

KOSTELANETZ & FINK, LLP

Presents



Federal Sentencing Update November 2019

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Brian P. Ketcham joined the law firm of Kostelanetz & Fink, LLP in 2011. Mr. Ketcham concentrates his work on criminal and civil tax controversies, white collar criminal matters, and civil litigation. He represents clients facing criminal charges in state and federal courts, individuals under government investigation, and taxpayers before the Internal Revenue Service and the NY State Department of Taxation. Mr. Ketcham also has experience involving regulatory and internal investigations.

Prior to joining Kostelanetz & Fink, LLP, Mr. Ketcham completed two clerkships in the United States District Court for the Eastern District of New York. From December 2009 to December 2010, Mr. Ketcham served as a law clerk to U.S. District Judge Roslynn R. Mauskopf. And, from November 2008 to November 2009, Mr. Ketcham served as a law clerk to U.S. Magistrate Judge Joan M. Azrack. In addition to his clerkship experience, while attending law school Mr. Ketcham served as a full-time case manager and courtroom deputy for several federal judges in the Eastern District, in both the Brooklyn and Central Islip divisions.

Mr. Ketcham received his J.D. from Brooklyn Law School in 2008, where he received several honors, including Dean's List and CALI Excellence for the Future Awards in Alternative Dispute Resolutions and Comparative Criminal Procedure.



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Brooklyn Law School, J.D. (2008)

BAR ADMISSIONS

New York, 2009

U.S.D.C. Southern District of New York, 2011

U.S.D.C. Eastern District of New York, 2011

Second Circuit Court of Appeals, 2012

U.S. Tax Court, 2012

Timed Agenda for CLE:

Federal Sentencing Update – Presented by Brian P. Ketcham, Esq.

November 21, 2019, 9:00AM-10:00AM

Kostelanetz & Fink, LLP

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Topic	Time
Sources of Federal Sentencing Law – the U.S.S.G.	
• Authority and Applicability	3 min.
• In Practice	3 min.
Common Sentencing Enhancements in Tax and White Collar Cases	12 min.
Sources of Sentencing Law – 18 U.S.C. § 3553(a)	9 min.
Tax Loss – How Accountants Can Help	3 min.
How Accountants Can Help – Examples	3 min.
Sentencing Procedures and Practices	3 min.
Sentencing Advocacy	3 min.
The Sentencing Memorandum	3 min.
The Sentencing Hearing	3 min.
New Developments in FBAR Cases	3 min.
The Tax Table vs. The Fraud Table	3 min.
The Effect on the Sentencing Range Can be Profound	3 min.
The Effect on the Sentencing Range <i>Has Been</i> Profound	3 min.
<i>United States v. Manafort (E.D.Va.)</i> - Application of the Fraud Table Rather than the Tax Table (Simplified)	3 min.

Sources of Federal Sentencing Law – the U.S.S.G. Authority and Applicability

Promulgated and updated by the U.S. Sentencing Commission (composed of two federal district court judges together with a representative from the Attorney General's office and the U.S. Parole Commission).

Judicial agency that collects and analyzes nationwide federal sentencing data. <https://www.ussc.gov/>

Goal: reduce disparity and promote transparency and proportionality.

Sentencing Commission publishes the Guidelines Manual annually. But follow the “one book rule,” which requires that Court's refer to the Manual in effect on the date of conviction when consider sentencing.

Since 2005 the Guidelines are advisory and non-binding. *See United States v. Booker*, 543 U.S. 220 (2005) (mandatory Guidelines violate Sixth Amendment right to trial by jury; only facts admitted by a defendant or proven to a jury beyond a reasonable doubt may be used to calculate a defendant's sentence).

The Guidelines remain the “starting point.” *See United States v. Bonilla*, 618 F.3d 102 (2d Cir. 2010).

The government often argues that the Guidelines are the “critical” starting point; the defense often argues that the Guidelines are the “mere” starting point.

Sources of Federal Sentencing Law – the U.S.S.G. In Practice

Fraud Loss/Tax Loss + Relevant Conduct + Acceptance of Responsibility (maybe) + Criminal History = Advisory Sentencing Range

Example (criminal tax case with tax loss amount of \$169,000):

§ 2T4.1)	Base offense level:	16 (USSG)
§ 2T1.1(b)(2)	Sophisticated means:	+2 (USSG)
	Adjusted offense level:	18
§§ 3E1.1(a)-(b)	Acceptance of responsibility:	-3 (USSG)
	Total offense level:	<u>15</u>
	Criminal History Category:	I

See Sentencing Chart (attached): advisory Guidelines range: 18-24 months' prison.

Upward/Downward Departures: becoming largely obsolete in white collar matters.

Common Sentencing Enhancements in Tax and White Collar Cases

U.S.S.G. § 2B1.1(b)(10) (Sophisticated Means): (A) the defendant relocated, or participated in relocating, a fraudulent scheme to another jurisdiction to evade law enforcement or regulatory officials; (B) a substantial part of a fraudulent scheme was committed from outside the United States; or (C) the offense otherwise involved sophisticated means and the defendant intentionally engaged in or caused the conduct constituting sophisticated means, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12. *See also* U.S.S.G. § 2T1.1(b)(2) (similar 2 level enhancement for tax offenses involving use of sophisticated means).

U.S.S.G. § 2T1.1(b)(2), Application Note 5: “sophisticated means” means especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense. Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore financial accounts ordinarily indicates sophisticated means.”

But at least one court has rejected application of the sophisticated means enhancement in a case related lying about ownership of a foreign account. *See United States v. Briguet*, 15-CR-0050 (E.D.N.Y. 2015) (rejecting enhancement where there was not “anything sophisticated about the utilization of a foreign account” and “all Swiss accounts are numbered accounts.”).

Common Sentencing Enhancements in Tax and White Collar Cases

USSG § 2B1.1(b)(17) (Specific Harms to Financial Institutions). If (A) the defendant derived more than \$1,000,000 in gross receipts from one or more financial institutions as a result of the offense, increase by 2 levels; or (B) the offense (i) substantially jeopardized the safety and soundness of a financial institution; or (ii) substantially endangered the solvency or financial security of an organization that, at any time during the offense, (I) was a publicly traded company; or (II) had 1,000 or more employees, increase by 4 levels. (C) The cumulative adjustments from application of both subsections (b)(2) and (b)(17)(B) shall not exceed 8 levels, except as provided in subdivision (D). (D) If the resulting offense level determined under subdivision (A) or (B) is less than level 24, increase to level 24.

Common Sentencing Enhancements in Tax and White Collar Cases

Accountants: **U.S.S.G. § 2T1.4(b)(1), Aiding, Assisting, Procuring, Counseling, or Advising Tax Fraud** “[i]f (A) the defendant committed the offense as part of a pattern or scheme from which he derived a substantial portion of his income; or (B) the defendant was in the business of preparing or assisting in the preparation of tax returns, increase by 2 levels.

Lawyers, Trustees, other Fiduciaries: **U.S.S.G. § 3B1.3, Abuse of Position of Trust or Use of Special Skill** “[i]f the defendant abused a position of public or private trust, or used a special skill, in a manner that significantly facilitated the commission or concealment of the offense, increase by 2 levels.”

Obstruction: **U.S.S.G. § 3C1.1, Obstructing or Impeding the Administration of Justice** “[i]f (1) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice with respect to the investigation, prosecution, or sentencing of the instant offense of conviction, and (2) the obstructive conduct related to (A) the defendant’s offense of conviction and any relevant conduct; or (B) a closely related offense, increase the level by 2 levels.”

SENTENCING TABLE (in months of imprisonment)

Offense Level	Criminal History Category (Criminal History Points)					
	I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
Zone A	1	0-6	0-6	0-6	0-6	0-6
	2	0-6	0-6	0-6	0-6	1-7
	3	0-6	0-6	0-6	0-6	2-8
	4	0-6	0-6	0-6	2-8	4-10
	5	0-6	0-6	1-7	4-10	6-12
	6	0-6	1-7	2-8	6-12	9-15
	7	0-6	2-8	1-13	4-11	12-18
	8	0-6	4-10	6-12	10-16	15-21
	9	4-13	6-13	3-14	12-13	18-24
Zone B	10	6-12	8-14	10-16	15-21	21-27
	11	8-11	10-16	12-16	16-21	21-30
	12	10-16	12-18	15-21	21-27	27-33
Zone C	13	12-16	13-21	16-24	24-30	30-37
	14	15-21	18-24	21-27	27-33	33-41
	15	16-24	21-27	24-30	30-37	37-46
	16	21-27	24-30	27-33	33-41	41-51
	17	21-30	27-31	30-37	37-46	46-57
	18	27-33	30-37	33-41	41-51	51-63
	19	30-37	33-41	37-46	46-57	57-71
	20	33-41	37-46	41-51	51-63	63-78
	21	37-46	41-51	46-57	57-71	70-87
	22	41-51	46-57	51-63	63-78	77-96
	23	46-57	51-63	57-71	71-87	84-105
	24	51-63	57-71	63-78	77-96	92-115
	25	57-71	63-78	70-87	84-104	106-133
	26	63-78	70-87	78-97	92-115	110-137
	27	70-87	78-97	87-120	100-131	130-151
Zone D	28	78-97	87-108	97-121	110-137	140-175
	29	87-136	97-137	108-173	131-151	146-176
	30	97-121	108-135	121-151	135-168	151-188
	31	106-143	121-161	135-168	151-188	188-210
	32	121-151	135-168	151-188	168-210	188-235
	33	121-160	151-198	168-210	188-235	210-262
	34	151-188	168-210	188-235	210-262	235-293
	35	168-210	188-235	210-262	235-293	292-327
	36	188-235	210-262	235-293	262-327	292-365
	37	210-262	235-293	262-327	293-323	321-405
	38	235-293	262-327	292-365	324-405	360-life
	39	262-327	292-365	324-405	360-life	360-life
	40	292-365	324-405	360-life	360-life	360-life
	41	321-405	360-life	360-life	360-life	360-life
	42	360-life	360-life	360-life	360-life	360-life
43	life	life	life	life	life	

Sources of Sentencing Law

– 18 U.S.C. § 3553(a)

The sentencing statute requires Judges to “impose a sentence sufficient, but not greater than necessary to comply with the purposes of [of sentencing].”

Statutory factors:

- The nature and circumstances of the offense and the history and characteristics of the defendant. (This is often the most critical factor.)
- The need for the sentence to reflect the seriousness of the offense, promote respect for the law, and provide just punishment; to afford adequate deterrence (note: general and specific deterrence); protect the public; provided needed educational/vocational training, medical care, or other correctional treatment.
- The kinds of sentences available.
- The Sentencing Guidelines.
- Policy statements from the Sentencing Commission.
- The need to avoid unwanted sentencing disparities.
- The need to provide restitution.

Sources of Sentencing Law

– 18 U.S.C. § 3553(a)

Post-Booker, the statutory factors have become far more important than the Guidelines, especially in white collar cases, even if the Guidelines are the supposed “starting point.”

Pre-Booker, factors such as a defendant’s good deeds, medical problems, or attempts to make victim’s whole were irrelevant; now, these are often critical points argued to courts.

Main reason: the fraud and tax loss tables drive the Guidelines to draconian results.

Judge Rakoff (S.D.N.Y.): The Guidelines’ “most fundamental flaw is the notion that the complexity of human character and conduct can be rationally reduced to some arithmetic formula.”

Example: *United States v. Saquib Khan*, 13-CR-268 (E.D.N.Y. 2014). Defendant self-reported check kiting (bank fraud) scheme to the USAO when his business was disrupted by Hurricane Sandy, voluntarily surrendered his passport, and did everything in his power to pay back defrauded banks. Yet, based solely on loss amount of about \$22 million (which was actually closer to \$5 million because a substantial amount of money had already been recovered and more money was expected to be recovered in bankruptcy court), the defendant faced a total sentencing range under the Guidelines of 97-121 months’ imprisonment. Fortunately, the Judge disregarded the Guidelines and sentenced the defendant to a term of probation. See https://www.silive.com/westshore/2014/11/source_judge_chooses_to_cheat.html

Tax Loss – How Accountants Can Help

In criminal tax cases, IRS-CI and DOJ Tax will come up with the highest possible tax loss they can compute in order to drive the Guidelines higher (remember: the Guidelines are still the “starting point”).

Creative (but defensible) methods of computing a lower tax loss amount can sometimes persuade DOJ to agree to a lower sentencing range in the plea agreement or convince the Probation Department or the Court to “start lower.”

U.S.S.G. § 2T1.1, Application Note 2: sentencing courts should account for any unclaimed credits, deductions and exemptions when determining tax loss.

How Accountants Can Help - Examples

In cash skim cases: determine whether the defendant used some cash to pay for legitimate business expenses and can claim a deduction.

In foreign account cases: determine how much the defendant paid in bank fees (often a lot) and use to offset income from the account.

Another example: client under criminal investigation for payroll and corporate income tax offenses had made improvements to real estate. But an internal cost segregation analysis revealed that the client's former accountant did not properly compute the basis of this improvements and did not properly categorize the improvements. As a result, they missed large depreciation deductions to which the company was entitled. After the new accountants took over, they took the allowable deductions in the current year and carried losses back two prior years (i.e., the years under investigation). In the end, the client was able to show entitlement to refunds, rather than tax loss to the government.

Sentencing Procedures and Practices

Defendant is either convicted at trial or enters guilty plea

Defendant is referred to the U.S. Probation Department for presentence investigation

Defendant is interviewed by a Probation Officer (often the defendant's spouse or another family member will also be interviewed), who also collects numerous documents (birth certificates, diplomas, financial info., etc.)

- Opportunity to make arguments about tax loss and make the Officer aware of mitigating factors such as health problems, family hardship, etc.

The Probation Officer issues a draft Presentence Investigation Report

Defendant is given an opportunity to offer corrections to and object to the draft Report

After any amendments to the Report, it is submitted to the Court; both parties can submit formal objections

Both sides typically submit sentencing memoranda to the Court

The Court will conduct a sentence hearing at which it will determine what it believes are the appropriate Guidelines and rule on any objections, hear argument from both sides, may hear argument from any victims, and impose sentence

Sentencing Advocacy

Assuming the client does not go to trial, advocacy begins in plea negotiations.

- Charge negotiations (e.g., 18 U.S.C. § 1001; 26 U.S.C. 7212); loss amount negotiations; Guidelines enhancement negotiations.

The presentence investigation.

- Present favorable information about the client to the Probation Department.

The sentencing memorandum.

- Probably the single most important document in the case from the defendant's perspective; see next slide.

The sentencing hearing.

- Avoid: minutiae (e.g., extended argument over the specific costs of laptops used in internal investigation), claims of innocence, playing victim
- Highlight: explanations for the conduct, good deeds, health issues, pre-paid restitution.

The Sentencing Memorandum

Two views: short/sweet vs. long/historical – *know your Judge*.

Opportunity to educate the Judge about the “nature and circumstances of the offense” and the “history and characteristics of the” client in more human terms than set forth in the PSR.

Meaningful and substantive letters of support often make the difference.

- Letters from family, business colleagues, friends, medical professionals, charities should be carefully edited to avoid generic statements (e.g., “defendant has always been a charitable person”) and include specific examples of the defendant’s contributions to society and community. There is a fine line between letters obviously crafted by lawyers vs. letters that come from the heart but include specifics.
- Ten solid, substantive and meaningful letters are more effective than fifty generic letters.
- Be aware of redaction rules. *See Fed R. Crim. P. 49.1.*

The Sentencing Hearing

Usual procedure:

- 1) Judge determines the appropriate Guidelines
- 2) Oral argument from defense counsel
- 3) Oral argument from the government
- 4) Rebuttal from defense counsel
- 5) Defendant's personal statement to the court

If there is a sentence of imprisonment:

- Remember to ask for a self-surrender date
- Remember to ask for a recommendation to a specific facility or area

New Developments in FBAR Cases

Since the government's crackdown on U.S. person's with foreign accounts began about 10 years ago the DOJ took the position at sentencing that the "tax loss" about for Guidelines computation purposes should be the tax loss resulting from untaxed income generated from the foreign account, pursuant to U.S.S.G. § 2T4.1 (the "Tax Table").

The result was that many – if not a majority – of defendants convicted for unreported foreign accounts received probation or a very light term of imprisonment.

In response, in late 2017, at a criminal tax fraud conference in Las Vegas, DOJ senior litigation counsel announced that, going forward, the DOJ would assert that the money laundering and monetary transactions pursuant to U.S.S.G. § 2S1.3, which, in turn, refers to U.S.S.G. § 2S1.3 (the "Fraud Table").

The Tax Table vs. The Fraud Table (They look similar, but...)

§2T4.1 - Tax Table

THE TAX TABLE

Tax Loss (apply the greatest)	Offense Level
(A) \$2,500 or less	6
(B) More than \$2,500	8
(C) More than \$6,500	10
(D) More than \$15,000	12
(E) More than \$40,000	14
(F) More than \$100,000	16
(G) More than \$250,000	18
(H) More than \$550,000	20
(I) More than \$1,500,000	22
(J) More than \$3,500,000	24
(K) More than \$9,500,000	26
(L) More than \$25,000,000	28
(M) More than \$65,000,000	30
(N) More than \$150,000,000	32
(O) More than \$250,000,000	34
(P) More than \$550,000,000	36.

THE FRAUD TABLE

(START WITH OFFENSE
LEVEL 6, THEN ADD AS SET
FORTH BELOW)

Loss (apply the greatest)	Increase in Level
(A) \$6,500 or less	no increase
(B) More than \$6,500	add 2
(C) More than \$15,000	add 4
(D) More than \$40,000	add 6
(E) More than \$95,000	add 8
(F) More than \$150,000	add 10
(G) More than \$250,000	add 12
(H) More than \$550,000	add 14
(I) More than \$1,500,000	add 16
(J) More than \$3,500,000	add 18
(K) More than \$9,500,000	add 20
(L) More than \$25,000,000	add 22
(M) More than \$65,000,000	add 24
(N) More than \$150,000,000	add 26
(O) More than \$250,000,000	add 28
(P) More than \$550,000,000	add 30.

The Effect on the Sentencing Range Can be Profound

This is because the money laundering and monetary transactions Guidelines are tied to the “value of the funds,” not the “tax loss.”

In other words, the government now claims that the value of a foreign bank account—not the actual unpaid tax resulting from gains in the account—represents the government’s “loss” in the case; even if the funds in question are repatriated to the U.S. and reported to the Treasury Department.

The value of the foreign account will always far exceed the unpaid tax on income generated from the account, resulting in much higher Guidelines in FBAR cases.

The Effect on the Sentencing Range *Has Been Profound*

Since the late 2017 public statement from DOJ, the government has not yet actually promulgated any formal guidance about the new policy.

United States v. Kim, 17-CR-248 (E.D.Va. 2018), was the first FBAR case to be sentenced following announcement of the new policy. However, there, the government agreed that the tax Guidelines should be applied to avoid disparate treatment and because the government still advocated for the tax loss rule at the time the plea agreement was signed.

United States v. Manafort, 18-CR-0083 (E.D.Va. 2019), was the first FBAR case where the government insisted that the Fraud Table be applied. The court held that the government's interpretation of the appropriate Guideline provision was correct (and it is) and calculated the Guidelines using the value of Manafort's unreported foreign accounts.

United States v. Manafort (E.D. Va.)

Application of the Fraud Table Rather than the Tax Table (Simplified)

The Tax Table Analysis:

- Probation determined a tax loss to the government of \$6,000,000.
- Result: Total Offense Level = 24 (51-63 months' imprisonment). See U.S.S.G. § 2T4.1(J).

The Fraud Table Analysis:

- Probation determined a total value of the unreported account of \$55 million.
- Result: Total Offense Level = 28 (78-97 months' imprisonment). See U.S.S.G. § 2B1.1(L).

The Difference: 27-34 months' greater prison exposure.

Thank you

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Kostelanetz & Fink, LLP has built a national reputation as the law firm of choice for clients facing high-stakes negotiations and controversies with government agencies. Because of our experience handling the most challenging, complex and sensitive cases, our attorneys are considered to be some of the country's foremost experts on tax controversies, white collar defense, and regulatory matters.

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