide that property derived from or used to facilitate a violation of their provisions are subject to confiscation. Confiscation may be accomplished either through civil or criminal procedures. The forfeiture referred to in the Guidelines is criminal forfeiture and proceedings are conducted pursuant to Rule 32.2 of the Federal Rules of Criminal Procedure following conviction.

Without statutory authorization, a sentencing court may not order a defendant to pay restitution to his victims. Several federal statutes supply the necessary authorization under most circumstances. As a general rule, a court must order restitution following conviction for a crime of violence, fraud or other crime against property proscribed in title 18 of the U.S. Code, or for product

tampering. A court may order restitution following conviction for a controlled substance offense, any offense proscribed in title 18 of the Code, for certain crimes committed aboard an aircraft, or as a condition of probation or supervised release. There are also several restitution provisions that apply to specific offenses. The Guidelines track the statutory provisions.

## **Procedures**

Chapter 6 of the Guidelines replicates and parses some of the statutory and rule provisions that govern sentencing: 18 U.S.C. 3553, as well as Rules 32 and 11 of the Federal Rules of Criminal Procedure. Unless otherwise directed by the court, a probation officer must conduct a presentencing investigation and report. Copies of the report must be presented to the prosecution and defense, who may object to any of its provisions or omissions. The court is to rule on any unresolved disputes following a sentencing hearing. If the court intends to depart from the sentence prescribed by the Guidelines, it must give the parties prior notice. The Guidelines point out that the court will honor the victims' rights provisions of 18 U.S.C. 3771 during the sentencing process. They describe the plea bargain procedures articulated in Rule 11 of the Federal Rules of Criminal Procedure. They close with the observation that a plea agreement may include a statement of stipulated facts, which is not binding on the court and may be subject to local court rules.

## **Sentencing Organizations**

Under federal law, a corporation is criminally liable for the crimes, committed at least in part for its benefit, by its authorized employees and agents, unless Congress has provided otherwise by statute. Chapter 8 of the Guidelines establishes a separate, related but distinct, sentencing regime for organizations. For purposes of the Guidelines, an organization is any legal entity that is not an individual. Chapter 8 establishes its own governing principles and scoring procedure to determine the recommended sentence under the Guidelines. Organizational sentences must: (1) compel the defendant organization to remedy any harm caused by the offense of conviction to the extent practicable; (2) strip the assets of any entity operated primarily for criminal purposes or by criminal means; (3) reflect the seriousness of the offense and the organization's culpability; and (4) include probation when needed. Chapter 8's procedure involves: (a) an identification of the appropriate remedial measures; (b) calculation of the applicable fine; (c) determination of whether and under what conditions probation should be imposed; and (d) compliance with statutory requirements for special assessments, forfeitures, and costs.

## **Section 3553(a) Considerations**

Having discerned the sentencing range recommended by the Guidelines for either individual or organizational defendants, a court must consult the provisions of 18 U.S.C. 3553(a) to determine the appropriate sentence. Subsection 3553(a) begins with the observation that the court should impose "a sentence sufficient, but not greater than necessary, to comply with purposes set forth" in the section. It then identifies factors other than the recommendations of the Guidelines to be considered before imposing sentence.

# Appellate Review

The trial court must present in open court and justify the sentence it imposes. The sentence and court’s justifications may be appealed by either the defendant or the government or both. The sentence will be upheld on appeal if it is substantively and procedurally reasonable. A sentence is procedurally reasonable if it is free of “significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the §3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence – including an explanation for any deviation from the Guidelines range.” A sentence is substantively reasonable if it is reasonable under the circumstances; it is substantively unreasonable if it ignores a relevant sentencing factor, if it overvalues a relatively minor sentencing consideration, or if it undervalues a significant sentencing factor. The appellate court may consider reasonable a sentence within the Guidelines sentencing range, but it may not consider a sentence unreasonable simply because it rests outside that range.

**Table I. Sentencing Table**

(In months of imprisonment)

		<b>Criminal History Category (Criminal History Points)</b>					
		<b>I (0 or 1)</b>	<b>II (2 or 3)</b>	<b>III (4, 5, 6)</b>	<b>IV (7, 8, 9)</b>	<b>V (10, 11, 12)</b>	<b>VI (13 or more)</b>
<b>Zone A</b>	<b>1</b>	0-6	0-6	0-6	0-6	0-6	0-6
	<b>2</b>	0-6	0-6	0-6	0-6	0-6	1-7
	<b>3</b>	0-6	0-6	0-6	0-6	2-8	3-9
	<b>4</b>	0-6	0-6	0-6	2-8	4-10	6-12
	<b>5</b>	0-6	0-6	1-7	4-10	6-12	9-15
	<b>6</b>	0-6	1-7	2-8	6-12	9-15	12-18
	<b>7</b>	0-6	2-8	4-10	8-14	12-18	15-21
	<b>8</b>	0-6	4-10	6-12	10-16	15-21	18-24
<b>Zone B</b>	<b>9</b>	4-10	6-12	8-14	12-18	18-24	21-27
	<b>10</b>	6-12	8-14	10-16	15-21	21-27	24-30
<b>Zone C</b>	<b>11</b>	8-14	10-16	12-18	18-24	24-30	27-33
	<b>12</b>	10-16	12-18	15-21	21-27	27-33	30-37
<b>Zone D</b>	<b>13</b>	12-18	15-21	18-24	24-30	30-37	33-41
	<b>14</b>	15-21	18-24	21-27	27-33	33-41	37-46
	<b>15</b>	18-24	21-27	24-30	30-37	37-46	41-51
	<b>16</b>	21-27	24-30	27-33	33-41	41-51	46-57
	<b>17</b>	24-30	27-33	30-37	37-46	46-57	51-63
	<b>18</b>	27-33	30-37	33-41	41-51	51-63	57-71

19	30-37	33-41	37-46	46-57	57-71	63-78
20	33-41	37-46	41-51	51-63	63-78	70-87
21	37-46	41-51	46-57	57-71	70-87	77-96
22	41-51	46-57	51-63	63-78	77-96	84-105
23	46-57	51-63	57-71	70-87	84-105	92-115
24	51-63	57-71	63-78	77-96	92-115	100-125
25	57-71	63-78	70-87	84-105	100-125	110-137
26	63-78	70-87	78-97	92-115	110-137	120-150
27	70-87	78-97	87-108	100-125	120-150	130-162
28	78-97	87-108	97-121	110-137	130-162	140-175
29	87-108	97-121	108-135	121-151	140-175	151-188
30	97-121	108-135	121-151	135-168	151-188	168-210
31	108-135	121-151	135-168	151-188	168-210	188-235
32	121-151	135-168	151-188	168-210	188-235	210-262
33	135-168	151-188	168-210	188-235	210-262	235-293
34	151-188	168-210	188-235	210-262	235-293	262-327
35	168-210	188-235	210-262	235-293	262-327	292-365
36	188-235	210-262	235-293	262-327	292-365	324-405
37	210-262	235-293	262-327	292-365	324-405	360-life
38	235-293	262-327	292-365	324-405	360-life	360-life
39	262-327	292-365	324-405	360-life	360-life	360-life
40	292-365	324-405	360-life	360-life	360-life	360-life
41	324-405	360-life	360-life	360-life	360-life	360-life
42	360-life	360-life	360-life	360-life	360-life	360-life
43	life	life	life	life	life	life

Source: U.S. Sentencing Commission.

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