

Sentencing Guidelines for Insider Trading: Recent Amendments Create Greater Disparity

When it passed the Sentencing Reform Act of 1984, Congress created the United States Sentencing Commission and envisioned that it would issue sentencing guidelines designed to “avoid[] unwarranted sentencing disparities.”¹ Yet this goal seems increasingly out of reach in the area of white-collar crime, where the recommended sentencing ranges and the sentences judges actually impose on defendants frequently diverge.² Indeed, some members of the judiciary have asserted that the exceedingly high Guidelines for fraud offenses reflect a political calculation that is neither substantiated by empirical evidence nor reflective of the “nuanced reality” in the “trenches where fraud sentences are actually imposed.”³

In the wake of the 2008 financial crisis, politicians, pundits, and the general public alike demanded that something—anything—be done to punish those who had caused the crisis and prevent another market collapse from occurring. The most significant legislative reaction to the crisis was the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), which President Obama signed into law on July 21, 2010. One aspect of Dodd-Frank is its directive that the Commission “review and if appropriate amend” the Guidelines for securities fraud offenses to “appropriately account for the potential and actual harm” such offenses cause the public and financial markets.⁴

The Commission responded to this directive by amending the Guidelines to increase sentencing ranges for a number of financial crimes, including insider trading.⁵ Specifically, the Commission increased the offense level for insider trading cases by adding almost automatic enhancements for crimes committed by financial industry professionals. In so doing, the Commission failed to recognize that many judges were already uncomfortable with the somewhat irrational effect that the “gain calculation” was having on the length of these sentences.⁶ By increasing the overall offense level for insider trading crimes, the amendments have established an even higher sentencing plateau for insider trading defendants—and financial industry professionals in particular—even as many judges were already departing downward from the existing, gain-driven Guidelines. Given this backdrop, the recent amendments will likely further exacerbate the growing sentencing disparity in this area, thereby disserving the very purpose of the Guidelines.

In this article, we consider the impact of the recent amendments on insider trading sentences, as well as the likelihood that these amendments will further undermine the Guidelines’ stated goal of fostering sentencing uniformity in light of the already uneven application of gain-based enhancements. As a preliminary matter, we provide an overview of the amended insider trading Guideline (the Amended Guideline). Then, we discuss the application of the Amended Guideline in recent, prominent white-collar cases, with a particular focus on the impact of the existing “gain” calculation. Although it appears from current trends that the Commission has been somewhat successful in its efforts to increase insider trading sentences, it is also clear that this perceived success has come at the cost of uniformity.

I. Insider Trading Amendments

The Amended Guideline alters the insider trading Guideline, § 2B1.4,⁷ in two ways relevant to our analysis: (1) it increases the base offense level for organized schemes to engage in insider trading; and (2) it broadens the existing “abuse of trust” enhancement to include virtually all financial professionals.⁸ These amendments are clearly focused on increasing sentences for hedge fund and other financial services professionals, even in circumstances where a trade based on inside information did not result in significant financial gain.

A. Organized Scheme to Engage in Insider Trading

Any defendant found to have participated in an “organized scheme to engage in insider trading” is now subject to a base level of 14, which amounts to a recommended prison range of 15–21 months for a defendant with no criminal history.⁹ An “organized scheme” is defined as “considered, calculated, systemic, or repeated efforts to obtain and trade on inside information” and is distinguished from “fortuitous or opportunistic instances of insider trading.” In determining whether the offense involved an organized scheme, courts may consider any of the following nonexclusive factors: (a) the number of transactions; (b) the dollar value of the transactions; (c) the number of securities involved; (d) the duration of the offense; (e) the number of participants in the scheme (although an organized scheme may exist even with one participant); (f) the efforts undertaken to obtain material, nonpublic information; (g) the



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number of instances in which material, nonpublic information was obtained; and (h) the efforts undertaken to conceal the offense.¹⁰

The “organized scheme” provision may impose the most severe penalties on the least culpable offenders. Although the value of the relevant transactions is a consideration, the provision also takes into consideration how the scheme operated (*i.e.*, the size and scope of the organization), rather than the role of a particular defendant who participated in the scheme. Therefore, defendants who received little personal benefit or who played only a minor role in the offense are not differentiated from sophisticated, self-interested ringleaders. Moreover, the effect of the “organized scheme” provision is greatest where the gain is lowest. For example, zero-gain insider trading cases trigger an automatic increase of 6 offense levels to meet the new floor of offense level 14.¹¹ Yet in cases where the gain exceeds \$30,000, the revised Guideline is inconsequential because the offense level is already set at 14.

B. Abuse of Trust

The “abuse of trust” enhancement, set forth in § 3B1.3, has been broadened with respect to insider trading schemes to include defendants with “special” professional skills, regardless of their professional or managerial discretion. Specifically, defendants will now be subject to increased recommended sentences if their employment “in a position that involved regular participation or professional assistance in creating, issuing, buying, selling, or trading securities or commodities was used to facilitate significantly the commission or concealment of the offense.”¹² Financial services professionals who regularly participate in securities transactions, as well as lawyers who regularly provide professional assistance in connection with such transactions, are expressly included in this group. Application of the “abuse of trust” enhancement can result in recommended sentence increases from six months to more than five years.

The “abuse of trust” enhancement greatly increases the exposure for financial professionals, regardless of their individual culpability for insider trading violations. Indeed, in promulgating the Amended Guideline, the Commission reasoned that financial professionals are “generally viewed as more culpable”¹³ for any violations by virtue of their special knowledge regarding the financial markets and the rules prohibiting insider trading.

II. Implications of the Increased Guidelines Range for Insider Trading

Although the Guidelines are only advisory, they play a prominent and influential role in the sentencing process. For example, judges must begin their sentencing analysis by calculating and considering the applicable Guideline range,¹⁴ and must explain the reason for varying from that range for purposes of appellate review.¹⁵ As the Commission has observed, “The sentencing [G]uidelines have remained the essential starting point in all federal

sentences and have continued to exert significant influence on federal sentencing trends over time.”¹⁶ Even where judges are clearly displeased with the severity of the resulting range, the sentences they impose are often higher than in the pre-amendments era, as the Amended Guideline provides a higher plateau from which to depart.¹⁷

It is thus no surprise that many commentators observe that white-collar defendants such as those accused of insider trading face significantly more exposure at sentencing than they did in years past.¹⁸ Even as some judges continue to depart dramatically from the Guidelines, average fraud sentences have gotten longer as the Guidelines sentencing ranges have increased.¹⁹ According to an analysis conducted by the *Wall Street Journal*, defendants convicted of insider trading received a median sentence of about 29 months in the two years preceding Raj Rajaratnam’s sentencing in October 2011, compared to a median sentence of 18 months over the preceding decade and 11.5 months from 1993 to 1999.²⁰ A study conducted by *Bloomberg News* corroborates this trend, finding a 20 percent increase in sentences imposed for inside traders from January 1, 2011, through mid-2012 compared to the previous eight years.²¹

A significant weakness of the insider trading Guideline, even before the recent amendments, was the outsized importance of the gain adjustment in calculating a defendant’s total offense level. The gain attributable to an insider trading defendant may easily account for half to two-thirds of his total offense level, without any regard to how much, if any, of the gain is paid to the defendant personally. The resulting disconnect between individual conduct and the sentence imposed is especially prominent with respect to defendants who trade large positions in a security. In today’s electronic trading environment, large financial services firms often trade on enormous positions, which can easily be in the tens or hundreds of millions of dollars, in a matter of seconds. As such, a trader who engaged in one instance of insider trading with respect to a security in which his or her firm held a large position may be subject to a Guidelines range that is equal to or greater than that recommended for a trader who spent an entire career trading on inside information, but at a small firm that assumed conservative positions. Because the gain calculation does not take into account motive, intent, or personal gain, it often creates unreasonably high sentencing recommendations that are not meaningfully tethered to the defendant’s individual culpability.

For example, in December 2012, hedge fund managers Anthony Chiasson and Todd Newman were convicted of trading on inside information related to technology companies Dell and Nvidia over a two-year period. Of the \$70 million in illegal gains prosecutors attributed to the defendants, \$53 million was the result of a single trade made prior to Dell’s August 2008 negative earnings announcement. Under the Guidelines, a gain of \$53 million yields a 24-level increase in the offense total—enough to move a defendant’s recommended minimum sentence

from 30 months to life imprisonment.²² Thus, although both defendants ultimately received sentences that were below the recommended Guidelines range, these sentences nonetheless represented some of the longer jail terms imposed for insider trading offenses. Specifically, Newman was sentenced to 54 months in prison, against a recommended Guidelines range of 63–78 months,²³ and Chiasson was sentenced to 78 months, against a recommended Guidelines range of 120–156 months.²⁴

III. Recent Insider Trading Cases

A review of recent insider trading cases confirms that, although average sentences have steadily increased, the Guidelines have done little to promote sentencing consistency among this class of defendants. Whereas some judges have been willing to impose Guideline sentences even on those defendants who pled guilty, others have been reluctant to follow the recommended minimums even for high-profile defendants who have proceeded to trial. Even more troubling, the factor most responsible for increasing sentencing minimums under the Guidelines, the defendant's monetary gain, is often not the most relevant to judges when assessing culpability.²⁵ As a result, rather than grappling with the nuances of the Guideline recommendations, some judges reject the gain calculation altogether and instead exercise mainly their own discretion to determine sentence length.²⁶

In practice, similarly situated defendants often receive sharply different sentences depending on the judge's individual viewpoint. As one commentator recently noted, "the assignment of a case to a particular judge, which is done at the beginning of a prosecution, can have a significant effect on the eventual punishment if the defendant is convicted."²⁷ The variance in sentencing from judge to judge has not gone unnoticed by members of the defense bar, who are well aware that drawing the "right" judge is crucial to securing a more lenient sentence.²⁸ And now that the Amended Guideline has pushed the sentencing ranges even higher, there is good reason to fear that, even if average sentence lengths increase, sentencing volatility will intensify. An increase in the frequency and extent of some judges' downward departures risks further undermining the Guidelines' purpose of promoting sentencing consistency.²⁹

A. A New Era of Insider Trading Sentences: *Goffer*, *Jiau*, and *Rajaratnam*

The recent tension between Guideline recommendations and judicial discretion is well illustrated by a trio of insider trading cases in the Southern District of New York that were decided in September and October 2011. In each case, the gain calculation resulted in a very high Guideline range; the three judges, however, imposed quite different sentences. On September 21, 2011, Judge Richard Sullivan sentenced Zvi Goffer to 10 years' imprisonment for bribes related to the provision of inside information regarding unannounced transactions. Under the prior Guidelines, the court calculated that Goffer's actions carried an offense

level of 30 and a recommended sentence of 97–121 months, with the great majority of Goffer's offense total—20 levels—being added as the result of gain attributable to Goffer and his associates. In choosing to impose a sentence at the top end of the range, however, the court focused relatively little on the gains itself. Rather, in explaining his reasons for the sentence, Judge Sullivan noted that "insider trading is very, very hard to detect and because of that it has to be dealt with harshly to send a message."³⁰

A few hours after Goffer's hearing—and within the same building—Judge Jed Rakoff imposed a sentence on Winifred Jiau who, like Goffer, had been convicted by a jury for selling inside information to several hedge funds over a two-year period.³¹ According to the court's calculations, Jiau's offense level under the Guidelines was 28, calling for a sentence of 78–97 months. As in Goffer's case, over half of Jiau's offense total—18 levels—was due to the gain arising from the fraud, only a small portion of which went to Jiau herself.³² Notwithstanding these similarities, however, the court imposed a sentence of only 4 years. As in the past,³³ Judge Rakoff criticized the Guidelines while imposing the sentence, remarking that they "give the mirage of something that can be obtained with arithmetic certainty."³⁴ Indeed, Judge Rakoff referred to the calculation of the Guideline range as "the least important part of th[e] proceeding."³⁵

To many observers, the sentences imposed on Goffer and Jiau were most noteworthy because they served as a prelude to the sentencing that would take place only one month later for Raj Rajaratnam—the most high-profile defendant convicted to date in the government's crackdown on insider trading. Judge Richard Holwell sentenced Rajaratnam to 11 years' imprisonment for his involvement in several insider trading schemes.³⁶ Notably, although the sentence was then the longest ever imposed in an insider trading case, it was well below the Guidelines applicable to the offense. In a lengthy opinion, Judge Holwell fixed Rajaratnam's offense level under the Guidelines at level 38, calculated as follows: base offense level (8), plus gains resulting from the offense (24), plus leadership role (4), plus obstruction of justice (2).³⁷ Taken together, these factors called for a sentencing range of 235–293 months.³⁸ Thus, Rajaratnam's actual sentence turned out to be 103 months less than the *minimum* term prescribed for his offense.

Under the Amended Guideline, the sentencing range applicable to Rajaratnam's crimes would be even stiffer—and the corresponding disparity between the Guidelines range and the sentence actually imposed even greater. Because Rajaratnam operated a hedge fund, and therefore "regularly participate[d] in securities transactions," his total offense level would increase by 2 levels to a total of 40. The change is enough to inflate Rajaratnam's Guideline sentencing range to 292–365 months.³⁹

B. Sentencing after *Rajaratnam*

Not surprisingly, judicial disagreement about the appropriate sentencing standards for insider traders has not

abated in the wake of the Rajaratnam sentencing. One year after the decision in *Rajaratnam*, Judge Rakoff sentenced former Goldman Sachs director Rajat Gupta for his role in the Galleon scandal. The court calculated Gupta's total offense level at 28: base offense level (8), plus gains resulting from the offense (18), plus abuse of trust (2). That offense level produced a range of 78–97 months. Nevertheless, the court imposed a sentence of only 2 years.

In its sentencing opinion, the Court reiterated its criticism of the Guidelines, suggesting that the emphasis on the defendant's gain "reflect[s] an ever more draconian approach to white-collar crime, unsupported by any empirical data."⁴⁰ The court was particularly scornful of the Guidelines' instruction that Gupta's abuse of the trust he was accorded as a director at Goldman Sachs added only 2 levels to his total offense, but the monetary gain attributable to him—although largely beyond his control—added a whopping 18 levels.

Before carrying out his own analysis, Judge Rakoff noted that the sentence he intended to impose "would not vary one whit if the [gain] calculation was that proposed by the Government, that proposed by the defendant, or anywhere in between."⁴¹ Rather, in light of the myriad letters submitted on Gupta's behalf by prominent humanitarian figures, including Bill Gates and Kofi Annan, as well as Gupta's longstanding commitment to charitable activities, the court departed sharply downward from the Guideline range, imposing a sentence that was less than one third of the recommended minimum.

But other judges have faithfully adhered to the Guidelines and the harsher sentences to which they can lead. For example, in June 2012, Judge Katharine Hayden of the District of New Jersey imposed a 12-year sentence on Matthew Kluger, a corporate attorney who for 17 years used his positions at prominent law firms to trade on inside information, amassing profits that he shared with coconspirators.⁴² Judge Hayden calculated the applicable Guideline range to be 135–168 months, resulting mostly from the gain calculation, and imposed a sentence toward the middle of that range. Kluger argued that a lower sentence was warranted in part because his personal profit from the insider trading activity amounted to only \$500,000 over 17 years, even as the scheme generated a total of almost \$37 million in illicit proceeds.⁴³ Kluger also attempted to demonstrate remorse by speaking at universities to dissuade others from following in his wayward footsteps, and submitted 200 letters written in support of his plea for leniency. Despite those efforts, Judge Hayden was not persuaded to depart from the Guidelines, instead imposing the longest sentence on record for insider trading.⁴⁴

IV. Real World Impact and the Road Ahead

In spite of the Guidelines' objective of fostering consistency across the sentences meted out to similarly situated defendants, recent cases reflect enormous variety both in

the length of sentences judges impose and in the degree to which they accede to sentencing factors deemed important under the Guidelines. In particular, sentencing opinions and transcripts indicate that some judges are relatively uninterested in the gain calculations that are most responsible for inflating sentencing ranges under the Guidelines. The disconnect between the factors judges deem important in sentencing and those emphasized in the Guidelines—and the roller coaster–like sentencing disparity that results from that disconnect—undermines the Guidelines' very *raison d'être*. Moreover, the lack of sentencing consistency has an immediate and very real impact on countless federal defendants each and every year, as their punishments depend increasingly on the judge to whom their case is assigned rather than their underlying conduct.

It falls to the Sentencing Commission—which includes three new voting members to replace three members whose terms on the Commission are expiring⁴⁵—to take a fresh and serious look at judges' real-world application of the Guidelines and to consider adjustments that will ensure that the Guidelines adhere to Congress's intent in establishing the Commission. Absent that, the Guidelines risk remaining a well-intentioned remedy for sentencing ills that harms as often as it cures.

Notes

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¹ 28 U.S.C. § 991(b)(1)(B) (stating the intended purposes of the Commission).

² U.S. Sentencing Commission, Report on the Continuing Impact of *United States v. Booker* on Federal Sentencing 2012 at 67 (2012) [hereinafter, *Booker Report 2012*] (noting that "the average guideline minimum and the average sentence have not consistently paralleled one another over time, and the divergence between the two has increased since fiscal year 2004"). See also Letter from Jonathan J. Wroblewski, Director, Office of Policy and Legislation, U.S. Dep't of Justice, to the Honorable William K. Sessions III, Chair, U.S. Sentencing Comm'n 3–4 (June 28, 2010) (stating that the Guidelines for fraud offenses "have lost the backing of a large part of the judiciary").

³ *United States v. Ovid*, No. 09-CR-216 (JG), 2010 WL 3940724, at *1 (E.D.N.Y. Oct. 1, 2010) (quoting Wroblewski 2010 Letter, *supra* note 2). See also Jed S. Rakoff, *Why the Federal Sentencing Guidelines Should Be Scrapped*, 26 FED. SENT. REP. 6 (2012).

⁴ Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1079A(a)(1), 124 Stat. 1384 (2010).

⁵ The Amended Guideline went into effect on November 1, 2012.

⁶ The dollar amount of gain to the defendant is the chief determinant of the sentencing range for white-collar crimes. As explained in the 2012 *Guidelines Manual*: "Insider trading is treated essentially as a sophisticated fraud. Because the victims and their losses are difficult if not impossible to identify, the gain, i.e., the total increase in value realized

through trading in securities by the defendant and persons acting in concert with the defendant or to whom the defendant provided inside information, is employed instead of the victims' losses." U.S.S.G. § 2B1.4, comment. (backg'd.). In calculating the gain amount, courts refer to the loss table in § 2B1.1(b)(1).

⁷ U.S. Sentencing Commission, 2012 Sourcebook of Federal Sentencing Statistics § 2B1.4 (2013), available at http://www.ussc.gov/Publications/Annual_Reports_and_Statistical_Sourcebooks/index.cfm. According to the Sourcebook, forty defendants were sentenced under this Guideline in FY 2012.

⁸ The Guidelines were also amended to specify the preferred means of calculating loss. Although the use of loss calculation is relatively rare in the insider trading context, cases involving the fraudulent inflation or deflation of the value of a publicly traded security or commodity are now subject to a rebuttable presumption that actual loss is accurately calculated through the "modified recessionary method." Under this method, the amount of actual loss is determined by (a) calculating the difference between the average price of the security or commodity during the period that the fraud occurred as well as during the ninety-day period after the fraud was disclosed to the market, and (b) multiplying that difference by the number of shares outstanding. U.S. Sentencing Commission, Unofficial Amendments to the Sentencing Guidelines at 2 (Apr. 30, 2013) [hereinafter, U.S.S.C. Unofficial Amendments], available at http://www.ussc.gov/Legal/Amendments/Reader-Friendly/20120430_RF_Amendments.pdf.

Prior to this amendment, courts were not provided with specific guidance as to how to calculate loss and generally employed one of four methods: (1) simple rescissory method, see, e.g., *United States v. Grabske*, 260 F. Supp. 2d 866, 872–73 (N.D. Cal. 2002); (ii) modified rescissory method, see, e.g., *United States v. Bakhit*, 218 F. Supp. 2d 1232, 1240–42 (C.D. Cal. 2002); (iii) market capitalization method, see, e.g., *United States v. Peppel*, No. 3:06-cr-196, 2011 WL 3608139, at *9–10 (S.D. Ohio Aug. 16, 2011), *aff'd*, 707 F.3d 627 (6th Cir. 2013); and (iv) market-adjusted method, see, e.g., *United States v. Olis*, 429 F.3d 540, 546 (5th Cir. 2005). Nonetheless, the amendment preserves much of the discretion that courts have traditionally possessed with respect to calculating loss. In determining whether the resulting loss amount is reasonable, courts may—but are still under no duty to—consider the extent to which such loss was caused by factors unrelated to the defendant's criminal conduct. For example, courts may choose to disaggregate changes in value caused by external market forces, such as differences in economic circumstances, investor expectations, or industry specific conditions. In the event that the loss calculation overstates the seriousness of the offense, judges may pursue a downward departure in sentencing.

⁹ Before this amendment went into effect, the base offense level for insider trading was 8, and the recommended prison range was 0–6 months for defendants with no previous criminal history. See U.S.S.G. § 2B1.4; U.S. Sentencing Commission, Sentencing Table (2012).

¹⁰ U.S.S.G. § 2B1.4, comment. (n.1).

¹¹ As the Commission noted, the amendment "ensures that the Guidelines require a period of incarceration even in . . . a case involving relatively little gain." 2012 *Guidelines Manual*. U.S.S.C. Unofficial Amendments at 2.

¹² Before this amendment, the "abuse of trust" enhancement applied only to defendants who exercised "substantial" discretionary trading or investing authority in their professional capacity, such that their "judgment . . . [was]

ordinarily given considerable deference." U.S.S.G. § 3B1.3, comment. (n.1).

¹³ U.S.S.G. § 3B1.3, comment. (backg'd.).

¹⁴ *Gall v. United States*, 552 U.S. 38, 49–50 (2007). See also 18 U.S.C. § 3553(4) (instructing courts to consider the Guidelines in determining sentencing).

¹⁵ See *Rita v. United States*, 551 U.S. 338, 357 (2007) ("Where the judge imposes a sentence outside the Guidelines, the judge will explain why he has done so.").

¹⁶ Booker Report 2012, *supra* note 2, at 3.

¹⁷ For example, as Professor Frank Bowman has pointed out, "a judge who wanted to impose a twenty-five year sentence on a . . . [white-collar offender], thus equating their economic offenses with murder by a five-time felon, would have to depart downward *nineteen* levels to do it." Frank O. Bowman, *Sentencing High-Loss Corporate Insider Frauds After Booker*, 20 FED. SENT. REP. 167, 168–69 (2008) (emphasis added).

¹⁸ Todd Haugh, *Can the CEO Learn From the Condemned? The Application of Capital Mitigation Strategies to White Collar Cases*, 62 AM. U. L. REV. 1, 37–38 (Oct. 2012) (citing *United States v. Parris*, 573 F. Supp. 2d 744, 756–63 (E.D.N.Y. 2008) (cataloguing the calculated Guidelines ranges and sentences of recent white collar defendants)). See also Booker Report 2012, *supra* note 2, at 67 (observing that the average fraud sentence nearly doubled from 13 months, during the period between June 1996 and April 2003, to 25 months, during the period between December 11, 2007, and September 30, 2011).

¹⁹ The length of imprisonment for economic offenses generally over the last four years highlights this trend of increased sentences: according to the 2012 Sourcebook, economic offenses resulted in an average sentence of 29 months in fiscal 2008; 28 months in fiscal 2009; 30 months in fiscal 2010; 29 months in fiscal 2011; and 32 months in fiscal 2012. *Supra* note 7, at fig. E (Length of Imprisonment in Each General Crime Category).

²⁰ Chad Bray & Rob Barry, *Long Jail Terms on Rise—Inside Trades Draw Lengthier Sentences, Analysis Finds*, WALL ST. J., at C1 (Oct. 13, 2011), available at <http://online.wsj.com/article/SB10001424052970204774604576626991955196026.html>. The analysis also determined that a higher percentage of convicted insider trading defendants have been incarcerated in recent years. For example, in the two years preceding October 2011, 79% of defendants sentenced in New York were sent to prison, compared with 59% in the 2000s and less than half from 1993 to 1999. *Id.*

²¹ David Glovin & Bob Van Voris, *Insider Traders Face Longer Sentences as Judges Get Tough*, BLOOMBERG NEWS, July 20, 2012, available at <http://www.businessweek.com/news/2012-07-20/insider-traders-face-longer-sentences-as-judges-get-tough#p1>. The average sentence from January 1, 2011 to mid-2012 was 22 months, compared with 18.4 months during the previous eight years. *Id.*

²² According to the 2011 Sentencing Commission statistics regarding Use of Guidelines and Specific Offense Characteristics, 25 of the 26 defendants sentenced for insider trading in 2011 achieved gains of at least \$70,000, and were therefore subject to an offense level increase of 8 or more levels. The most common gain range attributed to insider trading defendants (7 of the 26 defendants) was \$1,000,000 to 2,500,000, subjecting these defendants to a 16 level increase in their total offense level. U.S. Sentencing Commission, Use of Guidelines and Specific Offense Characteristics For Fiscal Year 2011, at 13, available at http://www.ussc.gov/Data_and_Statistics/Federal_Sentencing_Statistics/Guideline_Application_Frequencies/2011/Use_of_Guidelines_and_Specific_Offense_Characteristics.pdf.

- ²³ See Richard Vanderford, *Fund Exec Gets 4½ Years for Dell Insider Trading*, LAW360.COM (May 2, 2013), available at http://www.law360.com/whitecollar/articles/438140?nl_pk=74fe4f11-8dcc-4a72-8de4-9f80950ca63e&utm_source=newsletter&utm_medium=email&utm_campaign=whitecollar. Many observers perceived Newman's sentence as rather harsh in light of his modest, family-oriented lifestyle, his otherwise clean criminal record, and the dozens of letters extolling his kindness and decency that supporters wrote on his behalf. In explaining Newman's sentence, Judge Sullivan stressed the importance of relatively long jail terms in insider trading cases to deter others in the finance industry. *Id.*
- ²⁴ Peter Lattman, *Ex-Hedge Fund Manager Sentenced in Insider Trading Case*, N.Y. TIMES DEALBOOK (May 13, 2013), available at <http://dealbook.nytimes.com/2013/05/13/ex-level-global-manager-sentenced-to-more-than-6-years/> (noting that Chiasson received "one of the stiffest sentences yet in the government's vast campaign to root out wrongdoing on Wall Street trading floors").
- ²⁵ For example, in sentencing former Impath Inc. President Richard Adelson to 3.5 years for overstating results at the biotech company, Judge Rakoff rejected the guidelines sentence of 85 years—which was based on the \$50 million of losses attributable to the conspiracy—and later referred to it as "barbaric." See Jed S. Rakoff, *Why the Federal Sentencing Guidelines Should be Scrapped*, 26 FED. SENT. REP. 6 (2012).
- ²⁶ See, e.g., Judge Jed Rakoff's objections to the sentencing requirements during the sentencing phase of *United States v. Adelson*, 441 F. Supp. 2d 506 (S.D.N.Y. 2006), and *United States v. Gupta*, 904 F. Supp. 2d at 349 (S.D.N.Y. 2012).
- ²⁷ Peter J. Henning, *Insider Traders Should Be Ready to Do Hard Time*, N.Y. TIMES DEALBOOK (July 15, 2013), available at <http://dealbook.nytimes.com/2013/07/15/insider-traders-should-be-ready-to-do-hard-time/> ("The aversion to the guidelines is one reason for the growing disparity in sentences in insider trading cases.").
- ²⁸ Glovin & Voris, *supra* note 21.
- ²⁹ Frank O. Bowman III, *Nothing is Not Enough: Fix the Absurd Post-Booker Federal Sentencing System*, 24 FED. SENT. REP. 356 (2012).
- ³⁰ Bob Van Voris & Patricia Hurtado, *Rajaratnam is Next After Two Insiders Get 14 Years in Jail*, BLOOMBERG NEWS, Sept. 22, 2011, available at <http://www.bloomberg.com/news/2011-09-21/ex-galleon-trader-zvi-goffer-sentenced-to-10-years-in-prison-1.html>. Goffer's sentence was affirmed by the Second Circuit, which concluded that Goffer's sentence was neither "unreasonable [n]or disproportionate to the severity of his crimes." *United States v. Goffer*, Docket No. 11-2591-cr (July 1, 2013), available at [http://www.ca2.uscourts.gov/decisions/isysquery/71052806-6827-431f-88c4-36f4c351c058/2/hilite/](http://www.ca2.uscourts.gov/decisions/isysquery/71052806-6827-431f-88c4-36f4c351c058/2/doc/11-3591_opn.pdf#xml=http://www.ca2.uscourts.gov/decisions/isysquery/71052806-6827-431f-88c4-36f4c351c058/2/hilite/).
- ³¹ David Glovin & Patricia Hurtado, *Gupta Judge Ignored Sentence Proposal in Insider Cases*, BLOOMBERG NEWS, June 18, 2012, available at <http://www.businessweek.com/news/2012-06-18/gupta-judge-ignored-sentence-proposals-in-insider-cases>.
- ³² *Id.*
- ³³ *Adelson*, *supra* note 26.
- ³⁴ Peter Lattman, *Two Defendants Sentenced in Insider Trading Case*, N.Y. TIMES DEALBOOK (Sept. 21, 2011), available at <http://dealbook.nytimes.com/2011/09/21/2-defendants-sentenced-in-insider-trading-case/>.
- ³⁵ Transcript of Sentencing, *United States v. Jiau*, No. 11-CR-161 (JSR), 2011 WL 1810166, at *37 (S.D.N.Y. Mar. 8, 2011).
- ³⁶ Rajaratnam's sentence was affirmed by the Second Circuit on June 24, 2013. *United States v. Rajaratnam*, 719 F.3d 139 (2d Cir. 2013); see also Peter Lattmann, *Rajaratnam Conviction Upheld by Appeals Court*, N.Y. TIMES DEALBOOK (June 24, 2013), available at <http://dealbook.nytimes.com/2013/06/24/rajaratnam-conviction-upheld-by-appeals-court/>.
- ³⁷ The enhancement for obstruction of justice was based on Rajaratnam's provision of false answers to questions posed to him by the SEC in a June 2007 deposition regarding the agency's investigation into a hedge fund run by Rajaratnam's brother. *United States v. Rajaratnam*, No. 09-CR-1184 2012 WL 362031, at *17–21 (S.D.N.Y. Jan. 31, 2012).
- ³⁸ *U.S. v. Rajaratnam*, (NO. RJH, S-20901184-01). 2011 WL 6259591 (Trial Order) (S.D.N.Y. Oct 20, 2011).
- ³⁹ This steep increase demonstrates another dubious feature of the Guidelines—namely, that additions to the offense level at the top of the sentencing table have a far greater impact on sentencing than those at the bottom. Whereas increasing a defendant's total offense level from 6 to 12 has the relatively minor effect of boosting the sentencing Guideline range from 0–6 months to 10–16 months, increasing Rajaratnam's already-high offense level of 38 to 40 adds anywhere from a low of 57 months to a high of 72 months to his recommended sentence. For a discussion of this phenomenon, see generally Bowman, *Sentencing After Booker*, *supra* note 17.
- ⁴⁰ *United States v. Gupta*, 904 F. Supp. 2d at 351.
- ⁴¹ *Id.* at 352.
- ⁴² David Voreacos, *How Wall Street Lawyer Turned Insider Trader Eluded FBI*, BLOOMBERG (July 31, 2012), available at <http://www.bloomberg.com/news/2012-07-31/how-wall-street-lawyer-turned-insider-trader-eluded-fbi.html>.
- ⁴³ Most of these proceeds went to trader Garrett Bauer, who was also sentenced by Judge Hayden. Bauer pled guilty to charges of trading stocks based on confidential information related to mergers and acquisitions, and was sentenced to nine years in prison. Walter Pavlo, *Inside Trader, Garrett Bauer, Sentenced to 9 Years in Prison*, FORBES (June 5, 2012), available at <http://www.forbes.com/sites/walterpavlo/2012/06/05/inside-trader-garrett-bauer-sentenced-to-9-years-in-prison/>.
- ⁴⁴ Kluger's sentence was affirmed by the Third Circuit on July 9, 2013. Jonathan Stempel, *Lawyer's Record 12-Year Prison Term for Insider Trading is Upheld*, REUTERS TRIBUNE (July 9, 2013), available at <http://www.reuters.com/article/2013/07/09/us-insidertrading-kluger-idUSBRE96814J20130709>.
- ⁴⁵ U.S. Sentencing Commission, *Senate Confirms Three Sentencing Commissioners* (News release, June 7, 2013), available at http://www.ussc.gov/Legislative_and_Public_Affairs/Newsroom/Press_Releases/20130607_Press_Release.pdf. The three new members are Judge Charles R. Breyer of California, Judge William H. Pryor of Alabama, and Professor Rachel Barkow of New York. The Commission's four other voting members are Judge Patti Saris of the District of Massachusetts (chair), Chief Judge Ricardo H. Hinojosa of the Southern District of Texas, Dabney L. Friedrich of Maryland, and Judge Ketanji B. Jackson of the District of Columbia.